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Repeat Players, the Law, and Social Change: Redefining the Boundaries of Environmental and Labor Governance Through Preemptive and Authoritarian Legality

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Powerful corporations leverage the law to shape the regulatory environments in which they operate. A key strategy for achieving this is litigation. I ask under what conditions corporations litigate, and specifically, what happens when two repeat players, transnational agribusiness firms and local governments, face each other in court. I compare outcomes of two cases—Hawaii and Arica, Chile—documenting how different sociopolitical contexts and legal systems shape how actors engage the law. Interviews with firm managers, unions, government officials, lawyers, and advocacy organization leaders and document analysis reveal that firms seize on existing institutional norms and politics to define their localized legal strategies. Through *strategic legalism*, a defensive legal strategy that is outcome-oriented and context-specific, firms accomplish legal compliance and political containment of their opposition. In Hawaii, firms rely on *preemptive legality,* a strategy that moves controversial issues like pesticide safety from one domain of democratic politics to another that is largely incontestable because it is preempted by a higher authority. In Chile, firms use *authoritarian legality*, an approach that draws on authoritarian structures and policies within the state, to sway legal outcomes. These cases reveal the mechanisms that corporations draw on to institutionalize their power advantages through the law, offering a typology for future scholars to better understand how the strategic behavior of corporations shapes regulatory outcomes.

Corporations rely heavily on the law as a tool to influence regulation and policies that affect them. Studies document corporate participation in lobbying (Yackee 2015), negotiated rulemaking

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(Coglianese 1997), design of dispute resolution forums (Talesh 2009; Edelman 2016), and regulatory litigation (Kagan and Axelrad 2000), among others. Yet it is not clear when firms use one tool rather than another or what shapes their choices between tools. This study asks how transnational corporations use the law to shape the regulatory environments in which they operate, and specifically, under what conditions they litigate. I examine regulatory contestations between transnational firms in the genetically modified corn seed industry and local governments in two contexts: Hawaii and Arica, Chile. These cases reveal distinct, localized strategies that I draw on to construct an overarching framework to understand how firms navigate the particularities of place to mold regulation. My work shows more broadly how transnational firms use the law to exploit fissures between different levels of the state to erode local autonomy.

The sociolegal concept of repeat playing provides useful insight into how large corporations contest the state to establish and maintain favorable regulation. Galanter's (1974) classic article showed how formally fair legal systems can produce decidedly unequal outcomes in practice, particularly between those who frequently litigate (repeat players) and those who do not (one-shotters). Sociolegal studies have examined repeat playing in diverse contexts, ranging from the Supreme Court and the World Trade Organization to social reform legislation and alternative dispute resolution programs (Songer and Sheehan 1992; Albiston 1999; Edelman and Suchman 1999; Conti 2010; Talesh 2013; Szmer et al. 2016); however, much of this literature has treated repeat players as a homogeneous class, glossing over how power inequalities between repeat players are crucial to winning.

Since Galanter wrote his influential piece, numerous legal, geopolitical, and economic changes have occurred that influence how repeat players shape the law (Galanter 2006; Gordon 2014). These global shifts have altered relationships of power between legal actors, raising the question of how the repeat player category might be different if it were developed today, but also bringing additional questions to the foreground. My study asks three main questions to elucidate the complex interactions between two types of repeat players, transnational corporations and local governments. First, when, or under what conditions do firms turn to the law to institutionalize their legal right to operate as they deem fit? Second, what advantages and disadvantages do local governments and powerful corporations have as repeat players against one another? Finally, how does the local sociopolitical context and type of legal system affect a players' ability to promote or hinder social change?

To answer these questions, I draw on and link three literatures within the sociolegal tradition: repeat playing, legal

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endogeneity, and legal adversarialism. The repeat player literature provides a typology to understand which legal actors tend to win in court. Legal endogeneity shows us the mechanisms that corporations use to shape the law in firms' favor. The scholarship on legal adversarialism documents the ways that the national legal order and legal style matter for legal actors. Integrating these theories permits a more comprehensive picture of the institutional and political mechanisms at play when corporate actors try to shift regulatory boundaries to their advantage.

To examine these phenomena, I conduct an extended case study of two key research and development (R&D) sites, Hawaii and Arica, Chile, for the genetically modified (GM) corn seed industry for the U.S. market. Transnational seed firms have confronted significant local pushback to their operations in both sites in the past decade, resulting in legal battles between transnational firms and local governments. R&D sites are at the forefront of the debate on agricultural biotechnology, since it is here that seeds are developed and tested before they reach the global marketplace. Because firms' competitiveness hinges on being in specific types of environmental and regulatory contexts in order to extract rents from patents, firms are relatively place-bound (Ipsen 2016). This competitiveness strategy makes the stakes of staying in these spaces particularly high, encouraging firms to build relationships with key actors to make the regulatory climate more in line with their needs rather than engaging in capital flight. The place-bound nature of this work weakens firms' negotiating power and makes litigation more likely. Firms deal with their need to locate in highly specific places by proactively engaging in shaping activities such as lobbying or making campaign donations. These actions attempt to mold the regulatory environment to protect firms' right to operate as they wish. However, when these tactics are not fruitful and firms confront pushback, firms then engage in what I call strategic legalism,[1] a legal strategy that is defensive and outcome-oriented, and takes different forms in different contexts. Strategic legalism helps firms achieve two connected goals: making it difficult for opponents to mobilize the law for social change and ensuring their own legal compliance.

Much like Edelman's (2016) and Talesh's (2014) work on legal endogeneity, I argue that organizations play active roles in shaping the rules and the meaning of compliance in order to influence formal legal institutions and make it difficult for opponents such as governments and social movements to engage in rights mobilization. In Hawaii, firms rely on preemption, or the idea that

[1] Maguire (2000) used strategic legalism in a different context to discuss the extraordinary effort the U.S. made to ensure the German war criminal trials were just and legal.

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environmental regulation falls under the purview of federal and state authorities rather than local governments. This approach strips county governments of the power to govern local issues. Firms achieve their goal by depoliticizing the debate, reframing the issue from one centered on the safety of pesticides to a technical concern focused on the preferred level of governance. Hawaii is a home rule state where counties have the ability to pass laws to govern themselves as they see fit as long as they obey state and federal constitutions. However, courts have found that Hawaiian counties do not have the right to regulate local environmental issues (Atay v. County of Maui 2016; Syngenta Seeds v. County of Kauai 2016). In Arica, the seed firm takes a different approach, using the law to discipline local labor authorities.[2] Many of the regulations, laws, and institutions that today guide labor relations in Chile were developed during a dictatorship in the 1970s. This institutional and political legacy is tied to a strict neoliberal economic model that privileges economic growth over workers' rights. The firm takes advantage of this latent authoritarianism within the state structure, particularly labor policies, to limit the ability of the local government to enforce laws that the firm believes threaten its right to operate. My analysis of these cases sheds new light on the institutional and political mechanisms that corporations draw on to institutionalize their power advantages through the law, offering a typology for future scholars to better understand how the strategic behavior of corporations shapes regulatory outcomes.

