Labour and Constitutionalism-from-Below

On the Effective Potential of Legal Strategy

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Abstract

This thesis engages in a critical socio-legal analysis that evaluates the potential effectiveness of legal mobilisation as a tool of social struggle with a view to conceptualising the labour movement's capacity for political participation through meaningful engagements with law. The domination of financial markets on political systems, the diminishment of labour law protections and the proliferation of undignified working practices ask difficult questions of a constitutional theory that insists on the continued importance of national legal systems, and the potential opportunity that remains in law's resources to transform the present conditions of work and the social relation between capital and law. This thesis takes a strategic approach to constitutional theory and argues that national legal systems remain a key site of struggle for labour. Rather than cede the regulatory space of the State to market-interests, labour must engage in litigation, legislation and political actions that confront the inadequacy of existing work standards and insists on the constitutional protection of dignity, solidarity and the right to work. In order to locate the tools of such strategic engagements, we will turn to a method of constitutional analysis 'from-below' that is committed to uncovering the agency of social movements in constitutional practices. This will provide the space for a critical analysis of the following tenets of effective legal engagement: The articulation of recognisable legal claims, law's institutional capacity and, the productive interaction between legal mobilisation and political objectives. This thesis presents a pragmatic conception of the potential effectiveness of labour's engagements with law, as a means to reconstruct the link between political subjects and constitutional structures and provide important mechanisms for labour to confront its present condition.

Table of Contents

List of Figures

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A Note on Translations

This thesis examines constitutional texts, statutes and judgments written originally in Spanish. Where a translation is given with no attribution to the original translator or author, the translation is my own. I have provided original versions of translated passages in the footnotes.

Author's Declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Introduction

Law holds the promise to order social relations according to values and principles that are the foundation of our political communities. However, under contemporary conditions constitutional structures, while formally committing to popular sovereignty appear detached from emancipatory demands, with law reduced to a tool of regulation mainly operating to secure the protection of the extant property regimes. A key concern for contemporary legal scholarship is whether civil society can still draw on law's promise to confront their conditions of exclusion, oppression and withdrawal of dignity. This thesis is concerned with the capacity for labour to engage effectively with law's resources and transform the present conditions of work and the social relation between capital and labour. In order to address this challenge, we will turn to the potential of constitutional strategy to document the agency of labour in a political struggle that tests the opportunities and limitations of legal mobilisation. This thesis seeks to reclaim a constitutional discourse that is committed to the productive relation between social struggles and law, and contributes to an understanding of the conditions that determine the potential effectiveness of legal engagements 'from-below'.

The underlying problematic present in this research, is the absence of any reference to labour within democratic discussion. Despite the socio-economic importance of work, the State enshrines civil over labour rights, and the focus of political debate fails to register the social importance of labour. Take Europe for example: Labour is the primordial site of solidarity[1], yet this project is conceived in a Europe that has moved toward the comprehensive clamping down of syndicalist action. Today, apart from worker collectivisation, solidarity is understood at the inter-governmental level as ensuring the servicing of public debts to maintain market confidence, and State decision-making is guided by market determinations over the political demands of citizens[2]. At the supra-national level, the Court of Justice of the EU has elevated capital's freedoms of movement over that of labour's right to strike[3].

While austerity politics has built upon the liberalisation of labour regulations, accentuating the capitalist logic of profit maximisation at the expense of democratic alternatives, the elevation of this logic into law realises a terminal problematic of the people's exclusion from

[1] Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market* (Verso 2012) 93.
[2] Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso 2014).
[3] *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2008] EC C-438/05, ER 127.; *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2008] EC C341/05, ER 166.; ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 Industrial Law Journal 126.

socio-legal decision-making[4]. This has seen a global trend toward the hollowing-out of socio-economic rights whereby substantive rights protections have been replaced by formal guarantees leading to the absence of any meaningful protection of socio-economic rights[5]. We are therefore surrounded by the effects of the confrontation between capitalism and democracy[6], and the subsequent effects upon both the legal and social value of labour, which raises concerns regarding the political capacity to realise change in the sphere of labour.

In legislating against exploitation and for dignified work national legal systems have represented both an opportunity and limitation as they both provide the tools to institute economic and social reforms and yet simultaneously reproduce the social relation between capital and labour. The challenge of the State for labour movements is grounded in the fact that legal and political systems of western liberal democracies are weighted normatively toward the protection of capital over labour. The organisation of the modern State around bourgeois interests produced a legal and political system that is structured, through individual rights and a commitment to limited government, according to the normative programme of economic individualism that facilitates capital accumulation[7]. By placing property and the desire for accumulation as the basis of the modern social contract, Locke presents an understanding of labour as both the source of property during primitive accumulation and later a commodity that can be traded[8]. This transformation is made possible in the modern State with the emergence of stable institutional powers that guarantee contracts and titles and money that enables accumulation through exchange, and not physical labour.

