



The devil is in the details: How arbitration system design and training facilitate and inhibit repeat-player advantages in private and state-run arbitration hearings

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Abstract

This article demonstrates that arbitration system design and the training that arbitrators receive shape the extent to which repeat players gain advantages in arbitration hearings. While prior arbitration research does suggest that arbitrator training matters, this is the first article to show how it matters, as we observe actual arbitration hearings in private and state-run arbitration systems in two states. Our comparative analysis links three literatures interested in how seemingly interest-neutral institutions, like disputing forums, serve in practice to reinforce dominant norms, values, and hierarchies: (1) sociolegal studies of repeat-player advantages in disputing, (2) studies of occupational socialization in educational settings, and (3) neoinstitutional organizational sociology studies of how managerial values influence the way in which organizations construct law. We bridge these literatures by showing how arbitrator system design and the occupational socialization that arbitrators receive in private arbitration are primary mechanisms through which managerial values influence the arbitration process, ultimately providing a pathway for repeat-player advantages in hearings. Because our analysis compares two distinct arbitration systems, we identify variation in these processes and offer preliminary but tangible policy recommendations for the design and implementation of arbitration systems that best protect civil and consumer rights within arbitral forums that the Supreme Court continually upholds.

Given the recent and dramatic expansion of disputes being heard outside courts and, in particular, the role of arbitration in the American legal system, scholars have labored to understand the consequences of favoring arbitration over courts. This endeavor, gaining real urgency in the 1980s with benchmark Supreme Court decisions approving arbitration's expansion, has developed today into a robust literature, much of it focusing on the ways in which arbitration may serve to favor "repeat players"—that is, regulars in the forum—over "one-shotters," who are unlikely to make use of the forum more than once, potentially exacerbating a phenomenon identified in the courts (Galanter 1974). These studies generally focus on particular facets of a single arbitral system or comparative analyses of a particular arbitral forum and the courts.

But scholarship comparing different arbitration systems to one another is strikingly absent from this discussion (cf. Chandrasekher and Horton 2019). This gap is significant for two reasons. First, there is no single system of arbitration. Unlike the court system with its standardized rules and procedures, each arbitration system takes its own stance on myriad issues of design, procedure, and evidence, resulting in a diverse array of dispute resolution structures all falling under the nominal umbrella of "arbitration." Insofar as the existing scholarship focuses on differences between courts and arbitration and outcomes within single arbitration systems, it has largely failed to assess the impact that variation between arbitration systems might have on the substantive rights claimed therein and the extent to which "repeat players" are advantaged over "one-shotters" in a given forum (Galanter 1974). Second, there is no reason to think that a shift away from arbitration's expanded role is on the horizon given the Supreme Court's recent decisions and the current political climate. For better or worse, the expanded role of arbitration appears unlikely to change in the near future (Glover 2015).

Given the expanded role of arbitration in the American legal system and the diverse array of dispute resolution structures encompassed by the label "arbitration," it is imperative to understand how best to protect the efficacy of civil and consumer rights *within* different arbitral forums in which repeat players often hold advantages (Galanter 1974). Thus, in this article, we seek to answer the following question: how do different arbitration system designs and the training that arbitrators receive to implement those systems facilitate or inhibit repeat-player advantages in arbitration hearings?

To answer this question, we undertook an analysis of arbitration hearings in California and Vermont, which involved substantively similar consumer warranty "lemon" laws but substantially disparate arbitration designs. California's lemon law allows disputes to be resolved in dispute resolution forums funded by automobile manufacturers but operated by external third-party organizations. By contrast, in Vermont, consumer disputes are resolved using a public arbitration structure operated by the state alone. In California, a single arbitrator, trained by the third-party provider using a uniform system and typically without a background in the automotive industry, adjudicates the dispute. In Vermont, a five-member board made up of a technical expert, an automobile dealer, and three citizen members adjudicates the dispute, having received little to no formal training. The systems adopt different models of justice and different approaches to procedural nuances. By analyzing these disparate systems arbitrating substantially similar consumer protection laws, we are able to best identify the differences in system design and arbitrator training that facilitate or inhibit repeat-player advantages. We gained access to and observed fifty-seven hearings in both states, analyzing hearing transcripts where available and contemporaneous field notes where they were not.

Selecting these forums for our analysis also allows us to build upon the limited existing literature comparing arbitration systems. Talesh (2012) undertook a comparative analysis and found that these different arbitration systems give different meanings to substantially similar lemon laws operating in both states, and that this is due largely to the way that business and

consumer values are incorporated into the training of arbitrators and the design of the arbitration systems. Talesh identified various design features that he argued could have a significant impact on the arbitration hearings but stopped short of an analysis of the hearings themselves, rendering his arguments on this point largely speculative.

Whereas Talesh focused on these features in the abstract, we take the logical next step to answer our research question by observing consumer lemon law arbitration hearings in the same forums that Talesh analyzed in 2012. In doing so, we are able to determine the extent to which differences in arbitration system design have a practical impact on lemon law arbitration hearings, if at all. To our knowledge, this is the first study to qualitatively observe and explore how actual arbitration hearings operate. Our analysis draws from, links, and contributes to three literatures with an interest in how seemingly interest-neutral institutions, like disputing forums, serve in practice to reinforce dominant norms, values, and hierarchies: (1) sociolegal studies of repeat-player advantages in disputing (Galanter 1974), (2) neoinstitutional organizational sociology studies of how managerial values influence the way organizations construct law and compliance (Edelman 2016), and (3) studies of occupational socialization and hidden curriculum in educational and training settings (Vallance 1973).

Our empirical research suggests that arbitration system design and the training arbitrators receive shape the extent to which repeat players gain advantages in arbitration hearings. We build on Talesh's earlier work by more precisely identifying the mechanisms through which managerial and consumer values influence the meaning of law and thus the extent to which repeat players are advantaged, with some unexpected results. In particular, we show how the socialization and hidden curriculum that arbitrators receive in private arbitration forums is one of the main mechanisms through which managerial values influence the arbitration process and provide a pathway for subtle repeat-player advantages in actual hearings. In doing so, we extend the new institutional and sociolegal studies literatures by revealing mechanisms that have not been previously explored in the context of repeat-player advantages and how managerial values influence organizational structures. Whereas Talesh's prior study argues that arbitrator training and socialization matter, we show *how* it matters in actual hearings and how it allows repeat players to gain subtle advantages in seemingly neutral forums. By explicitly connecting hidden curriculum theory to sociolegal and new institutional literatures, we are better able to understand the ways in which this occurs in spite of the explicit goals of the forums—neutrality and impartiality. Finally, because our analysis compares two distinct arbitration systems, we are able to point to variation in these processes and offer preliminary but tangible recommendations for the design and implementation of arbitration systems to best protect civil and consumer rights within arbitral forums that the Supreme Court has continually found to be valid.

1 | CONSUMER LEMON LAWS AND THE RISE OF PRIVATE AND STATE-RUN ARBITRATIONS

California and Vermont provide consumers substantially similar warranty law rights, but they represent far ends of the spectrum concerning the alternative dispute resolution forums available to consumers.¹ Both states require a manufacturer to refund a consumer or replace the consumer's vehicle² if "after a reasonable number of attempts" the manufacturer fails to correct a defect that "substantially impairs the use, market value, or safety" of the vehicle "to the consumer" (CA Civ. Code §§ 1793.2 & 1793.22). Both states afford the consumer a legal presumption that a "reasonable number of attempts" has been reached and that their vehicle is a "lemon" if during the first eighteen months of purchase (1) the vehicle has been out of service by reason of repair for a cumulative total of thirty days, or (2) the vehicle has been

subject to repair by the manufacturer at least three times (in Vermont) or four times (in California). Prevailing consumers in California can also seek attorneys' fees and a civil penalty of twice the actual damages.

Today, all fifty states require a consumer to submit to an arbitration forum before the consumer is entitled to assert the legal presumption in court that the consumer's vehicle is a lemon. Thus, the legal rights afforded by lemon laws are contingent on first utilizing alternative dispute resolution forums, where attorneys' fees and civil penalties are not available and arbitrators may award another repair attempt by the manufacturer instead of replacement in some situations (Talesh 2012). In California, consumers submit to a private arbitration forum administered by third-party organizations contracted by the manufacturer. In these forums, the decision maker is a single arbitrator, who has no background in the automotive field and undergoes training by a third-party organization.³ In California, the consumer may forego arbitration in favor of a more expensive lawsuit for breach of warranty. However, if they do so, they forfeit the ability to invoke the powerful legal presumption that the manufacturer has had a reasonable number of attempts to repair a defect and that the vehicle should be considered a lemon as a matter of law.

In Vermont, consumers do not have the option to sue in court. Instead, consumers have a choice between a similar manufacturer-funded forum and a state-run alternative dispute resolution forum, the Motor Vehicle Arbitration Board ("Lemon Law Board").⁴ There, the decision maker is a five-person panel, made up of three citizen members, one technical expert, and an automotive dealer, each appointed by the governor.⁵ Prior research shows that consumers win a refund or replacement twice as often in Vermont's state-run arbitration system than they do in California's privately run structures (Talesh 2012). In this article, we explore the mechanisms underlying this variation in repeat-player advantages.