1. Understanding why Corporate Actors Litigate to Improve their Regulatory Context

1.1 Making the Rules through Repeat Playing and Legal Endogeneity

Galanter (1974) asked how different legal actors affect how legal institutions operate, finding that the litigation system creates structural advantages for repeat players and not for one-shotters. He argued that the ability to "play for the rules" is key to the advantages that repeat players garner since they tend to litigate

[2] In this study, I include province-level labor inspection and the regional-level labor directorate in Arica in my discussion of local labor authorities. Regions are equivalent to states and provinces to counties. I include both levels within my discussion of local government for three reasons: both offices play key roles in labor issues in Arica; specialized units with enforcement duties, like labor directorates, tend to be underfunded and overworked; and Arica is an "extreme region" which translates into low regional budgets and less representation at the national level, making power inequalities at the province level more salient.

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only when the outcome seems likely to be favorable. Sociolegal scholars have tested the causal mechanisms underlying Galanter's model, finding that repeat players with more resources, higher-quality lawyers, and larger legal teams have more successful case outcomes (Szmer et al. 2007; Szmer et al. 2016).

For Galanter (1974), repeat players were large bureaucratic organizations which included governments, firms, and advocacy organizations. Galanter (1974: 112) hypothesized that litigation would be more likely by and against government than in other repeat player versus repeat player dyads because the withdrawal of future association is not possible when dealing with the government and the notion of monetary and policy "gain" is more contingent for government units than other parties. Firms in my study face a similar dynamic due to their place-bound nature, limiting their ability to withdraw and likely leading to increased litigation.

My work responds to Grossman et al.'s (1999) call to take seriously the critical role of government in the litigation process. Most studies treat the government as an ideal-typical repeat player, focusing on government's repeat player advantages and often subsuming all levels of government under one umbrella or looking exclusively at the federal level (Songer and Sheehan 1992). This focus limits examination of how local-level government outcomes may differ significantly from what Kritzer (2003) calls the "government gorilla" or the dominance of the federal government as a repeat player.

The dominance of the federal government is largely premised on the idea that it has the fundamental advantage of setting the rules by which cases are brought and decisions are made. However, other scholars have shown that private corporate actors play a significant role in creating or molding law through shaping dispute resolution structures (Talesh 2009, 2013; Edelman 2016), participating in regulatory policy-making through indirect lobbying (Yackee 2015), and developing laws through negotiated rulemaking (Coglianese 1997). Recent studies of corporations have shown that company prestige matters for legal outcomes (Shaffer 2009; McDonnell and King 2018), as do financial resources and access to elite litigation teams (Szmer et al. 2016). Yet we have little understanding of how these resources differ substantially for government and corporations, since most studies estimate their importance through proxies such as expenditures on lawyers, size of legal teams, and law school prestige. I address these lacunae by documenting and measuring the shape that strategic legalism takes in two cases in which powerful firms litigate against local governments. Rather than relying on abstract proxy measures which can only tell us a limited part of the story—primarily if a resource matters—my work gives us a deeper understanding of how

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resources are used, how local contexts interact with these resources, and why certain resources matters for repeat playing.

While Galanter's original insight about repeat players is pivotal to understanding why certain types of legal actors turn to the courts, it reveals little about the ways that legal actors, such as corporations, influence the rules outside the courts or what specific strategies they use to shape the rules that regulate them. Legal endogeneity scholars have shown that repeat players not only shape the law by playing for the rules, but they also internalize legal rules by creating and formalizing rules that mimic the law, transforming the large bureaucratic organization into a private legal system in its own right (Edelman and Suchman 1999; Kritzer and Silbey 2003; Edelman 2016). Edelman (2016) argues that savvy organizations use the ambiguity of the law to their advantage to reframe the legal environment and create, disseminate, and mobilize symbolic structures, such as dispute resolution systems, that imitate the law to maximize both legal and business ideals. Once these structures become institutionalized, "the symbol, in essence, becomes the law" (Edelman 2016: 41).

Corporations actively participate in regulatory processes in diverse ways. Talesh (2014, 2009) has extended Edelman's concept of legal endogeneity to show how it operates in the legislative context, highlighting the political and institutional mechanisms that corporate actors use to influence rulemaking in the case of consumer rights in different states. Coglianese (1997) shows how the law on negotiated rulemaking, a process through which government representatives and affected interest groups negotiate the terms of a proposed administrative rule, appears to be a response to the volume of litigation initiated by corporate actors in defense of their corporate accumulation strategies. Notably, he finds that litigation remains the primary strategy that firms use to influence rulemaking even under the negotiated process, making negotiated rulemaking largely symbolic rather than instrumental. While much research on legal endogeneity focuses on how it works within judicial settings (Talesh 2014; Edelman 2016), my research extends and refines this concept in nonjudicial settings, building on Talesh's institutional-political theory of legal endogeneity. More specifically, I show how firms draw on existing institutions and norms to inform their legal strategies and how those institutional and political mechanisms shape law.

1.2 Legal Adversarialism: How Corporate Actors Shape the Law in Different Legal Contexts

A key part of understanding legal institutions is comprehending the local legal context and how it shapes actors' ability

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to mold the law. Kagan (2001) uses the term adversarial legalism to describe the dominant legal paradigm in the U.S. He argues that U.S. regimes are more legally complex, conflict-oriented, punitive, unpredictable, and costly to comply with than their counterparts in other economically advanced democracies. However, this phenomenon is not uniform across industries. For example, the incidence of adversarial legalism is much lower in regulatory programs that are centralized in Washington D.C. The case of licensing of genetically engineered biological products (Kraus 2000) is one case where the U.S. regulatory space is less adversarial for firms. In such policy spaces, transnational firms experience the U.S. regime as equally or more efficient than in other countries, such as Chile. The relative ease of influence in Washington helps explain firms' strategic turn to preemption doctrine in the case of Hawaii.

The structure and rules of different types of legal systems also affect how legal actors engage the law. Although Galanter's theory is based on the U.S. common law system and has been tested in both common law and civil law jurisdictions,[3] no existing study compares repeat playing outcomes in both systems. Common law relies on legal precedent. For example, if the court rules that local counties can establish new criteria for pesticide use at the local level, it can be argued later in another case that the same decision should be reached. By contrast, in civil law in countries like Chile, laws are established through legal codes, not through the precedent of earlier court cases.

Kagan's work portrays regulation as a system of rules and laws that firms react to, choosing to comply with them or not depending on their strategic needs. Yet the law is malleable, shaped by the broader context in which it is embedded; and firms, judges, and lawyers play active roles in developing and perpetuating legal styles, or the norms of crafting and implementing laws and regulation, conducting litigation, and using the courts. I extend Kagan's work by taking a comparative approach to studying how the legal system and local context together matter for the repeat player advantage. The U.S. and Chile not only have different legal and regulatory systems and legal styles, but they also differ politically, economically, and historically. These differences affect how corporations and other actors approach the law and the mechanisms they draw on to shape it to their benefit.

My cases enable me to interrogate three assumptions within the sociolegal literature. First, while much scholarship analyzes the ways repeat players gain advantages over one-shotters, I

[3] In civil law see: Hendley et al. 1999; Haynie 1995; He and Su 2013; Kritzer and Silbey 2003.

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examine how repeat players fare when they confront each other, specifically in the case of a local government and a powerful corporation. Distinguishing conceptually between different kinds of repeat players with different available resources, power, and ability to influence the public legal order is necessary to understand how these differences matter for case outcomes.