This brief history of the modern State captures its early development around specific market-based interests but, we must also acknowledge the role of internal societal pressures as a result of universal suffrage and the demand for legitimacy[9]. Indeed, for our purposes, labour struggles have won valuable legal protections through sustained political campaigns, and the postwar State's commitment to welfare reforms went some way toward providing economic

[4] Hauke Brunkhorst, 'The Return of Crisis' in Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective* (Hart 2011).
[5] Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 Modern Law Review 532.
[6] Streeck (n 2).
[7] Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford University Press 1992) 119.; Michael Hardt and Antonio Negri, *Labor of Dionysus: A Critique of the State-Form* (University of Minnesota Press 1994) 54–136.
[8] See Ch.5 'Of Property' in John Locke, *Second Treatise of Government and A Letter Concerning Toleration* (Mark Goldie ed, Oxford University Press 2016).; On Locke's conception of property, see further Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from the Renaissance to Enlightenment* (Verso Books 2012) 156–165.
[9] Poggi (n 7).

and social rights protections and redressing the inequalities between capital and labour[10]. Moreover, the development of Labour Law provides some proof that, as a site of action, national legal systems can be reformed in a manner that protects the constitutional commitment to dignity and provides substantive welfare provision[11].

This sets up the constitutional State as a challenging terrain for labour, it is structured in a way that recognises labour within a subordinate relation to capital and, at the same time, national legal systems have the competence to significantly improve the social experience of labour within this relation. This means that, liberal constitutional structures cannot provide the tools to emancipate labour from the condition of its subjection to capital but, from a pragmatic perspective, it represents a key site of struggle for labour that seeks to impose legal obligations on capital and improve working standards. This thesis will proceed from the presupposition that, in spite of its challenges, there is too much at stake for labour to disregard or disengage from the State and the content of its legal rules that order social relations.

Today, labour endures threats of precarious work through zero hours contracts and mass unemployment owing to the migration of capital. The challenge of contemporary labour movements is to engage in legal and political struggles that can effect a positive recalibration of their constitutional relation with capital. The contemporary facts of the global organisation of capital vis-à-vis the fragmentation of labour, 'flexibilisation' and the diminishment of labour law protections, ask difficult questions of a theory that connects labour to political subject positions in the current constellation of politics, labour and financial markets. This thesis investigates the ways that labour movements can challenge their legal, political and economic dispossession through strategic uses of legal instruments. This requires a rejoinder that does not reduce democratic decision-making to electoral representation[12], but theoretically analyses the political subject's potential to affect constitutional structures. This task demands an innovative commitment to the potential of law as a tool of social struggle.

The research questions that motivate and guide this research are as follows:

[10] Wolfgang Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (OUP Oxford 2009) 7.
[11] Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014).
[12] Chris Thornhill, 'Rights and Constituent Power in the Global Constitution' (2014) 10 International Journal of Law in Context 357.

- What constitutional theory might recognise the agency of social movements in constitutional practices as opposed to reducing social conflict to a manageable demand in the process of societal reproduction?
- Can law be used strategically, and can it be used effectively, to counter the reproduction of the order of capital?
- What are the precise strategies that have enabled labour movements to engage meaningfully with law?
- And, to what extent can law be used as a tool of social transformation where labour's political demands confront the normative commitments of a legal system?

In response to these questions this thesis will argue that potentially effective engagements with law represent a key strategic opportunity for labour movements. By identifying law as a tool of social struggle, we can evaluate the ways that legal mobilisation can re-insert labour's political demands into legal and political structures. This means turning to a strategic approach to constitutionalism, one that does not rely on existing institutional mechanisms but argues that labour must engage with law in a manner that makes its normative demands recognisable in the fields of law and/or politics. A thread that will run throughout our conception of law's potential effectiveness is that there is a productive tension between law's opportunities and limitations. And, it is the navigation of this tension through strategic and tactical decision-making that we will locate the opportunity of legal mobilisation as a tool of struggle. By turning to the role of social struggles in the determination of law this thesis will contribute to a bottom-up conception of constitutional practices that reckons with the agency of social actors and their capacity to confront the reproductive processes of constitutional structures.

Before we begin, I will provide some further clarity on the aims and parameters of this approach to constitutional theory, what a strategic approach entails, and the working definition of labour movements. First, this thesis is concerned for the continued role of national constitutions in the determination of social experiences and expectations, and the extent to which State law and its constitutional provisions can provide the tools for social transformation. This approach to constitutional studies does not focus on the promises of law and government to deliver progressive social programmes, but on how social struggles engage with constitutions and encourage social transformations 'from-below'. In other words, this research re-inserts social struggles within constitutional discourse by

investigating how strategic engagements with law enable labour to register its democratic demands.

The thesis contributes to the theoretical body of 'constitutionalism-from-below'[13] that is concerned with social struggles that have an effect upon and shape constitutional norms and structures. This focus on the practices of constitutions brings the agency of social movements within the realm of constitutional discussion, as opposed to perpetuating a theoretical approach to social conflict that focuses on top-down processes[14]. Constitutionalism-from-below shifts the analytic focus on political power away from formal conceptions of constituent power[15]. Traditional constitutional theory locates the political power of the people in the constituent power that founds the constitutional order and this 'consent of the people' is maintained through institutional arrangements that check the exercise of governmental power and provide mechanisms of redress for citizens[16]. By turning to the exercise of political power by social groups, this thesis focuses on the ways that social conflicts challenge these institutional arrangements. Although I will not frame it in these terms, this study presents an understanding of the practical interaction between social actors and constitutions beyond formal conceptions of constituent and constituted power.