2 | INTEGRATING SOCIOLEGAL, ORGANIZATIONAL, AND EDUCATION THEORIES INTO DISPUTE RESOLUTION ANALYSIS

To answer our research question, we draw from and connect three literatures—sociological studies, new institutional organizational sociology, and education—that explore how seemingly interest-neutral institutions operate in practice to reinforce dominant norms, values, and hierarchies.

Marc Galanter's foundational article "Why the 'Haves' Come Out Ahead" (1974) has generated a robust literature focused on the advantages that repeat-player litigants enjoy in our legal system. Although courts and tribunals tend to be the focus, more recent scholarship has applied Galanter's framework to alternative forums. In particular, a growing body of empirical studies of arbitration and mediation forums have compared the success rates of one-shotters and repeat players (Hanningan 1973; Bingham 1998; Bingham and Sarraf 2000; Eisenberg and Hill 2003; Hirsh 2008; Colvin 2011; Chandraesekher, Cann, and Horton 2015), and examined the influence of occupational prestige and experience (Kinsey and Stalans 1999; Hirsh 2008), arbitrator background (Choi, Fisch, and Prichard 2014), lawyer representation (Bingham 1997; Horton and Chandraesekher 2015), legal resources (Steele 1974; Burstein 1989; Bingham 1997; Hirsh 2008), and complaint-handler decision making (Gilad 2010). However, these studies largely focus on a single arbitration system or comparisons of trial and arbitration outcomes, leaving questions about comparisons between arbitration forums or examinations of actual arbitration hearing processes underexplored. Recently, Chandrasekher and Horton (2019) compared private arbitration systems at the aggregate level and drew conclusions about repeat-player effects and the role of plaintiffs' law firms as repeat players that succeed in private arbitration. Although this large, macrolevel study is well executed and helpful, it does not qualitatively examine how arbitration processes operate at hearings.⁶

To understand the potential mechanisms that generate differential outcomes in lemon law arbitrations, we draw on neoinstitutional organizational theory as a means of better understanding how organizations interact with and influence the meaning of law (Edelman 2016). Much of this work focuses on how the law becomes “managerialized” (Edelman, Fuller, and Mara-Drita 2001) as managerial or business values of efficiency, rationality, and managerial discretion come to influence the meaning of law within organizations (Edelman, Abraham, and Erlanger 1992; Edelman, Erlanger, and Lande 1993; Edelman, Fuller, and Mara-Drita 2001; Talesh 2012; Gilad 2014) and eventually shape the content and meaning of law in public legal institutions such as courts (Edelman, Erlanger, and Uggen 1999; Edelman 2005, 2007, 2016; Edelman et al. 2011) and legislatures (Talesh 2009, 2014).

Bridging new institutional and sociolegal literatures, Talesh’s (2012) study of lemon law arbitration training programs for state-run and private arbitration forums found that the institutional design of dispute resolution and the ways in which business and consumer values and perspectives are translated by field actors in different arbitration systems lead to different meanings of law in California and Vermont. Managerial and business values of rationality, efficiency, problem solving, and discretion flow into California’s private arbitration structures primarily through an arbitration training and socialization process conducted by third-party administrators hired by automobile manufacturers to run their lemon law arbitration programs (Talesh 2012). The institutional context socializes arbitrators to ignore consumer emotion and narrows the fact-finding role of the arbitrator to that of a passive arbiter reliant on parties to present facts. Vermont’s vastly different dispute resolution system less frequently introduces business values into the meaning and operation of lemon laws. Rather than emphasizing professional training and socialization, Vermont’s structure illustrates how an inquisitorial fact-finding approach—balancing consumer and business perspectives in the decision-making process—and participatory representation via an arbitration board consisting of three citizens, an automotive dealer, and a technical expert can help curb repeat-player advantages.

However, Talesh’s inquiry focused exclusively on arbitrator training and system design in the abstract. Talesh did not and could not show whether and how those differences impacted arbitration hearings. In this article, we analyze actual hearings held in the same private and state-run arbitration systems to determine whether and how different arbitrator training and system designs facilitate and inhibit repeat-player advantages in arbitration hearings.

To address this question, we import theories of education and occupational socialization to help explain how training and socialization impact actual hearings. Educational theorists define the “hidden curriculum” as “a device for identifying those systematic side effects of schooling that we sense but which cannot be adequately accounted for by reference to the explicit curriculum” (Vallance 1973: 7). Although this concept has been applied to various aspects of schooling, a subset of hidden curriculum inquiry focuses on how the content of formal lessons, portrayed as objective and neutral, is in fact typically biased and one-sided, serving to reproduce dominant values, norms, and social order (Apple 1971; Popkewitz 1977; Anyon 1978, 1981; Giroux and Penna 1979; Cornbleth 1985; Su 2007; Stanton 2014). By curating lesson content and presenting it as objective truth, schooling legitimizes particular ideologies under a cloak of objectivity and neutrality (Apple 1971; Popkewitz 1977; Giroux and Penna 1979; Cornbleth 1985). Scholars have extended the hidden curriculum concept to studies of occupational or professional socialization in fields including medicine (Franks and Hafferty 1994; Hafferty 1998; Harris 2011; Hafferty and Halfer 2011), business (Trevino and McCabe 1994), policing (Engelson 1999; Prokos and Padavic 2002), and the legal profession (Arterian 2009; Moss 2013; Hamilton and Schaefer 2016). Although much of the hidden curriculum and occupational socialization literature involves longer-term schooling, some studies have found that the theory is applicable to short-term trainings as well (Engelson 1999; Prokos and Padavic 2002).

By importing hidden curriculum studies into new institutional and sociolegal studies, we offer a theoretically informed explanation of how training and socialization impacts actual practices—in this case, arbitration hearings.

3 | METHODOLOGY

Many scholars lament the difficulties of accessing arbitration hearings as research sites and the subsequent paucity of arbitration research on actual hearings (Galanter and Lande 1992). The gap in knowledge of how actual arbitration hearings operate exists not because of lack of researcher interest but because arbitration is largely a privatized process to which the organizations administering these programs do not allow access. Consumer lemon law arbitrations provide a rare opportunity to gain access to arbitration hearings and offer the additional benefit of variation.

Vermont's state-run lemon law arbitration cases occur twice a month in a public forum on a preset schedule. Private arbitration hearings in California, we were surprised to find out, are also open to the public, though they are not publicly advertised. It took multiple phone calls to the California Department of Consumer Affairs and the two third-party administrator organizations operating arbitration programs on behalf of automobile manufacturers in California to clarify that the hearings are open to the public. Once access was secured, we periodically contacted four different lemon law arbitration offices in northern and southern California to find out when hearings were taking place.

The arbitration hearings in both states took place in small rooms in which there were no auditory or visual barriers to observing the entire hearing. Hearings typically lasted from sixty to ninety minutes. Vehicle inspections took place in the parking lot, and we attended those as well. We never spoke or participated in the hearings. We attended sixteen hearings in California and ten in Vermont. In addition, we were provided with audio recordings of thirty-one arbitration hearings in Vermont. These hearings were professionally transcribed and included as part of our data set. Our observations were collected over a two-year time period. In total, we include fifty-seven arbitration hearings in our data set.

We were not permitted to tape record any part of the arbitration hearings that we attended in California. This limited our ability to obtain many direct quotes from actors, although we were able to obtain some. Instead, we took detailed notes during the sessions and drafted our field notes shortly thereafter (Emerson, Fretz, and Shaw 1995). Our field notes included notations concerning the physical parameters of the room; where people sat; the race, gender, and approximate age of participants; how law was being discussed; questions arbitrators raised; and answers by the respective parties. Our notes were contemporaneous with our observations and reflect events as they occurred given our position in the field as researchers listening to arbitration hearings. We are confident that the data that we collected accurately reflects how these arbitration systems operate because we began seeing the same distinctions repeatedly in each forum and clearly reached saturation (Lofland 1995).

We went into the field trying to evaluate the extent to which arbitrator training and institutional design matter. In addition to focusing on the procedural rules implemented in each state, our observations focused on whether and how differences in the two states' arbitration system designs and their arbitrator training programs impact actual hearings and repeat-player advantages, if at all. Prior work on arbitrator training and institutional design in California and Vermont suggest important distinctions. We capitalized on this prior research by specifically coding for a series of variables identified by Talesh (2012) as distinctive between California and Vermont. Table 1 reflects the key differences in the California and Vermont arbitrator training programs and institutional designs that Talesh (2012)

uncovered in his prior study of lemon laws. These variables formed the preliminary framework for how we coded in the field.

We operationalized these variables into our “open” coding scheme, then eventually into our “focused” coding scheme. Some examples of things we coded for include whether and how often arbitrators directed parties to the legal standard that needed to be met; whether arbitrators allowed hearsay evidence to be admitted in the hearing; instances where consumers showed visible emotion or raised their voices; whether and how emotional responses by parties were addressed, if at all, by arbitrators; and arbitrator questions that challenged the technical arguments put forth by the manufacturer or posed alternative theories as to the cause of the defect. We also coded for situations where arbitrators deviated from the procedural rules for the process. Coding in this manner proved important because, consistent with hidden curriculum theory, we are able to show that education and training presented as objective and neutral can in fact subtly reproduce advantages for one party over another in arbitration hearings (Fielding 1993). Simply stated, we were able to move from merely stating that training matters to highlighting how it matters in the way arbitrators adjudicate hearings. Equally useful was our finding that although some of Talesh’s predictions bore out, there were also some surprising results that an analysis of training and design in the abstract could not or did not discover. Our research design, therefore, both builds upon and refines earlier work in this area. We used qualitative coding software, ATLAS.ti, to code our transcripts and ethnographic data. This provided an additional layer of transparency, systematization, and formality to our coding process.