Second, the study reveals the process through which firms gain advantages by drawing on institutional and political economic mechanisms to influence law in society. The abundant financial and legal resources that transnational seed firms possess in Hawaii and Arica enable them to create an unequal playing field even outside the court. For these firms, legal actions are part of a broader range of strategies, conditions, and constraints—mechanisms—that affect what these repeat players do and how they come out ahead in the courts. Third, by analyzing cases situated within different historical, political, and socioeconomic contexts and legal systems—common law (U.S.) and civil law (Chile)—I am able to compare the role that these systems play in repeat playing outcomes. This comparison adds to existing work on legal adversarialism, offering a more nuanced view of how structural and institutional differences affect corporate behavior and prospects for social change. In the coming sections, I lay out a conceptual frame for understanding when firms litigate. I then detail the results from each site and analyze how they inform and contribute to sociolegal scholarship and policy.

2. Strategic Legalism: A Framework for Understanding when Firms Litigate

GM corn seed firms are more invested in place than most industries because their competitiveness hinges upon it (Ipsen 2016). This spatial constraint encourages firms to develop relationships with local regulatory actors and communities as a way of shaping the local context to meet their needs and to ultimately protect their legal and social right to operate. Ipsen (2017) finds that firms engage in shaping activities in three ways. First, firms take on "becoming local" strategies, incorporating locals into their workforce and molding the firm and its image to appeal to dominant local values about what local development and agriculture should look like and who should participate in it. Second, firms develop cooperative relationships with communities by taking on leadership roles in organizations that determine land and water use, as well as the shape and distribution of state benefits, such as labor and agricultural subsidies. Finally, firms influence the political landscape through campaign donations and lobbying.

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While firms use these shaping strategies to influence their environments, these actions are often not enough to enable them to stay in specific locales if they confront issues that threaten their right to operate. In these cases, firms draw on diverse types of legal tactics through *strategic legalism*, a defensive legal strategy that firms use to respond to a crisis when their shaping tactics have not thwarted pushback against firms. Firms' strategies are often multi-pronged, layered, and recursive, providing them means to increase their influence on regulation, while exhausting the resources of their opponents (Marshall et al. 2004; Halliday 2009; Yackee 2015). When firms seek to resolve a crisis with strategic legalism, they may continue with shaping tactics (e.g., lobbying and donating to campaigns), but litigation or threats of litigation take center stage. Firms choose a strategy that mobilizes the law as a way of achieving two connected goals: defining their desired actions as legal compliance and political containment of their opposition. The ambiguity of the law and the repeat player advantage are essential to this strategy, as they provide a mechanism—reinterpretation of the law—and the resources—financial, sociopolitical, and legal—to come out ahead in court. This strategy is context-specific and oriented to achieving firms' desire to operate as they see fit, and thus it takes different shapes in different locations. Strategic legalism shows us how firms mobilize diverse mechanisms locally and thus affect the law.

Table 1 offers an overview of the types of activities that strategic legalism includes in each site. In Hawaii, firms seek to retain their advantage through preemptive legality. Preemptive legality is a process through which firms shrink or reshape the rules and topics of debate within the public arena by moving an issue from a domain of democratic politics that is accessible to opposition through litigation to another that is largely out of reach because it is preempted by a higher authority such as the federal or state government. In this case, preemptive legality reframes the argument from a highly contested political one—the safety of pesticides or GM crops—into a simple, technical legal issue—which level of the state regulates this activity. The U.S. is characterized by fragmented and overlapping jurisdictions, making this type of legal tactic highly relevant because of the lack of clarity surrounding who regulates specific issues. Preemptive legality is not unique to the case of genetically modified seeds; it has become a common corporate tool that firms use as a way to shop for more generous regulatory venues, seeking out the level of the state where policies best meet their needs. This strategy is particularly common in environmental cases (Weiland 1999), such as frac sand mining, fracking, concentrated animal feeding operations, mining, and oil and gas.

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Table 1. Strategic Legalism in Hawaii and Arica

Place	System	Type	Activities
Hawaii	Common Law	Preemptive Legality	Play for the Rules to Set a Favorable Precedent Rely on Preemption to Take Regulation outside of the Local Jurisdiction to a Higher Level Shift Debate from Pesticides to Technicality of Governance
Arica	Civil Law	Authoritarian Legality	Pursue Numerous Lawsuits to Overburden Local Actors Use Lawsuits to Threaten Local Government and Labor Union Seek Higher Court Judgment for Formalist Interpretation that Tends to Support Industry

In my analysis of Arica, I draw on authoritarian legality to understand the firm's legal strategy (Gallagher 2017). This concept explains how authoritarian policies and structures intersect with democratic institutions to shape legal outcomes. Recent work on authoritarian courts has examined how the courts and law are used as instruments of governance in authoritarian states (Moustafa 2014). Rajah (2012) details the ways that institutions associated with democracy, such as courts, legislatures, and the law, can be used as tools to assert political control and to curtail rights, while also advancing a market-led economy. Much scholarship has focused on how judicial reform has facilitated market transitions in authoritarian contexts, promoting an investor-friendly, market-based economy in Vietnam (Sidel 2008), Singapore (Silverstein 2008; Rajah 2012), and China (Kennedy and Stiglitz 2013). Gallagher (2017) documents how this tension between democratic institutions, the economic model, and autocratic rule plays out in China, leading to a cycle of state encouragement, societal response, and state repression. Authoritarian legality resolves the puzzle of why an autocratic government would institute high labor standards and actively encourage its citizens to demand their enforcement (Gallagher 2017).

From 1973–1990, Chile's dictator enacted a radical neoliberal economic model that bolstered the regime's legitimacy and controlled dissent. The dictatorship combined this economic model with authoritarian politics in a new institutional order (*nueva institucionalidad*) established in a 1980 Constitution. As Bauer (1998) argues, the Chilean Constitution exemplifies a legal and institutional framework designed to encourage a free market economy, prioritizing economic growth, governability, and stability at the cost of accountability. In this way, the military government was able to dictate the institutional conditions of its departure, imposing an "institutional straightjacket" on subsequent governments (Siavelis 2016: 66). Despite some reforms,

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Chile is still ruled by this Constitution and the institutional order it imposed, leading scholars to frequently characterize Chile's democracy as "limited," "low-intensity," or "protected" (Shain and Linz 1992; Roberts 1998; Huneeus 2014). Informal institutions such as power-sharing agreements between political parties and "democracy by agreement" in which the President would negotiate with powerful economic sectors and leaders on the Right before introducing legislation in Congress surfaced as a way to cope with the imposed framework from the dictatorship, including the exaggerated presidential system and majoritarian electoral formula (Siavelis 2016). So, while informal institutions enabled Chile's democratic transition, they have also reinforced inequality and the status quo. The inherited political and legal structure, together with an economic model that prioritizes market-based approaches over rights-based ones, produces latent authoritarianism that is evident in the governance of labor relations today in Chile. Firms draw on this authoritarian feature of the state as a legal tactic to ensure that their revered status as investors remains salient over worker's rights.

My use of authoritarian legality is broader than Gallagher's, as I use it to describe a legal strategy by *firms*, not a government, in a democratic country that uses an authoritarian structure to govern its labor relations as a way of protecting a development model that was created under a dictator. Studying the case of Chile helps answer two core questions: how enduring are the institutional legacies of authoritarian rule in the courts and the law? And how do legal institutions structure state-society-industry interactions (Moustafa 2014)?