In response to a potential definitional objection, I will briefly distinguish my concern for social struggles as contributing to the practices of constitutionalism as opposed to the processes of constitutionalisation. Constitutionalism is the study of the practices of a constitution, from the processes of its formation to the functions it performs in society[17]. It provides a political theory of government that sets out the instruments of government, its relation with civil society, the norms and values that are at the core of the constitutional document, and the key principles that determine the management of these factors, such as the commitments to the rule of law and separation of powers[18]. There are, of course, a range

[13] Gavin W Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (2013) 20 Indiana Journal of Global Legal Studies 881.
[14] Gavin W Anderson, 'Beyond "Constitutionalism Beyond the State"' (2012) 39 Journal of Law and Society 359, 382.
[15] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 902–3.
[16] Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008) 1.
[17] Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press 2011) 9–12.
[18] Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP Oxford 2012) 55.

of traditions of republican[19], liberal[20], political[21] constitutionalism, and more recent expansion beyond the State to consider societal[22], transnational[23] and postnational[24] forms of constitutionalism. However, for our purposes, it is important to recognise that constitutionalism of all stripes is concerned with the practices that determine the structure and substance of constitutions.

Constitutionalisation flows from constitutionalism in the sense that it attempts to apply its substance and aims to different aspects of social life[25]. Contemporary constitutionalisation is experienced in the application of constitutional norms and structures to a range of different aspects of social life. This extracts the institutional arrangements and norms of constitutionalism from its usual emplacement in the national context and applies it to different circumstances and forms of public life[26]. The most common example of this process is the constitutionalisation of the post-national sphere of governance[27]. In this regard, constitutionalisation is the process through which various social phenomena are brought within the remit of constitutional government. Given its focus on governmental processes, I will focus on the extent to which the agency of social movements can be recognised as practices of constitutionalism. This means contributing a bottom-up perspective to the practices of constitution-making rather than focusing on the top-down processes of constitutionalisation.

In order to locate labour within constitutional analysis, this study will investigate the conditions that determine effective strategic and tactical engagements with law. Legal strategy is not simply the attempt to instrumentalise law for short-term gain but is tied to a wider political struggle about what law ought to be, and the re-determination of legal obligations and hierarchies of rights. I will proceed on the basis of a distinction between a

[19] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005).
[20] James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Penguin UK 1987).
[21] JAG Griffith, 'The Political Constitution' (1979) 42 Modern Law Review.; Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004).; Marco Goldoni and Chris McCorkindale, 'Three Waves of Political Constitutionalism' (2019) 30 King's Law Journal 74.
[22] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP Oxford 2012).; Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004).
[23] Chris Thornhill, *A Sociology of Transnational Constitutions* (Cambridge University Press 2016).; Christian Joerges, Inger-Johanne Sand and Gunther Teubner, *Transnational Governance and Constitutionalism* (Hart Publishing 2004).
[24] Jiří Přibáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (Routledge 2016).; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 Modern Law Review 317.
[25] Loughlin, 'What Is Constitutionalisation?' (n 18) 61.
[26] ibid.
[27] Přibáň (n 24) 14.

strategic approach to law that carries long-term normative objectives and a tactical engagement that refers to actions targeting short-term protections[28]. In this respect, legal strategy refers to the broader political nomos of a movement and tactics are the specific temporal actions that seek either immediate relief from harm or contribute to longer-term objectives. I will elaborate on this distinction in chapter two; for now, we can see that a strategic approach reckons with law's structural impediments that have prevented labour from being recognised and, turns to alternative strategic forms of political and legal action that might generate important protections for a social struggle[29].

This concern for strategic action as a means to engage with law confronts an important cleavage in legal theory between a conception of law as a communicative practice and its rejection of the strategic rationality. I do not intend to unpack the complexities of this long-running debate but highlight its significance for the purpose of distinguishing this thesis' strategic approach to the relation between law and social conflict[30]. In discourse theory there is a distinction between communicative and strategic action. Jürgen Habermas' conception of communicative rationality is premised on the commitment to reaching understanding through language. Whereas strategic action is understood as instrumentalizing communication to achieve certain ends. Communicative action is based on a common rationality between both parties so that an addressor can understand an addressee[31]. Applied to law, the communicative approach assumes a common set of norms and rationalities that are seen to underpin communication and enable legal argumentation about what belongs to a legal order.