4 | HOW ARBITRATION DESIGN AND ARBITRATOR TRAINING IMPACT REPEAT-PLAYER ADVANTAGES AT CONSUMER ARBITRATION HEARINGS

This section demonstrates that arbitration system design and the training arbitrators receive to implement those systems shape the extent to which repeat players gain advantages in arbitration hearings. We find that arbitration training leads to subtle and hidden advantages in three broad ways. First, although both private and state-run arbitration forums are committed to creating neutral and impartial arbitration forums, they conceptualize and operationalize what these concepts mean in different ways, resulting in hidden benefits for repeat players in private arbitrations that are not present in state-run arbitrations. Second, even though arbitrators in California and Vermont apply substantially similar lemon law statutes, differences in arbitrator training results in different constructions of law operating in hearings. Third, despite California’s flexible and Vermont’s strict adherence to procedural rules in training, arbitrators appear to apply procedural rules selectively in both forums during hearings, reflecting and reinforcing the respective forum’s dominant values. We discuss these findings in turn, analyzing specific features that lead to significant advantages for repeat-player manufacturers (in California) or that serve to mitigate those advantages (in Vermont).

4.1 | The Hidden Curriculum: Competing Models of Justice in California and Vermont’s Arbitration Systems

Though California and Vermont provide ostensibly impartial and neutral arbitration settings in which consumers can exercise their consumer rights, in the training arbitrators receive to implement those systems they conceptualize impartiality and neutrality in different ways, and they operationalize these concepts differently in hearings. This has a significant impact on the extent to which repeat-player manufacturers are advantaged at the expense of one-shotter consumers. Here, we discuss the two features of system design and arbitrator training that have the most

significant impact on the relative likelihood of success for consumers and manufacturers at hearings: the role of the fact finder and the role of experts. Table 2 highlights how the different training programs influence the manner in which actual hearings are administered by arbitrators and highlights the subtle but important ways in which the different models of justice in California and Vermont influence arbitration hearings.

4.1.1 | Inquisitorial and Passive Fact Finding by Arbitrators Impacts Repeat-Player Advantages

A neutral and objective decision maker is the key to legitimacy for any third-party disputing forum. Indeed, neutrality and objectivity are central to the justifications for various aspects of arbitrator training and system design in California and Vermont. California training programs teach arbitrators to be passive participants in the hearings in order to preserve the neutrality and objectivity of the forum:

CA Arbitrator Trainer: It is up to the parties to prove their own cases, and we do not want an arbitrator stepping over the line of proving a case for a party. . . . I wouldn't [say], how does that [car defect] affect your use [of the vehicle], because then you are feeding them, you are leading their evidence. (Talesh 2012, 479)

This approach relies on traditional notions of adversarial disputing as the most effective way to reach a just outcome. Its conception of neutrality and objectivity is one of equal opportunity, not necessarily equal ability. In stark contrast, prior research on lemon law arbitration training has indicated that Vermont's Lemon Law Board believes that achieving neutrality and impartiality requires them to approach fact finding very actively because of manufacturers' greater knowledge and experience (Talesh 2012). This approach implicitly rejects the

TABLE 1 Differences in California and Vermont dispute resolution

	California Managerial justice adjudicatory model	Vermont Collaborative justice adjudicatory model
Education and training program	Extensive	Minimal
Socialization process of arbitrators	Extensive (conformity, follow organizational script)	Minimal (maintain and value identity as a dealer, technical expert, or citizen arbitrator panel member)
Presence of emotion/voice in adjudicatory process	Ignored and de-valued	Important—provides snapshot of consumer's experience with vehicle
Fact-finding role of arbitrators	Adversarial process/passive investigator	Inquisitorial process/active investigator
Procedural rules	Tolerant (e.g., hearsay permitted)	Strict (e.g., hearsay not permitted)
Neutrality and legitimacy	Based on professional training, education, and socialization	Based on transparency and interest representation/balance

Note: This table reflects the key differences in the California and Vermont arbitrator training programs and institutional designs that Talesh (2012) uncovered in his prior study of lemon laws. These variables formed the preliminary framework for how we coded in the field.

Source: Talesh (2012).

TABLE 2 Hidden curriculum: different models of justice in California and Vermont arbitration systems

	Design and training	Manifestation in the hearing	Hidden curriculum and repeat-player impact
Role of fact finder	<p><i>California:</i> Arbitrators are trained to remain passive throughout hearing and leave the parties to make their case independently.</p> <p><i>Vermont:</i> Arbitrators are permitted to be as inquisitorial as they choose.</p>	<p>Arbitrator is significantly more passive than Vermont's Lemon Law Board, allowing the parties to make their cases independently in the hearings.</p> <p>Lemon Law Board is significantly more active than arbitrators in California, frequently questioning both parties.</p>	<p><i>Hidden curriculum:</i> Though said to preserve the forum's neutrality and arbitrator impartiality, training arbitrators to remain passive during hearings preserves the skill disparity between one-shooter consumers and repeat-player manufacturers who are better able to identify and present the most pertinent facts and strongest arguments.</p> <p><i>Mitigates repeat-player advantages</i> by (1) eliciting facts that support the consumer's position and/or harm the manufacturer's and (2) keeping the consumer's arguments focused on the legal standard.</p>
Role of experts in the hearings	<p><i>California:</i> Arbitrators are trained to value efficiency and to devalue third-party experts such as technicians or automotive dealers.</p> <p><i>Vermont:</i> Third-party experts are permanent members of the Lemon Law Board.</p>	<p>Arbitrators demonstrate an unwillingness to call for experts in the hearings, even where technical facts are central to the determination.</p> <p>Technical expert and new car dealer are permanent members on the Lemon Law Board and participate in every hearing.</p>	<p><i>Hidden curriculum:</i> Though said to be fairer for both parties (both parties save costs), emphasizing efficiency during hearings preserves the disparity in technical knowledge between the parties, allows the repeat-player manufacturer to take on the role of a third-party expert, and allows the manufacturer to argue for repair over replacement or refund.</p> <p><i>Mitigates repeat-player advantages</i> by allowing third-party experts to (1) push back on manufacturer's technical arguments, (2) solicit relevant facts from the consumer, (3) posit alternative theories of the defect, and (4) perhaps serve to prevent the manufacturer from shifting blame to the dealership.</p>

Note: This table highlights the subtle but important ways in which the different models of justice in California and Vermont influence arbitration hearings.

applicability of rigid adversarial theory to informal disputing structures where consumers are rarely represented by counsel. Instead, its conception of neutrality focuses on leveling the playing field and ensuring that decisions are premised on the fullest possible record of applicable facts, whether or not the parties would have presented those facts independently.

Consistent with how they were taught in training programs, California arbitrators played a minimal role in fact finding at the hearings. For the most part, the parties presented the facts they had with minimal interruption by the arbitrator. The questions that arbitrators asked in California were less probing. Though justified in terms of fairness and neutrality, the passivity encouraged by this training provides the manufacturer with a subtle but significant advantage. Whereas manufacturers sent paid representatives to the hearings, typically with backgrounds in the lemon law field and professional technical knowledge, consumers were noticeably uncomfortable with the legal standard and rarely had more than ordinary technical knowledge. As such, consumers were less able to identify the facts that best supported their position or to see the potential weaknesses in the manufacturer's position. In contrast, manufacturers were frequently "with the law" (Ewick and Silbey 1998), as it benefited their position, crafting efficient and complex legal arguments while undermining the facts presented by consumers. By remaining passive, arbitrators reinforced this dynamic, and the arguments became distinctly one-sided. It is difficult to show where the arbitrator could have drawn out key facts by asking more questions, insofar as we could only understand the significance of an unasked question from its nonexistent answer, but we found at least one clear example. In that hearing, the consumer sought a refund due to a defective relay, which the consumer alleged was a safety issue (CA Hearing 4). The manufacturer's defense was that the relay had no impact on the safety of the vehicle, although he later admitted that he was unsure what the relay actually did (CA Hearing 4). Neither the consumer nor the arbitrator followed up on this admission with a question as to how the manufacturer knew that the relay would not impact safety if he did not know what it did (CA Hearing 4).

Significantly, in the one California hearing (concerning an alleged paint defect) where the arbitrator asked a comparable number of questions to the arbitrators on Vermont's Lemon Law Board, the manufacturer was noticeably put off and challenged the arbitrator's questioning:

CA Arbitrator: Have there been any changes in the formulation of the paint for this vehicle for any length of time? How long has it been used?

Manufacturer: I have no idea.

CA Arbitrator: Well, I'd like you to find out for me.

Manufacturer: I have no way—how would I find that out?

CA Arbitrator: From the manufacturer.

Manufacturer: What's the relevance of that?

CA Arbitrator: The relevance is that when the manufacturer changes a formulation, what was not a problem in one year could become a problem in another year.

(CA Hearing 1)

The consumer likely would not have raised these questions, even though they had the potential to improve his arguments. From that exchange, it appeared that at least that manufacturer did not expect, and did not appreciate, such scrupulous fact finding on the part of the arbitrator, and in that sense the manufacturer's representative seemed to understand the advantage that the manufacturer held when the consumer was the only one asking questions.