3. Studying Corporate Legal Strategies in Two Legal Systems: Data and Method

This story unfolds in two isolated locations where the largest transnational seed firms have research and development (R&D) hubs for genetically modified (GM) corn seed development: Hawaii and Arica. I selected these sites for two main reasons. First, in both sites, seed firms won a significant legal battle against the local government, yet the shape of strategic legalism was distinct in each place. Second, while firms use these premier R&D hubs to do similar work in their development of corn seed for the U.S. market, each site is enmeshed in different legal and regulatory systems within diverse socioeconomic contexts. In addition, pushback by workers, local governments, and advocacy organizations regarding genetically modified seeds centered on different issues. This comparative frame allows me to examine how political, legal, and

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institutional differences matter for how corporations engage the legal system to shape how they are regulated.

Between 2013 and 2014, I conducted fifty-four semi-structured interviews in Hawaii and Arica with firm managers, government officials, unions, production association leaders, nongovernmental organization leaders, and lawyers.[4] Interviews were recorded and were conducted in English in Hawaii and in Spanish in Arica. I sought to understand why firms chose these sites for their R&D hubs and the strategies they used to stay in these places despite significant resistance from local governments, workers, and advocacy organizations. I also asked informants about their relationships with each other; their responses often led to discussions of their strategies for participating in or enforcing local regulation. Additionally, in 2018, I had conversations with five experts in the area of Chilean labor law to follow up on issues that were not clear from my initial interviews in Chile. In these conversations, I sought to understand the particularities of Chilean labor law with regards to replacing striking workers; how the law has changed over time; and how the law on the books differs in practice.

I relied on both purposive sampling and network sampling of experts knowledgeable about three key issues: the local seed industry, specific regulatory challenges (labor and environmental regulation), and the legal field in Hawaii and Arica. In doing so, I strove to include all relevant pro and anti-GM perspectives on these issues including those of firms, unions, government entities, lawyers, and advocacy groups. I attended town hall meetings on genetically modified seeds and visited four of the world's largest transnational seed firms to observe workers and managers in their place of work and to tour the facilities to better understand the work done there. I also gathered documents from trade journals, seed firms, seed associations, and government and legal sources that provided insight into the history of the seed industry, its regulatory challenges, and the associated legal cases.

To analyze my data, I performed thematic analysis, coding for emergent themes,[5] including the importance of unequal power relations between transnational firms and local governments for legal outcomes, local institutions such as labor inspection offices and courts, and legal and regulatory structures and policies like the specific rules about pesticide use and labor laws. I

[4] I preserved the anonymity of all individuals because of the highly polarizing nature of these debates. I include their role, the location, and the month and year the interview was conducted.

[5] I transcribed and translated my interview data from Spanish to English in the Chilean case.

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documented the regulatory policies for GM corn seed in each place and constructed timelines for the regulatory battles in each site in order to analyze firms' interactions with regulatory actors, the courts, and local communities.

4. Preemptive Legality in Hawaii

Kauai residents began to actively question the long-term effects that the year-round R&D work of seed firms might have on their health after school children near a seed facility complained of noxious orders and sought medical attention. In response, the Kauai County Council passed Bill 2491 in October 2013 which created pesticide buffer zones and required disclosure of restricted-use pesticides. A year later, the tension between seed firms and communities in Hawaii spread and voters in Maui County organized a ballot initiative to put a temporary moratorium on all GM crops.

Prior to the vote in Maui County, firms actively sought to keep the regulatory environment predictable and favorable. They proactively came together as an industry block to fund prime time television advertising spots to convince voters that a temporary moratorium would have negative consequences for farmers and businesses; to lobby and donate to political campaigns that favored them; to commission expert economic studies to demonstrate their contributions to these island communities; to use scientific uncertainty to question the credibility of their opposition; and to hire a team of lawyers to sue the local government. These actions mirror the adversarial techniques used to delay court proceedings in the Exxon Valdez trial (Marshall et al. 2004) and those that Galanter (2006) finds in his discussion of corporations and the law.

In Hawaii, from January to April 2014, Monsanto, Syngenta, DuPont Pioneer, and their trade groups spent over $50,000 lobbying the state legislature to ensure that the new laws regarding pesticides would be unenforceable (Wilse 2014). The seed industry's five largest firms contributed over $700,000 to state and county candidates from November 2006 through December 2013 (Wilse 2014). The ballot initiative in Maui is cited as the most expensive election per vote in American history; seed firms spent roughly $7,000,000 and anti-GM groups spent $60,000 (Affron 2017).[6] Lukens, the former Hawaii Program Director for Center for Food Safety, states, "the impact of this corporate cash on local politics is not just that

[6] For a discussion of firms' tactics to shape regulatory environments see Ipsen 2017 and Wilse 2014.

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representatives are pressured to vote based on donations to their campaigns. This cash has been strategically spent to create a mirage of confusion and disagreement around very mainstream issues like pesticide disclosure" (Wilse 2014).

Despite firms' active shaping tactics, in November 2014, Maui County voters passed the ballot initiative that put a temporary moratorium on all GM crops until a health and environmental impact evaluation was conducted. In the face of these potential legal changes, firms reacted by turning to litigation to shift the debate over pesticide use and biotechnology safety to a more favorable level of governance. Firms leveraged their legislative, regulatory, and legal expertise to redefine who has the right to regulate local environmental issues, claiming that existing federal and state laws invalidated proposed county law changes.

In January 2014, three major seed companies sued Kauai County over the enactment of the law. A week after the GM moratorium was won, firms sued Maui County as well. In both cases, nonprofit organizations and/or individuals were allowed to join the County in defending the proposed legal changes. When I asked a firm manager if the firm was considering pulling out of the islands given the unfriendly regulatory environment, I was surprised by the immediate and confident response I got, "they will have to drag us out of here" (Firm manager, interview, July 2014, Hawaii). A manager explained, "If you can't do state-of-the-art research, there's no point in being here. … If something like that passed, we'd be out of business" (Firm manager, interview, August 2014, Hawaii). However, a lawyer for an environmental advocacy group in Hawaii had another explanation for seed firms' concern. He pointed out that it was preemption, not the potential loss of profit, that prompted firms' legal approach. He said,

> [Preemption] is a legal doctrine that says whatever law the federal government passed may be the only law that regulates that issue. About twenty years ago it was decided that federal law didn't preempt state and local efforts. So chemical companies went to state legislators. [They] wanted them to preempt local law. Forty-three states have passed those laws, Hawaii wasn't one of them. (Lawyer, interview, July 2014, Hawaii).

Firms' legal strategies in Hawaii centered on playing for the rules. As one manager proclaimed, "if we allow this [the moratorium] to happen today, tomorrow they will do the same for other issues. A moratorium will become a common tool. … we can't allow that to happen" (Firm manager, interview, August 2014, Hawaii).

In Hawaii, all managers spoke positively about federal-level regulations to me. One manager declared, "we could set up other

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locations, but Hawaii is the U.S. There is a robust regulatory system and it's functionally very good from a stewardship perspective" (Firm manager, interview, July 2014, Hawaii). Despite the praise for federal-level regulation, managers were vocal opponents of local-level regulation, saying that it impeded their right to operate effectively (Firm managers, interviews, July and August 2014, Hawaii). Firms invest heavily in making the regulatory space a positive one for their work. As one manager explained to me, "Hawaii is a special case. Most firms here have a government affairs manager that just works on Hawaii, but in other places, that person would be in charge of a whole region. Hawaii requires more intense work that way" (Firm manager, interview, August 2014, Hawaii). Firms prefer to keep regulation at higher levels because those spaces are "more predictable and easier to lobby" (Firm manager, interview, August 2014, Hawaii). In August 2014, firms' fears were quieted as their legal strategy yielded positive results. U.S. Magistrate Judge Kurren declared that the Kauai ordinance was preempted by state law. A similar decision was made in November 2014 when the Maui moratorium was declared "invalid and unenforceable" due to preemption. In response to an appeal, the Court of Appeals in November 2016 affirmed that Hawaii Federal Judge Mollway had correctly ruled that the Maui Country moratorium is superseded by state law regulating potentially harmful plants. A similar decision was reached in the Kauai case.