For our purposes, the communicative approach and its imposition of a common rationality prevents certain claims from having traction in law. For instance, where a set of permissible norms and procedures structure communication, there is an inevitable narrowing of what can and cannot be said in law[32]. As Scott Veitch describes it, rationality in law is a process that limits the range of discursive opportunities because law must make a decision about what is

[28] Robert Knox, 'Strategy and Tactics' (2012) 21 The Finnish Yearbook of International Law 193.
[29] Matheson Russell and Andrew Montin, 'The Rationality of Political Disagreement: Rancière's Critique of Habermas' (2015) 22 Constellations 543.
[30] See further, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998).; Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Polity Press 1984).; Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press 1989).; cf. E Christodoulidis, 'The Objection That Cannot Be Heard: Communication and Legitimacy in the Courtroom' in A Duff and others (eds), *The Trial on Trial Volume 1: Truth and Due Process* (Hart 2004).
[31] Habermas, *The Theory of Communicative Action* (n 30) 29–38.
[32] Christodoulidis, 'The Objection That Cannot Be Heard' (n 30) 191.

and is not included in law[33]. This means that labour movements' range of recognisable legal claims is limited to the normative and procedural consensus that grounds the communicative rationality of Western legal orders.

The strategic approach adopted in these pages follows from a recognition of the structural impediments and normative commitments of national legal orders. We have already highlighted labour's problematic accommodation within liberal constitutional orders that are normatively committed to the productive interests of capital, once we recognise such barriers to registering labour's normative demands in law a communicative approach to law becomes counter-productive. It is our task to analyse the innovative ways that labour confronts these challenges, accept the limitations that liberal legal orders impose on social conflicts, and identify the strategic opportunities to engage with and challenge law's communicative rationality.

This thesis is concerned for the ways that a labour movement can assert itself democratically by engaging with constitutional structures. I do not intend to pre-determine what is or is not a labour movement by imposing qualifying criteria. This would run counter to an approach that moves away from formal institutional analysis of constitutionalism, and is concerned with the unexpected and disparate ways that social struggles engage with law and politics. The type of movement envisioned by this thesis will range from organised trade unions in the first world to ad hoc grassroots worker organisations in the third world. The experience of labour standards, organisational structures, legal institutions and demands of labour movements may be radically different but, at the same time, they share a common goal to challenge their present condition and the social relation between labour and capital. In other words, I am referring generally to the autonomy of labour as a social group and its specific instantiations as political movements that confront the ordering practices of government in a specific location.

In order to comprehend the ways that labour movements interact with law I will draw from disparate literatures that are concerned with the conflictual interaction between social autonomies and constitutional government. I will proceed on the basis that while my focus is on a specific form of struggle our investigation into effective engagements will contribute to a body of knowledge that is useful to a range of social struggles.

[33] Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart 1999) 161.

The structure of the argument is as follows. In chapter one we will set out a suitable methodological approach to the study of social conflict in constitutional theory. A key challenge to an understanding of the ways that labour movements engage strategically with law is the absence of agency and a concern for bottom-up processes in constitutional theory. I will document this challenge by setting out a representative example of the difficulty that top-down constitutionalism has in recognising social conflicts on their own terms. In order to bring labour movements, and social struggles per se, within the frame of constitutional analysis I will set out the method of 'constitutionalism-from-below'[34]. This approach to constitutional studies provides space for our investigation into labour movements' engagements with law due to two methodological commitments. First, it focuses on the role of social forces in constitutional practices; second, it aims to expand the canon of constitutional theory to include heterogeneous experiences of law and politics.

Chapter two turns to the substantive treatment of strategic legal engagements in the constitutionalism-from-below literature. I will draw from Boaventura de Sousa-Santos' conception of law as a tool of subaltern struggle and apply its insights to an understanding of labour's capacity to engage with law. This will set up the importance of strategic engagements to a constitutionalism-from-below and highlight the central tension between the opportunity and limitation of legal mobilisation. Indeed, this literature is finely attuned to both the promise of law as a tool of political struggle and the effects of vested interests in liberal legal systems. In the second part of this chapter I will present an internal critique of the constitutionalism-from-below method that builds on its concern for the conditions of social struggle. This will set out the issues that must be confronted if we are to better conceptualise how labour movements can engage meaningfully with law.

In chapter three I will present three tenets of effective legal engagement by labour movements. This draws on a range of influences from legal mobilisation scholarship and legal theory to contribute an understanding of the factors that determine the effectiveness of legal mobilisation. The first tenet will set out both a means to evaluate the ways that legal mobilisation can benefit a political struggle and, assess the role of framing in the articulation of effective legal arguments. Second, I will highlight the effect of context on legal mobilisation and why labour movements ought to pay specific attention to the institutional capacity of State legal systems. Third, we will explore the relation between legal

[34] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13).

mobilisation and political objectives and the extent to which the latter can be amplified, and not co-opted, by the former.

Chapter four brings together our conceptual treatment of effective legal mobilisation with empirical analysis of a particular labour movement's engagement with law. I analyse the trajectory of a labour movement as a means to ameliorate our conception of effective strategic and tactical uses of law with empirical legal analysis. Importantly, the case study will highlight the role of contextual contingencies and the pragmatism that shapes a movement's use of legal and political actions at different times. The labour movement that will be the subject of our analysis are the worker recuperated factories (*empresas recuperadas por sus trabajadores*, hereafter ERTs) of Argentina. These self-managed worker cooperatives began with the occupation of their workplaces after their employers filed for bankruptcy and, through their innovative and competent use of legal resources have won legal protections for their control of property. I will examine the BAUEN Cooperative's use of legislative and constitutional provisions and the effect of non-legal factors in the success and failure of their legal struggle for recuperation. The BAUEN Cooperative has been engaged in a legal struggle since 2003, the duration and complexity of their experience with law will provide a textured insight into the nuances of legal mobilisation.