By and large, California arbitrators asked few probing questions and never specifically asked how a particular defect substantially impaired the use, value, or safety of a vehicle to the buyer of the vehicle. This was consistent with the training they received. Indeed, the very structure of a single arbitrator design could exacerbate this passivity, as the arbitrator may feel as

though asking too many questions would show bias or favoritism, in contrast with a panel system where such an appearance would be mitigated. In Vermont, the board members routinely inquired about substantial impairment and elicited dispositive testimony from the consumer:

VT Arb. Bd. Member (Automotive Dealer): I guess I need to ask this question because I'm always a little bit of a stickler. I'm reading the complaint. I see it says the defect substantially impairs the vehicle's use, market value, and safety. What I'm asking you is to expand on that a little bit, how it affects its use, market value, and safety?

Consumer: Use, we travel a lot. We go all over the place. We go to Niagara Falls, we go to Vanderbilt. We travel a lot. We get in the car, go away. . . . And what if I'm up in Canada, Niagara Falls, where we frequently visit, or up in Maine and that car . . . the starter sticks? Because eventually, if the ignition keeps on sticking, suddenly we get stranded, who's going to come help me? (VT Hearing 5)

As the above quote highlights, rather than sitting back and allowing the parties to present their case independently, the panel would frequently step in to direct the consumer's argument back to the relevant legal standards, which in turn led to more focused answers by the consumer, improving the consumer's position. Thus, while both California and Vermont attempt to adhere to neutrality, the manner in which this neutrality is operationalized is shaped by the different ways in which each arbitration program socializes its arbitrators on how to approach fact finding.

In Vermont, exchanges like the one above were the norm. The Lemon Law Board frequently interrupted both parties to clarify or elicit facts and to challenge factual assertions. Given the disparity in skill between the parties, this benefited the consumer far more often than not. Repeat-player manufacturers have the experience to identify and clearly present the facts that best support their positions. Accordingly, arbitrator questions in Vermont were more likely to lead to new information that benefited the consumer's position than the manufacturer's:

VT Arb. Bd. Member (Automotive Dealer): What happens during that four months? Does it run pretty good and everything?

Consumer: Interesting you should ask. There was periods throughout that time where the check engine light would come on. It would stay on for a half hour, and then it would go off. I would call for service after the light stayed on for four, you know, several days at a time. I thought, okay, this time it's not going out. I better bring it in. (VT Hearing 3)

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VT Arb. Bd. Member (Automotive Dealer): So this wasn't like you brought it in for another visit?

Consumer: No.

VT Arb Bd Member (Automotive Dealer): Okay. That helps me understand it because I'm sitting here saying, well, why wasn't there a complaint about running rough, but that was part of the same problem. (VT Hearing 3)

Moreover, while the manufacturer was expected to independently point out flaws in the consumer's arguments, the inexperienced consumer was unlikely to do the same. Accordingly, we noticed that increased questioning was more likely to undermine the manufacturer's argument:

VT Arb. Bd. Member (Technical Expert): For the manufacturer . . . one question I do have, is you said you felt fairly confident it was fixed because the pump was replaced. But it came back [in for another repair] a day later.

Manufacturer: I think I misspoke on that one.

VT Arb. Bd. Member (Technical Expert): So, can you explain to me why you're still confident it's fixed? (VT Hearing 1)

Significantly, the Lemon Law Board's questions were not limited to the facts presented by the parties. More than once it was clear that one or more board members were developing their own theory as to a defect, entirely different from that put forward by the parties:

VT Arb. Bd. Member (Technical Expert): I'm starting to wonder if there's not another issue here. . . . All we can look at is it shudder or stop, but as soon as she mentioned that she's getting some shudder on the interstate, I'm starting to think there's a second problem here, maybe, that hasn't been divined . . .

*

VT Arb. Bd. Member. (Automotive Dealer): Well, if I was a service manager at the time of her request, I would not have taken the heads. I'd [check the] converter or transmission. (VT Hearing 3)

Not only do California arbitrators seem to ask fewer questions, they also play a subdued role in directing the parties' arguments. The hearings typically begin with a broad description of the hearing process that includes the explicit assumption that the parties already know what to do and require little direction:

CA Arbitrator: You already kind of understand the basic format that we'll start off with, [which] is the customer will give your opening statement or position, however you want to do it. Some people choose to do it chronologically, others . . . however you want to do it. . . . Just make sure, you know, that I understand what your respective positions are, and you will have done your job. (CA Hearing 4)

Moreover, while the hearing goes on, California arbitrators remain passive, giving only bare directions such as "It's your turn. Just talk again" (CA Hearing 1). As discussed, California's system explicitly justifies this passivity as a requisite for keeping the hearings fair and impartial; by sitting back and allowing each party to present its case, the arbitrator relies on an adversarial process to bring out the relevant facts and arguments. However, in these informal proceedings, the adversaries are hardly evenly matched. Accordingly, this passivity, which is cultivated during the arbitrator's training, functions as a significant hidden advantage for the repeat-player manufacturer.

For one, this creates the space for manufacturers to step into the role of providing the consumer (not to mention the arbitrator) with favorable interpretations of the statute while remaining unchallenged by the arbitrator, as discussed in our next section. More generally, of the fifty-seven hearings we analyzed, legal counsel represented the consumer in just one.⁷ Consumers in both states presented their cases in a stream-of-consciousness manner, relying on emotion instead of legal arguments, and failing to emphasize key legal arguments when they did bring them up. In contrast, as discussed earlier, manufacturers sent paid representatives, veterans of multiple hearings who often had industry experience, who focused on legal principles and arguments that benefitted their position. Thus, whereas an adversarial system of

dispute resolution may be appropriate in a judicial forum, insofar as lawyers represent the competing parties, implementing this system in arbitration leads to significant hidden advantages for repeat players, resulting in a system that is hardly impartial.

In sum, even though California arbitrators follow their training closely and approach fact finding passively in order to preserve the impartiality of the process, the disparity in skill between the parties means that the repeat-player manufacturer is much more likely to independently identify key facts, weaknesses in consumer's arguments, and the best theories to support its position. Vermont's inquisitorial system of justice, in contrast, recognizes this disparity in skill between repeat-player manufacturers and one-shotter consumers and adjusts the questioning accordingly. Thus, Vermont's Lemon Law Board ensures fairness by actively leveling the playing field in order to come to the correct decision according to the facts, whether or not the parties themselves would have brought up these facts independently. This approach is decidedly more in line with consumer protection values, which flow into the system through a balance of competing interests and perspectives in the composition of the arbitration panel.

4.1.2 | The Role of Experts in Arbitration Hearings Impacts Repeat-Player Advantages

Experts, such as technicians and car dealers, play an important role in both California and Vermont's dispute resolution systems. In California, the arbitration process allows arbitrators to appoint an independent expert to inspect the vehicle and issue an expert report (Talesh 2012). This is potentially useful because arbitrators typically do not have a background related to automobile repairs. However, prior research shows that California's dispute resolution system teaches arbitrators to avoid using these experts unless absolutely necessary due to concerns over efficiency:

Third-Party Administrator: It is a long process [to hire a technical expert], and you should not waste your time and delay unless it is necessary. . . . Think about the relevance. Think about why you need it. They are not the end all be all. (Talesh 2012, 480)

This reluctance to call on a technical expert manifests clearly in the hearings, where the arbitrators themselves routinely voice reluctance to call on the technical expert:

CA Arbitrator: I may need to have other information or I need to have an expert come to look at something . . . but that kind of delays it a little bit more. (CA Hearing 1)

In doing so, trainers and now arbitrators invoke a justification central to alternative dispute resolution systems almost everywhere: efficiency.

Efficiency, so the reasoning goes, benefits both parties, insofar as it leads to cheaper and easier resolutions to claims that would otherwise be fully litigated in court. However, in practice, training arbitrators to avoid using independent experts to inspect the vehicle and issue a report provides a hidden benefit to manufacturers' representatives, who are typically far more technically knowledgeable than the consumer or the arbitrator. Manufacturers regularly send representatives with technical backgrounds to argue against consumers in lemon law claims. The primary reason for doing so is clear: a representative with a technical background is able to make stronger arguments about the nature of a defect.

On top of this is a subtler advantage: without a third-party technical expert on hand, and without the likelihood that one will be called, manufacturers' representatives can take on that

role. Significantly, the arbitrators in California have little background in automotive repair and consequently tend to defer to the manufacturer's representative on technical issues. In one hearing, during an exchange between the consumer and arbitrator about the consumer's problems with her vehicle, the consumer mentioned that her oil gauge did not work. When the consumer mentioned that she used synthetic oil, the arbitrator interjected and turned to the manufacturer for clarification: "That might be a question for you to comment on. Does the type of oil affect the gauge?" (CA Hearing 10). In another hearing, the consumers complained that the door of their vehicle did not work correctly. After a lengthy back and forth regarding possible causes for the issue, the arbitrator, rather than calling for a third-party expert, asked the manufacturer whether determining the cause would be a "major job" (CA Hearing 9). Thus, training arbitrators in California to not call independent experts due to concerns over efficiency provides manufacturers with an advantage at hearings by allowing them to stand in for technical experts, with the consumer and arbitrator being, in most cases, in no position to contradict them.