Firms approached the challenge to their legal compliance by seeking to avoid new laws that redefine the rules that regulate them as an industry. To do this, they engaged in multiple tactics, such as lobbying and donating to political campaigns, but once they faced new laws and ballot initiatives, firms reacted by turning to litigation. Their legal strategy was built on their repeat player advantage, their superior resources, and their position of power with respect to local governments, which together made it possible to play for the rules and win. Firms sought to exploit the fissures between the different layers of the state, pitting the local government against the state and federal levels, effectively taking local environmental regulation out of the grasp of local governments. These acts undermined local authority, set a legal precedent favorable for the seed firms, and limited their opposition's legal recourse, resulting in a legal fix[7] that I call preemptive legality.

[7] This term parallels David Harvey's (2001) spatial fix. Harvey argues that firms seek out new places to do their work where they are best able to negotiate flexible regulations and casualized work relations. These locational shifts represent a spatial fix. I argue that firms also venue shop within the U.S. by looking at different levels of the state (federal, state, or local) to determine which is easier to lobby and/or which regulatory body best meets their needs, resulting in a legal fix.

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5. Authoritarian Legality in Chile

While Chile is no longer under a dictatorship, its legacy is enduring, particularly in the judiciary, where the institutional structure and culture actively discourage judges from engaging in assertive behavior to defend democratic rights (Hilbink 2008). Here, the firm's legal strategy relied on the institutional culture of apoliticism in Chilean courts and preexisting biases against unions in Chilean labor law to maintain the status quo on industry-labor relations (Hilbink 2007, 2008).[8] One seed corporation mobilized this structure to secure an advantageous place within the economic model to protect its right to operate as it sees fit.

5.1 The Structural and Institutional Legacy of Authoritarianism

Chile's historical context is key to understanding what shape workers' discontent took there, how seed firms reacted to it, and the tools one firm drew on to win in court. Chile's reputation as an investor-friendly country was established under the Pinochet dictatorship from 1973-1990 as part of one of the strictest neoliberal experiments in the world. Workers were highly controlled, labor unions were initially outlawed, and the unruly were killed or exiled, as military rule minimized both political and economic dissent (Winn 2004). At the same time, the dictatorship left the judiciary intact, insisting that it was acting in the name of the rule of law (Hilbink 2008). Notably, Chile's judiciary did not use its autonomy to challenge the regime, rather it defended its apoliticism as core to its role under the constitution (Hilbink 2007).

Chile's legal system guaranteed private and intellectual property rights and a pro-business labor code. The Labor Plan developed under Pinochet was seen by those in power as the cornerstone for Chile's neoliberal model (ACTA N° 372 Sobre Plan Laboral 1979). The plan allowed for unionization as an explicit way of appeasing international critics of the dictatorship and its labor plan, but made unionization difficult and ineffective at protecting workers' rights (ACTA N° 372 Sobre Plan Laboral 1979: 96). Making sure companies were able to replace striking workers was fundamental to making workers' rights subservient to industry demands. Striking continues to be a heavily regulated event only allowed as part of the collective bargaining process (Caamaño Rojo and Ugarte Cataldo 2008). Because unions in Chile face a number of limitations that affect their ability to defend workers' rights (discussed below), Labor Inspectorates,

[8] See Hilbink 2007 for a discussion of the institutional culture of the courts and its consequences.

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province-level government labor offices responsible for conducting labor inspections and ensuring legal compliance, have filled an important gap in the defense of workers' rights in court, making them an important repeat player. Arica's Labor Inspectorate lacks sufficient funding and staff to fulfill its mandate, particularly when facing powerful actors in court that have significantly more resources and legal staying power (Government official, interview, November 2013, Arica).

Though democracy returned to Chile thirty years ago, there have been few substantial labor reforms, leaving the spirit of Pinochet's Labor Plan to guide labor relations. The labor code[9] allows firms to replace striking workers after fifteen days or on day one if the firm's offer to workers meets certain criteria;[10] it allows for multiple bargaining units in one company and restricts bargaining to the firm level. The law also limits who can strike, prohibiting workers at a company from striking if doing so would cause serious harm to the health, economy, basic services of the population, or national security.

From 2000–2005 a legal reform was unrolled in Chile that made significant changes in the legal process affecting criminal as well as civil cases, speeding up trials and increasing transparency at all levels of the courts. Some scholars claim that the reform also changed the role of precedent (Bravo-Hurtado 2013), arguing that the importance of precedent should be seen on a scale, as opposed to a binary (MacCormick and Summers 1997). Others assert that it is up to the judges as to how much importance they give it (Chilean labor lawyer, conversation, March 2018, Santiago). In the case of labor, *unificación de jurisprudencia* introduced in 2008, can be used to ask a higher court to review how a lower court interpreted legal code. It establishes a quasi-binding precedent, one with more force than other types of precedent in the civil law system (Díaz García 2015; Vega and Andrea 2016). As we will see, these changes shape how repeat playing is enacted.

5.2 Local Unrest: The Tripartite Disagreement

In Chile, like in Hawaii, firms proactively sought to shape the regulatory environment at the local and national level. To do this, firms came together as members of the local seed association to lobby for a more favorable and predictable regulatory space for GM seeds. In addition, seed firm managers held positions in

[9] I refer to the labor code in place when the strike occurred. In 2016, there was a labor reform (Law N° 20,940) which took effect in April 2017 which will be discussed in the discussion and conclusion.

[10] See Portilla Frost 2016.

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government committees that develop the regulations on GM seeds; and, firms took advantage of the revolving door between government and seed companies, particularly in Arica, where former seed managers have come to hold key positions in government agencies that regulate the industry. Seed firms have also been successful at securing government incentives that lower their operating costs and subsidize the training of their workers. However, when a labor strike unfolded unexpectedly, one firm turned its attention to devising a defensive legal strategy to manage the disruption of their R&D activities and stomp out resistance.

Local pushback in Chile centered on labor rights. Seed workers in two transnational seed firms organized and formed unions in November 2012. According to government officials, Chilean labor law makes unionization difficult and ineffective at achieving workers' goals, and firms often retaliate against workers (Government official, interview, November 2013, Arica). One firm refused to negotiate with workers, which led to a twenty-two-day labor strike. This seed firm took a severe approach to the strike. According to one government official, there was no possibility of dialogue in the collective bargaining process. So, workers took over the property and the police intervened because they were burning tires and blocking entry to the fields at a key productive moment. One government official recalled, "The strike affected everyone. It radicalized everything. We mediated at first, it was a failure the second and third time that we sat down to negotiate. … At the regional level we've never lived anything like that before. They asked for 100 and got 20. It was exhausting…a process that wears you out" (Government official, interview, November 2013, Arica). Eventually, the company negotiated after local labor officials and the Catholic Church intervened, but workers' gains were minimal after unworked days and the lawyers' legal fees were deducted from the bonus they negotiated.