The ERTs' relative success in confronting the legal system's protection of private property rights and winning legal protections for worker cooperatives presents a unique opportunity to learn about the effective potential of legal strategy and the extent to which it can be used to confront the normative commitments of a legal system. The experience of the ERT movement will inform our conception of the juris-generative potential of labour movements and their capacity to intervene in constitutional practices. This thesis will draw equally upon both the theory of legal strategy to evaluate the ERT movement's engagements with law, and on the BAUEN Cooperative's experience to illustrate a theory of legal strategy in practice.

Chapter 1. The methodological relevance of legal strategy in constitutional theory: A view from the 'top-down' and the 'bottom-up'

The aim of this thesis is to document the potential effectiveness of labour's strategic engagements with law. However, before we can begin to develop our conceptual and empirical analysis, we need to establish a methodological approach that is capable of recognising the productive relation between law and social struggles. This chapter will consider how different methodological approaches include and exclude practices as constitutionally (ir)relevant and analyse the effect this has on their approach to social conflict. To draw out the importance of methodological perspective we will juxtapose the ways that both top-down and bottom-up approaches have rationalised social conflicts. I will argue that top-down constitutional theory has struggled to contend with the agency of social conflicts due to its concern for legitimate authority and a coherent account of constitutional practices. In order to bring social conflicts within our methodological framework, I will turn to a socio-legal method of constitutionalism-from-below. This approach enables an understanding of not only the effects of government functions in social reproduction but also the essential role of social movements in legal and political transformation.

This chapter is divided into two parts, in the first we will focus on the top-down method and its focus on governing processes. I will argue that this approach presents an internal conception of constitutionalism that reserves all constitutionally relevant practices to the functions of government. This provides a coherent explanation of constitutional functions whereby government's effective management of social conflict reproduces the legitimate authority of governmental power. The problem with this methodology, from the perspective of social struggles, is it fails to account for the role of social autonomies and the extent to which they challenge the structures and functions of government.

In the second part, we will turn to a method of constitutional analysis 'from-below' that is capable of recognising and evaluating strategic legal action as a constitutional practice. Boaventura de Sousa Santos' analysis of subaltern cosmopolitan legality[35] and Gavin Anderson's concept of constitutionalism-from-below[36] presents a constitutional method that

[35] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press 2002).
[36] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13).

explores the tension between social struggles and constitutional structures. Both authors have criticised the traditional methodological approach of Western constitutional theory for focusing upon institutional functions and over-emphasising the importance of top-down processes. This call to decentre constitutional analysis enables socio-legal scholarship to refocus attention on previously unconsidered sites of political power and constitutional experience. The importance of this approach, I will argue, lies in two methodological commitments: First, it identifies the role played by social struggles in legal and political transformations; and second, it encourages the production of new constitutional knowledge that transcend the limits of top-down analysis. This will set up a methodological perspective that brings the strategic opportunity of law into the frame of constitutional analysis that will guide the remainder of this thesis.

1 Top-down constitutionalism and the absence of social conflict in governing functions

In this section I will consider how the agency of social movements in constitutional practices has been under-analysed in constitutional theory. The absence of social struggles can be seen as a general theme in constitutional theory, contemporary scholarship has been occupied with describing the constitutional orders of post-national society[37], assessing the impacts of globalisation[38] and structural transformations that have been initiated by post-State governance regimes[39], and evaluating the potential futures of constitutionalism[40]. This scholarship has undoubtably provided key insights about the structures and trends in contemporary constitutionalism but they provide less analysis of the potentiality of social conflicts to engage with constitutional practices. I argue that there is a lack of an internal relation between orthodox constitutionalism and strategic legal action due to the former's overreliance on functional processes that misread the intentions and capacity of the latter. I will present a methodological explanation for the absence of social struggles that considers

[37] For example, the identification of 'societal' constitutionalisms by Teubner, *Constitutional Fragments* (n 22).; The concern for 'global' constitutionalism by Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397.; see also Damian Chalmers, 'Post-Nationalism and the Quest for Constitutional Substitutes' (2000) 27 Journal of Law and Society 178.
[38] See Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013).
[39] See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP Oxford 2012).
[40] Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism?* (OUP Oxford 2012); Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker, *After Public Law* (OUP Oxford 2013).

how an over-determination of top-down practices in constitutionalism excludes engagements with law and politics 'from-below'.

I will focus on Martin Loughlin's account of 'Political Constitutionalism' as representative of a methodological tendency in constitutional theory to privilege the role of government functions in constitutionalism. Loughlin's constitutionalism is concerned with State-building and the legitimate authority of governing processes. I will refer to this as 'top-down constitutionalism' because its methodological focus is the functions of government tasked with mobilising law and ordering conflicts.