Vermont's Lemon Law Board mitigates the manufacturer's ability to leverage its superior technical knowledge in hearings by including an active automobile technician on the board. During the hearings, the technical expert board member engaged with manufacturers on technical issues, regularly challenging manufacturers on technical points—in stark contrast to the deferential California arbitrator. For example, at one hearing, a consumer described various issues concerning his vehicle's four-wheel drive. The manufacturer's defense was that the vehicle's tires were to blame, not any defect with the vehicle. After a lengthy exchange, during which the manufacturer attempted to argue that unequal tire size had caused the issue, the board's technical expert concluded: "I think in all fairness, probably, if you came to my shop on a multi-state inspection, we would have told you your tires were greening [i.e., working] okay" (VT Hearing 29). In addition to challenging manufacturers' position, the technical experts in the hearings we observed often bolstered consumers' testimony by supplementing it with technical explanations:

VT Arb. Bd. Member (Technical Expert): Does the mileage drop more in the colder weather?

Consumer: Not much. A mile to the gallon or two miles a gallon. When it's acted up, Chrysler's [dealer] has had the vehicle, and they've had the same thing. Then they'll look at the diagnostic, and they'll repair something. The guy will drive it for a day or two, put a couple hundred miles on it, and the mileage will come back up after they know you made an issue of checking the EGR, which they have cleaned out. That was part of the issue.

VT Arb. Bd. Member (Technical Expert): Usually that happens on small trips; they'll get carbon buildup on the EGR, but when you drive like you're driving, it shouldn't happen. (VT Hearing 22)

This passage highlights how the technical expert arbitrator validates the consumer's claim.

In sum, California's diminished reliance on third-party experts in the name of efficiency provides hidden benefits to manufacturer's representatives, who can thus better leverage their technical expertise in arguments against layperson consumers, providing ostensibly neutral but almost certainly biased technical information to the layperson arbitrator in lieu of a third-party expert, all while shifting blame away from the manufacturer. The presence of a third-party automotive technician and the automotive dealer on Vermont's Lemon Law Board mitigates these advantages while still providing consumers with a speedy and less costly resolution to automobile warranty problems.

4.2 | How the Hidden Curriculum in Arbitration Training Leads to Disparate Applications of Substantially Similar Laws in Arbitration Hearings

Though California and Vermont arbitrators apply substantially similar lemon law statutes, variation in arbitrator training and system design lead arbitrators to apply distinct interpretations of those statutes during hearings. Organizational fields are typically subject to competing and contradictory logics (Heimer 1999; Stryker 2000; Schneiberg and Soule 2004). The lemon law field is no different, being subject to both managerial logics of problem solving, managerial discretion, and efficiency, and consumer logics of consumer protection, equal access, and emphasis on formal law (Talesh 2012, 2015).

Here, we discuss two distinct aspects of arbitrator training and system design that we believe lead to disparate interpretations of substantially similar lemon laws at hearings: (1) the reliance on formal law and (2) the role of consumer emotion and individual voice. Table 3 highlights how these disparate interpretations of substantially similar law can lead to subtle but significant hidden advantages for the repeat-player manufacturer. Table 3 also indicates, however, that these advantages can be inhibited through a different approach to arbitrator training and system design. The table highlights how arbitrator training or lack thereof leads to arbitrators applying laws differently at hearings.

4.2.1 | Arbitrators Adhere to and Rely on Formal Law Far More in Vermont than in California

Prior research has found that California training programs provide arbitrators with written manuals that selectively include and exclude statutory provisions and case law, while forbidding arbitrators, two-thirds of whom are lawyers, from conducting additional legal research (Talesh 2012). At the same time, trainers emphasize managerial logics of flexibility and discretion while expressly devaluing formal law:

Third-Party Adm. (Trainer): Because so-and-so versus so-and-so [referring to a case], what does that really have to do with what I'm looking at today, you know? Because an arbitrator, I think they feel like they're judge for the day. . . . So I think the arbitrators enjoy the program because they feel like they have flexibility, too. (Talesh 2012, 476)

Thus, California's arbitration programs create significant space for arbitrators to apply flexible interpretations of the lemon law and consequently provide an opportunity for extralegal managerial values to flow into the law. For example, one of Talesh's (2012) most important findings was that arbitrators are taught that they have discretion to award another repair attempt even if a consumer has met the legal presumption and given the manufacturer a reasonable number of attempts to fix the problem and is entitled to a full refund per the statute.

In the hearings, the result is that the relevant law and statutory language is brought up far less often in California than in Vermont. Instead of arguments as to whether the consumer is entitled to the statutory remedy of replacement or refund because the manufacturer has had "a reasonable number of attempts" to repair a defect that "substantially impairs the use, value, or safety of the vehicle," California arbitrators focused primarily on the alleged defect and whether or not a subsequent repair would likely remedy the problem (CA Civ. Code § 1793.22). In doing so, arbitrators clearly favored repair over the statutory remedy of replacement or refund. In one hearing, the arbitrator asked the manufacturer if it would like another opportunity to repair the vehicle, even though the consumer was requesting replacement and the manufacturer had already insisted that the vehicle was repaired (CA Hearing 11). In another hearing, the

TABLE 3 Hidden curriculum: disparate application of substantially similar laws by arbitrators at hearings

	Design and training	Manifestation in the hearing	Hidden curriculum and repeat-player impact
Emphasis on formal law	<p><i>California:</i> Arbitrators are trained to devalue formal law and prioritize informal problem solving.</p> <p><i>Vermont:</i> The Lemon Law Board is trained to apply relevant law consistently and as written.</p>	<p>Arbitrators rarely reference statutory text and shy away from formal legal remedies (replacement or repair) in favor of awarding manufacturer a new repair.</p> <p>The Lemon Law Board frequently references statutory text and legal standards. This indicates that it is beholden to statutory remedies when the manufacturer argues for repair.</p>	<p><i>Hidden Curriculum:</i> Though said to be fairer to both parties (consumer gets working vehicle and manufacturer saves costs), in the hearings, emphasizing problem solving over statutory terms and remedies biases the arbitrator in favor of a remedy (repair) that only the repeat-player formal law creates significant room for the manufacturer sees as a “win.” Moreover, devaluing formal law creates significant room for the manufacturer to influence the arbitrator’s interpretation of legal terms.</p> <p>Emphasizing a formal and uniform application of the lemon law statute <i>mitigates repeat-player advantage</i> by (1) preventing overuse of repair, the manufacturer’s preferred remedy, as an informal resolution; and (2) preventing the manufacturer from imposing favorable interpretations of the relevant statutory language.</p>
Emotion and individual voice	<p><i>California:</i> Arbitrators are taught in training that the emotional impact of a defect is irrelevant.</p> <p><i>Vermont:</i> The Lemon Law Board receives minimal training and is free to consider the emotional impact that the defect has on the consumer.</p>	<p>Arbitrators echo their training and admonish the parties to avoid emotion in their testimony.</p> <p>The Lemon Law Board appears to encourage testimony that involves the emotional impact of the defect in order to determine whether the vehicle is “substantially impaired.”</p>	<p><i>Hidden Curriculum:</i> Though said to preserve the forum’s neutrality and the arbitrator’s impartiality, devaluing emotion during hearings takes away the consumer’s strongest argument as to why a defect is “substantial”—an argument that the repeat-player manufacturer does not rely on. This effectively removes the phrase “to the buyer” from the substantial impairment standard, leaving arbitrators to apply a highly managerialized form of the lemon law statute.</p> <p>Allowing arbitrators to consider consumer emotion <i>mitigates repeat-player advantage</i> by (1) preserving “to the buyer” in the substantial impairment standard and (2) preserving the form of argument that consumers tend to rely on most heavily.</p>

Note: This table highlights how arbitrator training or lack thereof leads to arbitrators applying laws differently at hearings.

arbitrator repeatedly asked the manufacturer what would happen if the arbitrator awarded a repair instead of replacement or refund and the consumer's vehicle broke down. The arbitrator engaged in this questioning despite the manufacturer repeatedly stating that such subsequent repairs might not be covered by a warranty and despite the consumer's testimony that his radiator had already been replaced five times in less than two years (CA Hearing 5). In essence, the question for California arbitrators is not whether the consumer is entitled to the statutory remedy of a full refund or replacement vehicle, but rather whether the alleged defect can be repaired—a question that reflects arbitrators' training to favor managerial values of problem solving and discretion over consumer values such as strict adherence to formal law.

By devaluing formal law in arbitrator training and emphasizing problem solving, the hidden curriculum creates a situation in which arbitrators at hearings offer nonstatutory remedies, such as another repair attempt, even though the consumer is legally entitled to a full refund. In California, this emphasis on problem solving over formal law is said to be fairer, insofar as the consumer receives a working vehicle at a lower cost to the manufacturer at hearings. However, in practice, this training provides hidden benefits to the manufacturer. First, consumers, often frustrated by multiple unsuccessful repairs prior to arbitration, usually do not see a subsequent repair attempt as a success and favorable outcome. Eight years of consumer satisfaction surveys conducted by the California Department of Consumer Affairs show that consumers do not believe that another repair attempt constitutes a consumer "win," despite the fact that consumers receive decisions stating that they "prevailed" when awarded another repair attempt (California Department of Consumer Affairs Survey 2002–2009). In contrast, manufacturers regularly argue in hearings for attempting another repair. For example, in one hearing, the manufacturer argued for an opportunity to inspect various defects alleged by the consumer (including smoking brakes) and repair them if possible. After the arbitrator test-drove the vehicle, the arbitrator asked if that offer was still available. The manufacturer replied, "Yes, it is if you rule in our favor and award us a repair" (CA Hearing 6). As that exchange makes clear, manufacturers recognize that an opportunity to repair is usually a win and often explicitly argue in favor of another repair attempt.