The strike in Arica had other repercussions. The firm began a series of lawsuits against various actors, several of which went to the Chilean Supreme Court, and some workers lost their jobs. As one government official recalled,

> [The strike brought] lawsuits on all sides. Every week there was a new one, every week their prestigious lawyers would fly in from Santiago. It was a ton of work for us, for everyone. A big headache. It was inconceivable. We all knew the company didn't have financial problems. It was about power, that's all. They just wanted to fight and find a way to make up anything they lost in those 22 days of the strike. They went over the top with lawyers, lawyers for everything. (Government official, interview, December 2013, Arica).

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When threats of being fired did not deter workers from striking, the firm took overt action to defend its right to operate by replacing striking workers with workers from one of its other operations about 30 hours away. Subsequently, the Labor Inspectorate cited the firm for anti-union behavior. The law in this case would have allowed the firm to replace workers on day fifteen, yet the firm replaced workers on the eighth day. Despite losing the case in the Labor Court in Arica, the firm appealed and won in the Appeals Court. The Labor Inspectorate sought a higher judgment, asking the Supreme Court to interpret the precedent—using the *unificación de jurisprudencia* procedure. A government official commented:

> Sometimes we don't agree with the courts. At times, we see some practices as anti-union behavior and they don't. We still believe in our vision. …we say A, the courts say B. …At the end of the day they are political decisions. The rules are clear, but the courts find a loophole to have a different outcome. We don't agree with several laws regarding unions because they are such weak laws. In some cases, you just can't do anything about it. Strikes, for example, don't work at all after fifteen days. (Government official, interview, November 2013, Arica).

Ultimately, the Supreme Court upheld the Appeals Court's decisions, supporting the seed company in a ruling of three judges against two. The Supreme Court's interpretation relied on the specific wording of the law, *not* on the *rights* inscribed in the law. The judges based their decision on two main issues. First, the judges argued that *replacing* workers is not the same as *hiring* workers and the law only prohibits hiring new workers. Second, while the right to unionize is indirectly recognized in the Constitution, the Court chose to make a restrictive interpretation of the regulation since "in this case the strike certainly affects the economic development of the country"[11] (La Inspección Provincial del Trabajo de Arica y Parinacota v. Semillas Pioneer Chile 2013). The Supreme Court's rationale of prioritizing the economic model over workers' rights is reminiscent of the logic inherent in the extreme neoliberal economic model imposed during the dictatorship.

The firm also sued the Labor Inspectorate, saying that it should not intervene in the collective bargaining agreement. However, in the middle of the lawsuit, the firm changed its mind and withdrew it. Then the firm asked for a protection remedy saying that the government should have done something when

[11] Translated from Spanish to English by the author.

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the workers blocked the road. The firm also withdrew this case. A government official said, "it was an aggressive strategy on their part. There were so many lawsuits that their lawyers came once or twice a week from Santiago. That meant flights, hotels, lawyer fees…it was crazy. We couldn't get any work done." (Government official, interview, November 2013, Arica). The firm's intense legal strategy makes clear that power and resource inequality matter for repeat playing, conditioning which repeat players come out ahead in court when they meet head to head.

In addition, the company presented a criminal complaint against the labor inspector that verified the anti-union behavior, saying that the inspector had lied and that lying in a public position is a crime. One government official saw the complaint as an attempt at intimidation, "the idea of the company was to scare us. It was a threat. To intimidate us, to teach us a lesson… Two weeks ago the case was presented and was dismissed due to lack of evidence. It was a threat" (Government official, interview, November 2013, Arica). This threat seemed to have a disciplinary effect on officials. Another official went on to say, "if we need to look into something again with that company, we're going to be extra careful… it's like a marriage, you know that at the end of the night you have to sleep in the same bed" (Government official, interview, November 2013, Arica).

Following the strike, the company also sued the labor union. The lawsuit ended in an agreement in which the union had to take out a full-page ad in the local paper asking for public forgiveness, an act that signaled the firm's power to the community, as well as humbled and disciplined workers. One government official lamented the events, saying:

> They killed the union, little by little. The secretary of the union was accused of sexual harassment about the same period they started the collective bargaining process. … The denial of the right to defend himself was the thing that we investigated. We fined them and we won that in court, but they appealed and took it to the Supreme Court level. He was condemned to pay $1.000.000 pesos [roughly $1,400 USD] in legal fees. He had to pay the legal fees of the firm. … After that the company put in a petition to take away his legal protection [because he was protected by law as a union officer]. Once that was done, they fired him (Government official, interview, November 2013, Arica).

The firm's legal strategy revolved around three main axes. It relied on a preexisting bias within the legal system—a system known to be unfriendly to unionization—in order to oppress the threat that the strike held for the company. Appeals Courts do not

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have specialized labor training, which some scholars conclude is one of the reasons they tend to rule less favorably for workers (Gutiérrez Crocco and Gutiérrez Crocco 2017). In addition, the Supreme Court in Chile is known for its conservative and pro-business stance and formalist interpretation of the law (Couso 2005; Hilbink 2007; Gutiérrez Crocco and Gutiérrez Crocco 2017). Second, because the civil law tradition is built on statues and codes, not case law, the firm had little to lose if the case was not interpreted in its favor. The decision would not be held up as a legally binding precedent for future cases. In addition, maximum fines for noncompliance with anti-union behavior laws are relatively small, less than $12,000 USD, so seeking a higher judgment was theoretically nonthreatening to the firm.

Finally, the firm's argument centered on specific language in the law to justify its actions. Since the firm *did not hire* new workers, the lawyer argued that the firm did not break the law. This type of argument appeals to the traditional notion that the judiciary should not be involved in political matters, rather its role is to passively and strictly apply the codes to the cases (Couso 2005). Yet, it is clear that these institutional and political conditions provide a loophole for companies to get around the law, effectively putting corporate interests above workers' rights. As part of its legal strategy, the firm engaged in legal tactics that undermined local authorities by emphasizing federal power as more legitimate. They also humiliated and disenfranchised union leadership to quell opposition. I call this legal fix authoritarian legality.

6. Discussion: Repeat Player Advantage across Place and Legal System

In this paper, I have shown that firms in Hawaii and Arica turn to the courts as a way to avoid complying with the law on the books. This is important because it frames firms' legal actions in new terms, making visible the mutually constitutive ways in which firms and governments create and interpret laws. It shows the malleability of the law and how certain types of repeat players—those with more resources and legal staying power—are able to shift the boundaries of their own regulation through litigation or threats of litigation. The cases in Hawaii and Arica also demonstrate important differences that point to the ways the broader context and legal system matter for how firms engage the law to promote their interests and for law's potential to support social change. Despite these differences, as Table 2 shows, transnational

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Table 2. Outcomes of Strategic Legalism by Place

Place	Strategy	System	Who Wins
Hawaii	Preemptive Legality	Common Law	Powerful Firms
Arica	Authoritarian Legality	Civil Law	Powerful Firms

seed firms maintain their advantage over local governments in both cases, but for distinct reasons that I will detail below.

6.1 Repeat Playing: Powerful Firms and Local Governments

Differences in resources and power of repeat players affect their ability to come out ahead in the courts when they face each other as opponents. Transnational firms in both sites had well-coordinated legal teams who were experts in both the organizational culture of the firm and in the particular legal debates at hand. While local government entities in these sites are repeat players, they had fewer economic and legal resources to take on powerful firms in court.