I will present a methodological critique of Loughlin's constitutionalism from the perspective of social conflict. I argue that top-down constitutionalism's focus upon government and the internal practices of ordering means that it is unable to recognise or explain the role of strategic legal action or use of law by social movements. The principle problem that Loughlin's top-down approach poses to a conception of legal strategy in constitutionalism is its focus on governing processes which cannot account for the social autonomy of conflicts, their self-organisation and ways that they challenge constitutional structures. I will set out how the influence of functionalism and a concern for law's legitimate authority has caused Loughlin's constitutional theory to privilege governance practices over the ways that social conflicts engage with law.

While I will highlight the limitations of Loughlin's theory for an understanding of legal strategy, it is important to acknowledge the importance of his constitutional method to British public law. For Loughlin, public law is not restricted to the rules of civil association or the substantive content of a constitution, public law – as the practices of government - is understood as the means through which the modern constitutional State is ordered. This has shifted the focus of constitutional scholarship away from common law conceptions of legal validity and introduced a matter of fact account of the State. Loughlin does not reduce public law to juridical concerns or a positivist jurisprudence; on the contrary, it is a public law that contributes to an understanding of the modern State by bringing together an impressive range of legal and political theory[41]. Loughlin's constitutional theory has drawn upon theoretical

[41] Michael A Wilkinson and Michael W Dowdle, 'Questioning the Foundations of Public Law and Questioning Foundations of Public Law' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018) 3–4; Michael Gordon, 'A Basis for Positivist and Political Public Law: Reconciling Loughlin's Public Law with (Normative) Legal Positivism' (2016) 7 Jurisprudence 449; David Dyzenhaus, 'THE END OF THE ROAD TO SERFDOM?' (2013) 63 The University of Toronto Law Journal 310.

works that chart the development of the modern State and 'recast' public law as an essential contribution to existing works of political philosophy, political sociology and State theory[42]. We will draw on this conception of public law and the reproduction of the State as a political unity in what follows. However, our focus will be on its methodological[43] inability to grasp the role of social conflicts in civil society that are autonomous and not completely ordered by the State.

The structure of the argument will unfold as follows. To comprehend Loughlin's activity of governing and its treatment of social conflict, we will consider how Loughlin's constitutionalism draws upon functionalism to explain the 'activity of government'. I argue that this function of public law comes to dominate Loughlin's understanding of constitutionalism and excludes any potential role of external social forces in constitutional transformation. To chart the influence of functionalism will require a brief detour that highlights Loughlin's critical appraisal of the functionalist approach to public law. This will enable a unique reading of Loughlin's activity of governing as the internal function of government and reproduction of legitimate authority. I will tie these insights to existing critiques of Loughlin's constitutionalism that identify the absence of material and social forces in his conception of societal reproduction. Bringing these two conceptions together will reveal a methodological approach that can only recognise social conflicts as demands and threats that must be ordered by the function of governing, meaning the practices of civil society are reduced to their effect on ordering practices that does not capture the true potentiality of social conflict.

In his 1992 monograph, Public Law and Political Theory, Martin Loughlin charts the tradition of public law and its theoretical accounts of the source of legitimate authority. For Loughlin, the expansion of government and the rise in regulatory frameworks pose a problem for traditional explanations of public law's legitimate authority. The main concern is the proliferation of regulatory bodies and rise of administrative rules that structure multiple aspects of social life. Rather than the rules of civil association that are formalised in constitutional documents or other institutional writings and subject to mechanisms of

[42] Wilkinson and Dowdle (n 41) 3.

[43] For alternative methodological critiques of Loughlin's public law, see further Andrew Halpin, 'Questioning a Uniform Concept of Public Law' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018); Panu Minkkinen, 'The Tragic Politics of Public Law' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018); Jacco Bomhoff, 'Immanence and Irreconcilability: On the Character of Public Law as Political Jurisprudence' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018).

account, the modern experience of government is replete with regulatory governance by disparate government bodies or departments:

> The empirical world of public law is best symbolised, not by some slim constitutive document, but rather by the loose-leaf encyclopaedias on such subjects as housing, planning, social welfare, health and safety, and the regulation of competition. These are weighty, dense, rapidly changing compendia of the rules, orders, and guidance relating to particular social fields. This, in fact, is our experience of modern law in general.[44]

This grasps the role of contemporary governance practices in structuring social life and recognises the fact that laws passed by parliaments are no longer the sole means through which social relations are determined. From health and safety regulations to vehicle emissions and consumer directives, regulations have become an essential part of modern government and its capacity to order social life. It is this rise of regulation that, for Loughlin, asks questions of the contemporary source of governmental legitimacy.

Loughlin argues that the traditional public law theories, such as conservative normativism, cannot account for the contemporary, positivist experience of law. Conservative normativism sees law as a set of practices and conventions that form the common law tradition.[45] This concept of law is universal, with no differentiation between administrative law or ordinary legislation. The authority of law is explained by reference to common law traditions which, for Loughlin, cannot explain the practices of modern government and the rise of regulative governance detailed above.