Second, manufacturers are far better equipped than consumers to argue for a favorable interpretation of statutory terms when the terms are contested at hearings. In the hearings, manufacturers were noticeably "with the law" (Ewick and Silbey 1998), arguing for managerialized interpretations of statutory terms that further focused arbitrators on the question of repair, while consumers were clearly less informed about the legal standards in play and less able to argue for favorable interpretations. For example, in one California hearing, the consumer, whose claim involved defective engine noise, asked the manufacturer what "nonsubstantial" meant (CA Hearing 6). Under California case law, whether a vehicle defect substantially impairs the vehicle's use, value, or safety is evaluated with respect to "the specific circumstances of the buyer."⁸ However, in response to the consumer's question, the manufacturer answered that "a substantial impairment impairs the use, value, and safety of the vehicle, and noises are therefore not substantial" (CA Hearing 6). The consumer responded, "Because they can be fixed?" (CA Hearing 6). To which the manufacturer responded, "Yes, because they can be fixed and are minor" (CA Hearing 6). Significantly, this managerialized interpretation of "substantial impairment"—which suggests that a substantial impairment does not exist if the problem can be repaired, reflecting discretion and problem-solving values—is the very interpretation that we contend arbitrators show a preference for by focusing during hearings on the possibility of awarding another repair attempt.

Interestingly, during this exchange, the arbitrator did not intervene to clarify the legal standard and note that substantial impairment is evaluated from the perspective of the buyer. Taken together, the manufacturer's interpretation of the lemon law statute reframes "substantial impairment" and the accompanying legal remedies as dependent on whether or not the defect can be repaired. Under this interpretation, the purpose of the lemon law is to award another

repair attempt in such cases, even if the consumer has already met the law's legal presumption and is entitled to a full refund. Significantly, this managerialized interpretation of the law appears to be the one adopted by arbitrators, who rarely independently bring up the statutory language and appear most concerned with whether a subsequent repair will cure the defect, even after multiple failed attempts.

In contrast, Vermont provides arbitrators with the complete lemon law statute and trains new arbitrators to apply the law consistently (Talesh 2012). The result is that the arbitrators are more concerned with the language of the statute in hearings, especially when it comes to remedies. The adherence to formal law is captured in this Vermont arbitrator's comment at the hearings we observed: "We have to comply with what the law requires us to do. . . . Whatever the law requires this Board to recommend as a result or conclusion is what we will comply with" (VT Hearing 14). Our qualitative coding revealed that, in general, Vermont's Lemon Law Board referenced formal law (typically the lemon law statute) nearly twice as often as California's arbitrators.

Moreover, the Lemon Law Board regularly challenged manufacturers' legal arguments and interpretations of statutory terms, a burden that would fall on the consumer in California. For example, in one hearing, the manufacturer argued that the Vermont Lemon Law Board should award the consumer a replacement, rather than a more costly refund, which the consumer was requesting, echoing the problem-solving and fairness sentiment central to California's arbitration system:

Manufacturer: Why not offer [the consumer] another [vehicle]? They bought the vehicle, evidently they decided that's the type of vehicle they wanted, and our obligation is to repair the vehicle or replace it. (VT Hearing 13)

However, the Lemon Law Board explicitly rejected the manufacturer's argument by appealing to the statutory language, pointing to the fact that the lemon law statute gives the consumer the "option" to choose a remedy (VT Hearing 13). In doing so, the Lemon Law Board explicitly rejected the manufacturer's problem-solving argument and focus on discretion, emphasizing the law's consumer protection values instead:

VT Arb. Bd. Member (Automotive Dealer): Yes, we can't rule on a replacement. We can only rule on . . . a refund. The consumer chooses. [T]he lemon law, it's the consumer law. (VT Hearing 13)

By providing Vermont arbitrators with the complete lemon law statute and emphasizing adherence to formal law, Vermont's arbitrator training ensures that the statute's consumer protection values manifest in the hearings through the Lemon Law Board's interpretation of the statute. In contrast to the approach used in California, this approach mitigates the advantages manufacturers might otherwise enjoy by limiting the extent to which they can argue for favorable remedies or interpretations of statutory language. Conversely, California's process builds discretion and flexibility into legal rules, and arbitrators subsequently use that discretion at hearings in ways that are consistent with their training.

4.2.2 | Consumer Emotion and Individual Voice Are Handled Differently in Hearings Based on How Arbitrators Are Trained

In California, arbitrators are trained to diminish the role of emotion in lemon law hearings. As Talesh (2012, 481–82) observed, "Trainers in California admonish arbitrators 'don't feel buyers' remorse' and 'have empathy not sympathy.'" Concerns that matter to consumers, especially the emotional impact of the problem, are constructed as irrelevant." This training manifests clearly

in the hearings, where arbitrators often actively admonish the parties to avoid bringing emotion into the hearing:

CA Arbitrator: It's very important that we do not get into debate here, and I would appreciate it if you would address all of your comments and questions directly to me so that we don't get into any kind of emotional outbursts. (CA Hearing 1)

CA Arbitrator: We really don't need to go into a lot of detail about whether or not this person was rude or not. (CA Hearing 8)

Like other aspects of training and design in California, this approach is justified in terms of maintaining due process and preserving the neutrality and objectivity of the decision maker. In practice, however, this places a significant limitation on the consumer, while simultaneously benefitting the manufacturer.

Without experience disputing lemon law claims and crafting legal arguments and lacking advanced technical knowledge, consumers in California and Vermont regularly rely on emotion to argue that the defect substantially impairs the use, value, or safety of the vehicle to the buyer, which is one of the key legal elements of a successful lemon law claim:

Consumer: I feel like both the dependability and safety . . . are compromised. I live in fear that the day's going to come where I am going to get stranded at the side of the road. When I bought this car, I was a single mom with three kids, and I bought it with the extended warranty . . . thinking I was buying us several years of peace of mind. . . . And I do not have faith in the vehicle anymore. (VT Hearing 3)

By actively diminishing the value of emotion, arbitrators in California effectively remove “to the buyer” from the substantially impaired standard, while undermining one of the only tools available to the inexperienced consumer. This is compounded further by California's passive arbitrators, who are trained not to ask further questions and to direct a consumer's argument to non-emotional arguments, while also being taught that the emotional arguments put forth by consumers are not valuable or to be given weight. This benefits the repeat-player manufacturer, which can rely on experience—both technical experience and experience in the forum—to craft more sophisticated legal arguments that do not rest on emotion, but rather on a particularly technical conception of what constitutes a “substantial impairment.” In this way, removing emotion from the hearing contributes to the managerialization of the law by further focusing arbitrators on whether a defect can be repaired. Manufacturers, apparently recognizing this advantage, echo the training that arbitrators receive in California and argue at hearings that emotion is irrelevant:

Manufacturer: Is the customer disappointed? No question. That's why we're here—but the key issue is that the vehicle is not substantially impaired. (CA Hearing 3)

We note that Talesh (2012) found that when training arbitrators on substantial impairment, trainers omit the reference to the fact that the substantial impairment of use, value, or safety must be evaluated from the perspective of the buyer. Thus, arbitrators are unwittingly steered toward misapplying the substantial impairment legal standard at hearings. Despite the rhetorical justifications for minimizing consumer emotion in hearings (e.g., protecting due process and preserving arbitrator neutrality), California's approach is decidedly one-sided, hindering the one-shotter consumer, providing repeat-player manufacturers with a hidden advantage, and ultimately undermining the language of the governing statute, which indicates that “substantial impairment” of the vehicle should be judged from the buyer's perspective.

In stark contrast, Vermont's Lemon Law Board recognizes that emotion can play a valuable role in determining whether or not a defect substantially impairs the use, market value, or safety of the motor vehicle to the consumer:

VT Arb. Bd. Member (Automotive Dealer): Sometimes some emotion is a good thing. . . . When consumers are emotional, you see them telling their case. So when you see emotions, you can sometimes get a quick snapshot and a good feel of their experience, and that is really important. (Talesh 2012, 482)

The manifestation of this position on consumer emotion is apparent in the hearings. Rather than actively suppressing emotion, Vermont's Lemon Law Board appeared to encourage consumers to bring emotion into the hearing:

VT Arb. Bd. Member (Citizen Member): Just a couple of questions. I guess I just want to clarify, because obviously if you've had several repairs, it becomes an emotional process. (VT Hearing 30)

*

VT Arb. Bd. Member (Automotive Dealer): I was just giving both parties the opportunity to vent (VT Hearing 32).

Vermont arbitrators routinely used the word "stranded" when questioning consumers as to whether the reported defects substantially impaired the safety of the vehicles. This often elicited emotional responses from consumers:

VT Arb. Bd. Member (Citizen): But you've never been stranded or anything because of this?