In Hawaii, both firms and governments drew on their social networks for support. Nonprofit organizations and individuals joined with county-level governments, increasing their resources to fight the lawsuits. However, this type of resource-sharing can be constraining since agreeing on which strategy to pursue can divide parties, particularly when they have different interests in the case. On the corporate side, firms joined forces with influential organizations like the Farm Bureau and the Chamber of Commerce, which meant a richer, more powerful set of partners on the side of transnational firms. So, while both local governments and firms benefitted from pooled resources, the resources of local governments did not reach the size of their corporate counterparts. In Arica, on the other hand, the Labor Inspectorate relied on its own limited legal team, while the firm had both outside specialists and internal lawyers. Since the seed firm's strategy was to pursue multiple lawsuits against labor inspection and the union at the same time, the government's legal team was severely overburdened. Overall, local governments' legal teams tended to be less specialized and more time-strapped than their industry counterparts. Powerful firms are able to develop legal strategies with staying power, strategies backed by the resources for pursuing long-term goals.

6.2 Repeat Playing in Different Legal Systems

One of the primary differences between these cases is the legal system itself. Hawaii's legal system is based on a common law model and in Arica, it is based on a civil law model. Within these

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systems, I have examined two structural differences: the role of precedent and the role of judges and lawyers. In common law countries, like the U.S., case law is of primary importance. It is established through precedent in the form of published judicial opinions. In civil law countries, like Chile, the law is made through codified statutes, which judges apply to each case. In Hawaii, firms play for the rules by setting precedent. This shapes what types of cases firms seek to litigate since firms are reluctant to pursue cases that might set a negative precedent for them. Playing for the rules takes on a different meaning in Chile, since the rules are not established by setting precedent. Here, firms play for the rules by intimidating local government officials and overburdening the local labor offices with legal actions. Despite the seemingly clear differences in how the law is made in each legal system, the situation is more complex. This nuance is largely due to procedural and legal reforms (in Chile, as well as some other civil law countries) that have produced a system that mixes characteristics of common and civil law. We see this in the example of precedent.

Although precedent is not legally binding in Chile, it can play an important role, depending in part on the weight judges give it (Chilean labor lawyer, conversation, March 2018, Santiago). In Arica, the ambiguity of precedent did not affect the firm's legal strategy, as it pursued several, arguably frivolous, lawsuits without worrying that they would set a negative precedent. However, the quasi-binding precedent of *unificación de jurisprudencia* did play a long-term role in making the need for legal reform more visible and ultimately in providing a political opening for legal change to happen (Esteban and Matías 2017; Gutiérrez Crocco and Gutiérrez Crocco 2017). For example, if a precedent is counter to current cases in which judges do not agree on the interpretation of the law, this tension may be used to support legislative efforts to change the law so that the wording of the code represents its meaning. This change happened in Chile, albeit after the case I analyzed in this paper.

Under the right conditions, the ambiguity in the law can provide an opening for the judiciary to challenge the status quo. In April 2014, President Bachelet named Carlos Cerda Fernández, a known defender of human rights, as a new minister in the Supreme Court, replacing Patricio Valdés, who was a strong supporter of the business sector. The appointment altered the balance of power, creating a more labor-friendly court, as can be seen in its subsequent decisions. For instance, in May of 2014, the Supreme Court ruled in favor of labor in a groundbreaking decision that replacing striking workers with internal workers was against the law. Numerous cases have followed, setting a new

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quasi-binding precedent (La Inspección Provincial del Trabajo de Santiago v. RGM Mallas de Alambre 2014). While some have applauded the court for using political criteria in making the ruling, others have argued that it overstepped its bounds, acting in a quasi-legislative function (Humeres and Halpern 2015). The Supreme Court's reversal of earlier precedent was likely helpful at getting the issue included in the labor reform that was passed in 2016. The new law "prohibits the *replacement* of striking workers" instead of prohibiting the *hiring* of workers during a strike. This pro-labor shift in the Supreme Court is also noted in the *unificación de jurisprudencia* rulings in which workers won nearly 70 percent of their cases in 2014, as compared to 18 percent in 2013; and private employers did not win any cases in 2014, as compared to 45 percent in 2013 (Gutiérrez Crocco and Gutiérrez Crocco 2017). Procedural changes and a shift in the court's composition have made the courts a more viable option for change for workers.

Second, historically there have been key differences in the role that judges and lawyers play in each system. In civil law, judges led the proceedings, brought charges, constructed legal narratives, and applied remedies found in legal codes. Lawyers played minimal roles. Whereas in common law, judges mediated proceedings while lawyers built and presented the cases and examined witnesses. However, today those characterizations no longer ring true in many civil law contexts due to the procedural and legal reforms mentioned earlier. In Chile, for example, judges continue to play active roles, but lawyers' roles have become more visible since many trials now have oral components. In addition, while scholars have posited that judges in common law countries have greater flexibility to interpret cases and find appropriate sanctions than judges in civil law countries (Merryman 1969), my findings do *not* support that claim in practice. In Hawaii, judges took a narrow view of the law, despite recognizing the deeper significance of the case, stating that "cultivation and testing of GE [genetically engineered] plants raise several well-documented concerns" (Atay v. County of Maui 2016). The court made it clear that this was not a venue to address deeper political and environmental issues, asserting, "those who want those issues addressed must seek means other than the present order to accomplish that" (Robert Ito Farm, Inc. v. County of Maui 2015).

In Chile, the judiciary has historically relied on its apolitical stance to reinforce the status quo. As such, case outcomes have been similar to the case examined in Hawaii in which the judges preferred the technical application of the law over the spirit of the law. However, the reversal of earlier decisions regarding replacing

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striking workers implies that an important change may be happening. Despite a passive judiciary with a risk-adverse institutional culture, judges seem to have more flexibility than previously thought. The politics of the courts in Chile, as well as the procedural and institutional changes in recent decades, played a role in this shift. Judges came to embrace the spirit of the law, instead of focusing narrowly on its semantics. This change became part of the recursive cycles of lawmaking that supported clarifying the ambiguity and contradictions in the law on the books in support of workers' rights (Halliday and Carruthers 2007).

While differences in legal systems create different mechanisms for legal actors to draw on for repeat playing, these differences do not determine how these cases play out. The historical and sociopolitical context matters for how the law is developed on the books and how the law is interpreted and enacted in practice. This context, together with the local legal culture (practices and institutions), account for the differences observed between the cases of Hawaii and Arica, more so than the legal systems themselves. Particularities of place shape the kinds of strategic legalisms that make sense in different national contexts.

6.3 Strategic Legalism by Place

In Hawaii, firms' strategies centered on setting precedent. Because of this, firms pursued litigation to shift the debate from one over environmental concerns to one over the technicalities of governance. By using the argument of preemption, they shrunk the public arena, moving environmental governance from one domain of democratic politics accessible by opposition to one that is largely out of reach. As Gaventa (1980: 9) has argued, power is exercised not only on participants in the decision-making process, but with the purpose of exploiting certain kinds of conflict and suppressing others that are less manageable. As such, the debate becomes not about whether pesticide regulation should be stricter, which has moral implications, but about how the law's ambiguity can be used strategically to come out ahead. The contest becomes one of who has the power and the financial and legal resources to invest in the law as a way of changing the rules over time.