For the normativist, the transcendental authority of law is understood as the source of the common law's legitimacy. Scholars in this tradition, such as Dworkin and Hart, have been preoccupied with an adequate theory of the common law's authority or how we might identify something as a valid law. In its simplest terms normativism is the attempt to explain what law 'ought' to be according to the principles of the community. For Loughlin, this exercise is limited because it is forced to trace the daily operations of law back to its foundations. Moreover, the normativist focuses exclusively on the protection of individual rights and constructing adequate constitutional structures. The problem, Loughlin claims, is that normativist public law theory relies upon the tradition of law to explain its legitimacy at the expense of explaining the practices of law. In other words, the practices of public law

[44] Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) 241.
[45] ibid 232.

extend far beyond a normative conception of positive law's transcendental validity and involves the range of fundamental laws and structures of governance that maintain the modern State.

It is the concern for the practice of law, or how it operates in practice, that leads Loughlin to functionalism. However, a problem with certain trends in functionalism, Loughlin argues is that it can become too focused upon the instrumental possibilities of law for the achievement of certain societal transformations. The inadequacy of functionalism, for Loughlin, is its general tendency to view law in a purely instrumental sense – whereby law is not a theoretical abstraction but a means to achieve objectives with decisions evaluated on the basis of their political achievement.[46] The limits of normativism and functionalism are summarised by Loughlin as follows:

> [T]he conceptualisation of the normative style distorts any attempt to examine the social significance of law while the instrumental or behavioural orientation of the functionalist style fails adequately to account for our understanding of the normative character of law.[47]

The aim of Loughlin's inquiry is to conceptualise both the normative character of law – the rules that define something as law - and accept that law is a social exercise performed by government. Loughlin wants an understanding of public law that accepts law as a complex array of contextual and specialised rules from constitutional rights to the regulative output of the modern bureaucratic State. For Loughlin, the complexity and contingency of modern law means that its validity cannot be rooted in transcendental notions, but it is found in the capacity of law to respond to new societal complexities and ensure the future of the political community. Moving away from theorisations of law that place its validity in the common law tradition of traditional practical knowledge or moralised higher order foundational norms, Loughlin ties the legitimate authority to the function of government:

> While the authority of the common law depends on how old it is and how far back it stretches, that of legislation rests on how recently it has been enacted. Positive law is no longer valid through inalterability. Rather its validity is now based on its function.[48]

[46] ibid 205.
[47] ibid 243.
[48] Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 77–78; Loughlin, *Public Law and Political Theory* (n 44) 253.

Loughlin identifies the functionalism of Niklas Luhmann as providing a means to comprehend the practices of law, their normative character and, importantly, how legal functions reproduces its legitimate authority. Luhmann's break with transcendental normativism as the authoritative basis for law and the functional reproduction of systems are key to Loughlin's embrace of a functional conception of public law. Let us highlight these two features of Luhmann's functionalism before comprehending its significance in Loughlin's public law.

For Luhmann, law is neither founded upon a moral tradition, nor does it have an ontological grounding[49]. Instead, law's authority is explained from a functionalist perspective. This positive view of law separates the practice of law from conceptions of justice because the legal order is not legitimised by its moral content. For Luhmann, we can only understand the authority of law by turning to sociological analysis of legal practice. It is in the function of a system that Luhmann identifies the authority to perform a function.

A second key insight from Luhmann is that law is an achievement in the reduction of complexity[50]. This provides an account of how legal functions manage to respond to social conflicts and manage the complex and infinite range of social expectations. Rather than becoming swamped by social complexity law sustains itself on the basis of normative differentiation. The function of law is a self-referential practice, meaning the legal system's functions are an exercise in reproducing law's internal normative structure. Law's self-reflexivity is informed by the theory of autopoiesis which is borrowed from biology and developed in cybernetic[51] studies. Autopoiesis translates as 'self-reproducing' and presents systems as cognitively open but normatively closed[52]. The normative closure of the legal system "produces and delimits the operational unity of its elements through the operation of its elements"[53]. A system can operate only on the basis of its function, it is and is not capable of reproduction on this basis. Moreover, a system does not engage normatively with demands external to the system (environment); a system sustains itself through internal differentiation to the environment. A legal system will cognitively assess its environment, but any internal differentiation will occur according to its own binary coding: legal/illegal[54].

[49]; Loughlin p.252
[50] Luhmann (n 48) 88.; Richard Nobles and David Schiff Introduction to Luhmann (2004) 7
[51] Humberto R Maturana and Francisco J Varela, *Autopoiesis and Cognition: The Realization of the Living* (D Reidel 1980).
[52] Luhmann (n 48) 81–86.
[53] Loughlin, *Public Law and Political Theory* (n 44) 255.
[54] Luhmann (n 48) 93.

This reveals that a legal system does not absorb the claims of a social conflict but 'responds' indirectly to conflicts by producing its own normative output.