Consumer: People are. People can be stranded. A belt—if this thing is not functioning properly . . . this engine will not survive how long it's supposed to live. Every time I drive this truck, it's frightening to me. (VT Hearing 30)

*

Consumer: To me, the car is compromised as far as safety-wise. I don't feel safe in it. I don't trust it, and I always wonder if it's going to break down. (VT Hearing 3)

In sum, our crucial finding in this section is that this disparate application of substantially similar laws is not accidental, but rather is a side effect of the differing training approaches. In California, training and design structures that filter out consumer logics in favor of business logics result in the application during hearings of a highly managerialized interpretation of lemon laws that benefits the manufacturer by, in essence, turning the lemon law into a question of whether a defect can be repaired instead of a question of whether the consumer is entitled to the statutory remedy: replacement or a full refund. California's arbitration system minimizes consumer emotion, justifying its approach in terms of protecting due process and preserving arbitrator objectivity but in practice creating a system that handicaps consumers to the benefit of repeat-player manufacturers by allowing arbitrators to modify, or omit entirely, aspects of the lemon law statute in ways that severely restrict the arguments that consumers rely on most. In Vermont, where training is limited, arbitrators adhere strictly to the statutory language during hearings. Moreover, Vermont's system mitigates the hidden advantage that manufacturers enjoy in California by preserving the availability of consumers' most available and effective arguments and leaving the statutory language fully intact. Fairness is

achieved by ensuring that each party has access to and is free to use the arguments that best support its position.

4.3 | Hidden Curriculum: Selective Enforcement of Procedural Rules by Arbitrators at Hearings Impacts Repeat-Player Advantages in California and Vermont

The selling point for arbitration is its use of relaxed and efficient procedural rules. Talesh (2012) argued that even if applied consistently to consumers and manufacturers, California's relaxed procedural rules could, in practice, advantage manufacturers over consumers. For one, experienced manufacturers would be better able to present their case in the short twenty-minute window for its case-in-chief presentation than inexperienced consumers. Second, where evidentiary rules were far more flexible than in court, manufacturers would benefit "because they have even more access to resources, information, warranty records, and invoices" (Talesh 2012, 484). What Talesh's theory assumes is that the relaxed procedural rules that remain in place would still bind the parties in practice. However, we found that arbitrators in both states applied procedural rules inconsistently in arbitration hearings, leading to the surprising finding that the *selective* application of procedural rules is key to how repeat players are advantaged in California and that this advantage is mitigated in Vermont. Table 4 highlights the selective enforcement of procedural rules by arbitrators at hearings and highlights how the selective application of procedural rules advantages repeat players in California but inhibits repeat-player advantages in Vermont.

In practice, California arbitrators applied their procedural rules selectively. On the one hand, this benefited a consumer in at least one case in which the California arbitrator allowed the consumer's case-in-chief presentation to go on for thirty minutes, disregarding the stipulated twenty-minute time limit (CA Hearing 6). On the other hand, procedural breaks appeared to favor the manufacturer far more frequently in California—the above example was the only instance in which a procedural break favored the consumer. Some of these instances were seemingly innocuous, such as when one arbitrator instructed a consumer to make his closing remark before the manufacturer's, breaking a rule requiring the manufacturer to go first and that the arbitrator had noted at the beginning of the hearing (CA Hearings 6, 20).

However, others were more significant and enabled the manufacturer to leverage its superior technical knowledge to its advantage in the hearing. For example, in another hearing, the arbitrator, at the manufacturer's request, allowed the manufacturer to give testimony during the vehicle inspection, which is not allowed for either party. The manufacturer went on to give a ten-minute technical explanation of why the alleged defect (a jammed door) must have been caused by an impact rather than a defect, while the consumer was left to give a nontechnical rebuttal, asking "How can they say the fender moved, how did it move?" (CA Hearing 9). Finally, in another hearing, the arbitrator, at the manufacturer's urging, allowed the manufacturer to inspect the vehicle at a later date in order to determine whether another repair could fix the alleged defect, even though by appearing by phone, instead of in person, the manufacturer had waived that right according to that system's procedural rules (CA Hearing 10).

Thus, even assuming that these ostensibly neutral procedural rules would not benefit the manufacturer if applied consistently, it appears that California arbitrators apply their procedural rules selectively in a way that benefits the manufacturer more often than not. The most significant of these breaks came at the insistence of the manufacturer, providing further evidence of the hidden benefits that manufacturers enjoy in a system that emphasizes informality. The experienced manufacturer benefits significantly in such a system, being better able to identify where a procedural break will benefit its position and better able to persuade the arbitrator that the break will lead to an outcome (repair) that is consistent with the business logics of

TABLE 4 Hidden curriculum: selective enforcement of procedural rules by arbitrators at hearings

	Design and training	Manifestation in the hearing	Hidden curriculum and repeat-player impact
Selective enforcement of procedural rules	<p><i>California:</i> Procedural rules are informal (e.g., hearsay is permitted).</p> <p><i>Vermont:</i> Procedural rules tend to be more court-like (e.g., hearsay is not permitted).</p>	<p>Procedural breaks appeared to favor the manufacturer more often than the consumer.</p> <p>The Lemon Law Board appeared to hold manufacturers and consumers to a double standard, allowing consumers more leeway with procedural requirements.</p>	<p><i>Hidden curriculum:</i> Though said to be fairer to both parties (informal processes save both parties time and resources), in the hearings, application of this principle appeared to favor the repeat-player manufacturer, signaling a possible bias (implicit or explicit) on the part of the arbitrator.</p> <p>Holding repeat-player manufacturers to a higher standard on procedural rules <i>mitigates repeat-player advantage</i> by making up for disparities in the parties' respective levels of experience in the forum.</p>

Note: This table highlights how the selective application of procedural rules advantages repeat players in California but inhibits repeat player advantages in Vermont.

efficiency, discretion, and problem solving that govern arbitrator decision making in California—the same values that prior studies have shown to be emphasized in lemon law arbitrator training.

Talesh (2012) suggested that a stricter, more uniform adherence to procedure would mitigate this advantage in Vermont's lemon law hearings. We found the opposite to be true. In Vermont, as in California, procedural rules were applied only selectively. However, unlike in California, Vermont's consumers benefited more frequently from procedural breaks, and Vermont arbitrators appeared to hold manufacturers to a higher standard of procedural compliance. On paper, both states follow a similar hearing format: (1) the consumer presents, (2) the manufacturer presents, (3) the arbitrator asks questions, (4) both parties present closing statements, and (5) the vehicle is inspected and taken on a test drive. However, in practice, Vermont arbitrators regularly interrupted the formal process to ask questions and guide or challenge the parties' arguments:

VT Arb. Bd. Member (Technical Expert): Is it too late for me to ask something?

VT Arb. Bd. Member (Automotive Dealer): We're pretty informal. We'll back up still, and then we'll give him a chance to make more statements. (VT Hearing 26)

Contrast this with the insistence on adherence to procedure invoked by one California arbitrator:

CA Arbitrator: Don't bring up anything brand new in your closing statement that you haven't talked about before because the other side won't then have an opportunity to comment on it, so I'm not going to give it very much credence if you do that. (CA Hearing 4)

Consumers in both states tended to present their arguments in a less organized, stream-of-consciousness manner. As such, these sorts of active interventions by Vermont arbitrators served to strengthen the consumer's arguments and bring out information that consumers might not have thought important.

At the same time, Vermont arbitrators appeared to apply a double standard to consumers and manufacturers on other procedural rules. On the one hand, in one hearing, Vermont arbitrators allowed the hearing to proceed even though the consumer had failed to bring the vehicle with him to the hearing, in violation of a procedural rule (VT Hearing 10). On the other hand, in another hearing, the Vermont Lemon Law Board refused to grant the manufacturer an opportunity to conduct a final repair attempt, which it has a statutory right to conduct once the consumer files for arbitration, after finding that the manufacturer defaulted that right by failing to notify the consumer of its intent to exercise it (VT Hearing 18). Though our data is admittedly minimal here, it suggests the possibility that consumer protection values play a much stronger role in arbitrator decision-making in Vermont than in California's manufacturer-funded system.

In short, both California and Vermont appear to apply their procedural rules selectively. Rather than the procedural rules themselves being the source of hidden benefits, it is the disparate application of the rules, most often in favor and at the behest of the manufacturer, that benefits repeat players in California. Rather than offsetting these benefits through a stricter, more uniform application of procedural rules (Talesh 2012), Vermont's Lemon Law Board also selectively applies its procedural rules, but in a way that benefits the consumer while holding the manufacturer to a higher standard. At the methodological level, these findings show that by observing hearings, rather than just design and training in the abstract, it is possible to gain a far more precise understanding of the microprocesses through which repeat players gain advantages and how those advantages can be mitigated.