By shifting the debate, seed firms depoliticized the issue, making it difficult for local governments and social movements to use the courts to seek social change, achieving the dual goal of compliance and containment. Firms drew strategic advantages from their dominant repeat player status and the superior legal and extra-legal resources that enabled them to play for the rules and win. Because regulation in this industry is centralized and the issue of

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contention—environmental protection—falls under federal and state purview, firms took a less adversarial approach (Kagan 2001). In contrast to their wishes in Arica, seed firms wanted a quick decision that avoided additional litigation in Hawaii. Further litigation might have drawn more visibility to the issue and strengthened the movement against them, even if their opposition did not win in court (McCann 2006; Edelman et al. 2010). In fact, this momentum laid the groundwork for Hawaii to be the first state to pass legislation in 2018, Act 45, that phases out the use of neurotoxin, chlorpyrifos, by 2023 and creates pesticide buffer zones.

In Arica, the firm's approach was rooted in actions I call authoritarian legality. When confronted with a labor strike, the firm used the law to discipline and to threaten. While Hawaii has legislation[12] in place since 2002 that protects individuals against unfounded lawsuits that seek to silence opposition, there are no similar laws in Arica. In Arica, the firm benefits from the repeat player advantage, not by setting precedent, but by working within and taking advantage of an already existing authoritarian legality that values the contribution of multinationals to the economy over those of workers. The wealth of legal, political, and economic resources that the seed firm possesses enables it to overburden the local government with concurrent legal battles and seek judgments at higher levels which draws out litigation, putting the firm in a position of power over the local government. Because the institutional culture of higher courts in Chile has had a conservatizing effect on case outcomes in favor of industry, firms pushed decisions upward instead of relying on the Labor Court's interpretations. What sets Chile apart is this dominant mode of authoritarian legality, more so than the formal roles of judges or the status of precedent.

In the case of Arica, the legal system promotes a legal order that is in some ways similar to Kagan's (2001) adversarial legalism in that the firm relies heavily on legal threats and lawsuits to shape policy and legal outcomes. Because precedent does not hold the same weight in Chile, it is neither a clear threat nor a resource for firms, resulting in a legal system that does little to discourage lawsuits, even frivolous ones. The higher courts in Chile constructed an institutional barrier to regulatory change, prioritizing the firm's legal right to operate over the protection of workers' rights. Firms take advantage of this strategically, as a way of shutting down opposition and maintaining the status quo. This barrier, after thirty years of democracy, seems to be slowly eroding due to a mix of structural, institutional, procedural, and political changes, as documented in the recent labor reform.

[12] Anti-SLAPP legislation (legislation against strategic lawsuits against public participation).

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7. Conclusion

This research has shown how powerful corporations use litigation defensively to shape the boundaries of their own regulation, highlighting the mechanisms of corporate strategic behavior. I find that the dominant repeat player, in this case, seed firms, comes out ahead of the local government due not only to superior power and resources, but also to how firms strategically navigate the historical-political context in which the legal systems are embedded. My typology provides scholars with a conceptual frame to understand dominant repeat players' actions vis-à- vis the law. I examine legal endogeneity in nonjudicial settings where the relationships between norms and politics are especially salient. As such, strategic legalism took different forms in Hawaii (preemptive legality) and Arica (authoritarian legality) since different political and institutional mechanisms best met firms' needs. Seed firms typically relied on federal level structures as their allies, whereas workers in Chile and nongovernmental organizations in Hawaii turned to local government entities to represent them and push their claims forward. This division of representation is important for understanding how regulation works.

This study contributes to the scholarship on repeat playing and legal endogeneity in three ways. First, I break Galanter's repeat player category into two: those parties with greater resources and those with less. I do this to distinguish between powerful corporations and local governments that seek to regulate their behavior. I ask what happens when repeat players with different amounts of power face each other in contests to redefine or maintain the rules of the game. Second, I compare how the repeat player advantage plays out in two different contexts with differing legal systems. This comparison allows for a deeper understanding of how a system's legal infrastructure (made up of institutions with specific rules, roles, and legal styles) matters for how repeat players mobilize the law in their favor. Finally, while most studies focus on how organizations mobilize the law proactively to protect their interests, my study finds that firms use strategic legalism *defensively* against the state to simultaneously protect their legal right to operate and to discipline the local government. I show how firms use strategic legal tactics to seize on already existing legal and political structures as opportunities and constraints, affecting the ways "the haves" come out ahead.

My research also reveals the heterogeneity within a type of repeat player often treated as a monolith, government. Local governments play key roles in regulatory disputes despite having fewer resources and less authority, which affects their ability (and

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desire) to enact social change. While local authorities have gained more responsibility under the decentralized models of government that accompanied neoliberalism, in many cases local governments are overburdened with work, have limited budgets and staff, and lack the power to enact changes or enforce regulations that are unpopular with powerful actors. Firms are not only redefining the rules of their own regulation, they are using the tools of the state to do so. We see this in Arica through the Labor Inspectorate's frustrated attempts to enforce labor rights and in Hawaii through the County's attempts to pass new laws to regulate pesticide use and the safety of GM corn seed.

In both cases, local government entities had limited success in their negotiations with transnational firms to determine the boundaries of regulation. Yet at the same time, it is important to recognize the opportunities to act that these cases offer in what Hall and Lamont (2013) call spaces of social resilience within neoliberalism. Given the pro-business labor code in Chile, it is remarkable that workers formed a union, decided to strike, and that the union survived the firm's legal assaults. Perhaps more noteworthy is the subsequent labor reform that overturned decisions on replacing striking workers, changing the words of the law on the books to reflect its spirit. In Hawaii, small counties took on transnational firms by successfully passing legal changes to shift the regulatory boundaries of an industry that authorities felt threatened the health of their communities. While not all of the initiatives have been successful, local actors have brought important governance issues to the forefront, showing the potential for change and the role that the law might play in that process. However, there are reasons to be cautious. In Chile, the labor reform did not radically alter labor relations and the reform has imprecisions that could provide employers with a legal roadmap to use strikebreakers (Ugarte 2015). As the political tides shift with Chile's latest president,[13] so can the law. In Hawaii, like many states, preemption has become a powerful tool for corporations to circumvent local concerns. Recent news that one of the largest firms in the seed industry plead guilty in November 2019 to illegally using and storing a pesticide in 2014 that was earlier banned by the Environmental Protection Agency is particularly noteworthy because this act of noncompliance happened at the same time that many of these regulatory battles on pesticide safety were occurring in Hawaii. In sum, the local context plays an important

[13] Chile's President Piñera took office in March 2018. His brother, Jose Piñera, the former Minister of Labor & Social Security under Pinochet, was instrumental in the development of the 1979 Labor Plan.

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role in determining the degree to which the law is a space for social change.

At the same time, courts should not be underestimated as a potential place where weaker repeat players can come out ahead and social justice can occur. This study shows how the biases and vulnerabilities within political and judicial institutions perpetuate inequality. Whether those norms are reinforced or challenged depends on the emergence of a democratic politics that acknowledges the distributive tilt of the legal system. This type of democratic politics must extend to the institutions that are charged with defending the spirit of the law—the courts and also local governments—since they act as deterrents to regulatory capture (Yackee 2014). My study points to the need for policymakers, social movements, and authorities to take seriously the regulatory role of local governments by providing needed resources and authority, while also expanding localized efforts of resistance to address higher-level structures in their efforts to hold firms accountable and to promote long-term sustainable change.

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