5 | THE IMPLICATIONS FOR CIVIL AND CONSUMER RIGHTS OF ARBITRATORS' HIDDEN CURRICULUM

This article addresses a significant blind spot in the study of arbitration by showing how different arbitration systems actually work, and how the differences in those systems can have a significant impact on their efficacy in protecting consumer and civil rights. Our research suggests that arbitration system design and the training arbitrators receive to implement those systems can have a significant impact on the extent to which repeat players are advantaged in arbitration hearings and can also inhibit those advantages. By examining lemon law hearings specifically, as opposed to design features in the abstract, we elaborate sociolegal and neoinstitutional studies of law and organizations by more precisely determining the mechanisms through which business and consumer values shape the interpretation of lemon laws applied in practice, and the extent to which repeat players are advantaged as a result. In addition, we extend studies of occupational socialization and hidden curriculum theories to explicitly address arbitrator training and hearings. Unlike prior hidden curriculum studies, which often focus on long-term education, we show that the content of the shorter training sessions that arbitrators receive to implement disparate arbitration system designs, though justified in terms of objectivity and fairness, can have significant effects that favor one group or party over another. The hidden curriculum in arbitrator training is an important mechanism through which business and consumer values come to subtly influence arbitration hearings. However, we go beyond prior hidden curriculum studies by analyzing the *practical application* of trainings and lessons in conjunction with the lessons themselves, which allows us to more precisely assess the aspects of trainings and lessons that have the most impact on actual arbitration hearings.

Too often, scholarly and policy debates about arbitration center around who wins and loses, and dichotomies such as “arbitration is a sham” versus “arbitration works well.” Our findings here suggest a more pessimistic interpretation of what is taking place. Talesh’s (2012) study of arbitration training programs and our analysis of actual arbitration hearings do not reveal any blatant attempt by businesses to tilt the scales of justice in businesses’ favor. California arbitrators make a great effort to preserve the principles of neutrality as they understand them. Moreover, private arbitration forums may provide a significant opportunity for consumers to vent frustrations, resolve disputes, and even punish manufacturers in the form of restitution when consumers are fed up with improper service and a breach of warranty is recognized by the arbitrator. However, the techniques and approaches that arbitrators are taught in California, which are justified in terms of objectivity and neutrality but are infused with managerial understandings of law that subtly tilt the scales in favor of repeat players, are the *same* techniques and approaches deployed by arbitrators overseeing hearings in California. Thus, the bias in private arbitration is not explicit, but rather implicit and subtly built into the system. Even in situations in which one would most expect law to protect the one-shot player—cases arising under a remedial statute granting individual rights—there are subtle, nuanced ways in which statutes can be weakened.

The takeaway is not that private arbitration always benefits repeat players and that state-run arbitration always benefits one-shotters. Rather, it is that the institutional design of an arbitration system and its accompanying training may influence the arbitration process in important ways. Similar to Talesh (2012), we stop short of claiming that training and design are causing the vastly differential outcomes for consumers in California and Vermont (given the methodological limitations of our comparative analysis).⁹ However, our results do suggest that training and design matter insofar as they influence the way arbitrators administer arbitration hearings. To the extent that society is going to continue to permit private arbitration to occur, there should be greater scrutiny of how these structures are developed with respect to some of the issues raised in this study. We encourage scholars to continue working to gain access to the black box of arbitration hearings in order to learn how they actually operate in action.

Consistent with former Law and Society Association president Carroll Seron's call for law and society research to be mindful of and attempt to position itself to make "situated, pragmatic policy" change (Seron 2017), our empirical findings provide a basis for articulating tangible recommendations for designing arbitration systems in a way that decreases repeat-player advantages and protects substantive rights. First, we cast significant doubt as to the appropriateness of an adversarial system of justice for arbitration, at least in cases in which legal counsel does not represent the one-shotter. By employing an inquisitorial model of justice, arbitration systems can mitigate the advantages that repeat players have with respect to technical and legal knowledge and ensure that disputes are resolved on the merits and not due to significant disparities in advocacy skill. Moreover, by ensuring the availability of experts, or making experts part of the decision-making process, arbitration systems can further mitigate repeat-player advantages. Second, in order to best preserve statutory rights as written, arbitration systems should insist on a rigid interpretation of statutory language, rather than allowing arbitration's traditional informality to create space for repeat players to construct the meaning of law in ways that contradict the law on the books. Third, this rigid formality need not extend to procedural rules, where a higher standard for repeat players than consumers is arguably appropriate given the disparity in experience.

We note that concerns about sexual harassment and the "Me Too" movement as well as concerns about racial injustice in policing and the accompanying implicit bias in society has led to widespread calls for more training and education on these issues in workplace and government settings. While we applaud these calls for more training and attempts to address these important social justice issues, we offer a cautionary note. As prior studies have noted (Edelman 2016), many workplace settings already have training programs in place. Our research suggests that it is not more training that is needed but better training. We believe that one of the contributions of this study is that it highlights *how* training can impact substantive relief and consumer outcomes, making it more likely that repeat players gain advantages during ostensibly neutral proceedings. But our comparative analysis uncovers some approaches toward curbing repeat-player advantages. To the extent that trainings will continue, they need to fiercely adhere to the values embedded in civil rights and consumer protection statutes.

Finally, in *Shearson/American Express, Inc. v. McMahon* (1987, 232), the Supreme Court concluded that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." This notion served as a practical justification for the Supreme Court's dramatic shift in favor of the arbitrability of civil and consumer rights afforded by statute. Whereas freedom of contract principles and the Federal Arbitration Act's "liberal federal policy favoring arbitration agreements"¹⁰ served as the normative and legal bases for the Court's arbitration jurisprudence, an assertion that substantive rights lose none of their vigor when asserted in a private forum made the pill far easier to swallow (at least in theory).

In this article, we worked to show why the *McMahon* premise is so deeply flawed. Not, as prior work has argued, because it is incorrect in any absolute sense—certain arbitration systems can effectively protect statutory rights—but because such a broad, generalized statement about arbitration is utterly inappropriate in light of the wide variation in the systems encompassed by the word "arbitration." There is no single arbitration system to which we can compare courts. As we have shown, the role of the fact finder, the absence or presence of experts, adherence to formal law, emotion and individual voice, arbitration panel composition, and socialization potentially weaken substantive rights and advantage repeat players. However, variations also have the potential to mitigate repeat-player advantages and provide a reasonably adequate forum for one-shotters to bring their claims efficiently. Thus, insofar as arbitration's expanded position in the American legal system appears to be here to stay (given the Supreme Court's continued affirmation of the viability of mandatory arbitration clauses), we must continue to expand the debate about arbitration to capture this variation and bring further nuance to the conversation. At least until a new reversion away from the arbitrability of statutory and

contractually created private rights, scholars can have a real and practical impact on maintaining the strength of legal rights by examining and revealing the *features* of arbitration systems that best protect those civil and consumer rights. These empirical findings, we hope, are a step toward more sophisticated arbitration policy design and informed legislative and judicial decision making about the impact that arbitration systems have on substantive rights.

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ENDNOTES

- ¹ California and Vermont's lemon law statutes are, respectively, California Civil Code sections 1790 et seq. and Vermont Statutes Annotated, title 9, sections 4170 et seq.
- ² In both states, the consumer has the option to choose refund or replacement.
- ³ Two-thirds of the arbitrators in California are lawyers.
- ⁴ 99 percent of Vermont consumers choose to use the Lemon Law Board.
- ⁵ In California, the arbitrator's decision is binding on the manufacturer, which has no right of appeal. The consumer is not bound by the decision and may pursue a claim for breach of warranty against the manufacturer in court if they are unsatisfied with the arbitrator's decision. If the consumer does so, however, the arbitrator's findings are admissible without further evidentiary foundation. In Vermont, the board's decision is final and binding on both parties. Cases may be appealed to the superior court only for very limited situations of abuse of discretion or fraud.
- ⁶ In addition to the articles cited, we note that arbitration research in legal scholarship also focuses on two other categories: win rates and normative arguments about whether arbitration is good or bad for society. Because this study focuses on how these arbitration forums operate and the impact of design and socialization, we do not focus on these literatures.
- ⁷ The attorney for the consumer made clear that the reason this consumer was represented by counsel was because she worked at the law firm representing her.
- ⁸ *Lundy v. Ford Motor Co.* (2001, 478).
- ⁹ It is certainly possible that cultural differences between California and Vermont are driving the differences we observe in how arbitration hearings are administered or that the cases we observed were substantively different. Evaluating possible qualitative differences among different populations is always an issue in comparative studies, and as a practical matter these differences can be difficult to identify and evaluate. This highlights one of the challenges of comparative work and why we stop short of hard causal claims. That said, our sense, based on the prior studies in this area, is that it is not cultural differences but the design and training process that allow business values to flow through the private arbitration process more freely, while the state-run process balances business and consumer perspectives in the design and implementation of the arbitration system. In particular, interviews with lemon law actors involved in lemon law dispute resolution across the United States reveal that there are underlying competing business and consumer logics operating among public actors (e.g., state regulators, state lemon law administrators, state arbitrators) and private actors (e.g., manufacturers, automotive dealers, third-party administrators, private arbitrators) (Talesh 2015). In fact, there are only two third-party administrators that train private arbitrators across the United States, and they use the exact same training approach regardless of state (Talesh 2012). Existing research suggests that across the United States, private actors view the purpose of lemon laws and the value of informal disputing forums as adhering to "business logics" of efficiency, cost-effectiveness, allowing for managerial discretion, productivity (solving problems informally), and customer retention. Conversely, public actors view the goals and purposes of lemon laws and dispute resolution through the lens of a "consumer logic" more closely tied to the liberal legal language of rights, protection, equal access, transparency, and following the law. In sum, although it is possible that cultural differences in California and Vermont between the states and the actors operating in them are driving the

observations we describe in this Article, we are relatively confident in attributing the disparate application of lemon laws in California and Vermont's arbitration systems to design features and training that filter these values.

¹⁰ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (1983, 24).

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