Although Luhmann is not concerned with the source of law's legitimate authority but with an explanation of social differentiation; for Loughlin's purposes, his functionalism provides a means to comprehend how legal systems respond to social expectations and reproduce their legitimate authority. The principle insight that Loughlin draws from Luhmann is that modern law is too complex to be valid on the basis of transcendental norms and is best understood according to its function. For Loughlin, Luhmann's conception does not simply reveal how legal systems work but that a "legal system can manage its own reproduction within an environment which is not in itself attuned to the precepts of the system."[55] This lays the groundwork for an account of constitutionalism that is determined by the production of positive laws in line with the normative aims of the legal system. In other words, Loughlin draws on Luhmann's functionalism to show how modern legal systems are complex systems made up laws that manage social expectations and order conflicts in line with law's own normative determinations. Rather than tying the legitimacy of law to transcendental norms, Loughlin recognizes an opportunity to understand the validity of law according to its function.

The next step in our argument is to trace the influence of Luhmann's functionalism into Loughlin's later work and how it informs an account of modern law and government as the function of governing. Before we do so, we need to be clear about the limits of Luhmann's influence upon Loughlin. Loughlin has praised systems theory and the functionalist approach per se as providing a scientific approach to the functions of law and politics. However, Loughlin does not hold onto a strict conception of social systems theory to guide his account of public law because its overly positivistic approach fails to comprehend the reality of modern constitutionalism[56]. At issue is the closed nature of a (legal) system in Luhmann which limits the scope of a social systems functions to either law or politics. For Loughlin, public law is not monopolised by the legal system but is a deeply political activity[57]. Indeed, Loughlin advocates an approach to public law that is capable of capturing the internal complexity of modern law and government *and* the interaction between the

[55] Loughlin, *Public Law and Political Theory* (n 44) 257.
[56] Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 The University of Toronto Law Journal 361, 400.
[57] Loughlin, *Public Law and Political Theory* (n 44) 259.

practices of law and politics in the effective governance of the State[58]. This hybrid conception of the function of governing cannot cope with the theoretical demands of Luhmann's autopoietic theory.

While an explicitly functional account of law may be absent in Loughlin's later work, I argue that its influence can be identified in Loughlin's explanation of public law as the actual practices of government that maintain political unity. This is important because it reveals a methodological approach to constitutionalism that focuses on governing process at the expense of social conflict. The functional method gives insufficient weight to societal conflicts because of an overreliance on internal processes that allow the constitutional order to reproduce itself. For instance, functional processes universalise conflict by responding to its content according to law's available resources which excludes the normative demands or agency that drives social struggles. In other words, by approaching constitutionalism as a practice done by government, we will see that Loughlin leaves limited space for the active role played by social conflicts in constitutionalism.

In *The Idea of Public Law* (2003) and *Foundations of Public Law* (2010), public law is the function that governs/organises the State and ensures the preservation of political unity[59]. As Loughlin puts it:

> As a general phenomenon, the activity of governing exists whenever people are drawn into association with one another, whether in families, firms, schools, or clubs. In order to maintain themselves, and certainly to be able to develop and flourish, such groups must establish some set of governing arrangements, however rudimentary. The formation of governing arrangements is a ubiquitous feature of group life. Whatever the type of governing arrangement established, an iron law of necessity holds sway. Since it is simply not possible for associations of any significant scale and degree of permanence to be capable of governing themselves, the business of governing invariably requires the drawing of a distinction that has become fundamental to the activity: the division between rulers and ruled.[60]

Conflicts are understood as an inevitable consequence of a political community. They are presented in Loughlin's account as a challenge to political unity which requires government to be capable of ordering demands and threats, and to secure the future of a constitutional State. The management of conflicts occurs through a representative relation whereby the

[58] Wilkinson and Dowdle (n 41) 4.
[59] ibid 6.
[60] Loughlin, *The Idea of Public Law* (n 21) 5.

government has a duty to effectively perform its function through the provision of social needs and protection of the community from external threats. We can also see how the legitimacy of government flows from its capacity to effectively exercise these functions:

> Political power is thus derived from those tensions and conflicts which exist in all collectivities. These tensions must be properly handled, and it is for this purpose that the practices of politics have evolved.[61]

In Loughlin's account the legitimacy of government has come to be defined by the concepts of 'political right'. Loughlin's account of political right is a 'political jurisprudence'[62] that explains the political authority of law which, as we have identified, is central to Loughlin's project. The idea of political right extends beyond positive law and identifies the range of governing practices that respond to conflicts productively thereby securing political unity and reproducing its legitimate authority to rule. I do not intend to explore the detail of this complex conceptual account of legitimate authority[63], our task is to recognise how this conception of public law is concerned principally with the function of ordering conflicts. Wilkinson and Dowdle capture the focus in Loughlin's public law on legitimacy and management of conflict:

> For the governing process to remain in productive tension, converting conflict into manageable contest, an overall unity of purpose and character needs to be established and maintained through representational devices. And the dominant mode this takes in the context of modern public law is the unity of the State and autonomy of the political on which its power and authority rests. The arrangements of public law thus contribute to the maintenance of the State as a political unity, one that discharges political responsibility to its subjects.[64]

In order to comprehend Loughlin's constitutionalism, we must recognise his conception of public law as the activity of governing and how its function – ordering – provides an

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[61] ibid 64.

[62] Martin Loughlin, *Foundations of Public Law* (OUP Oxford 2012) 2.; Loughlin's 'political jurisprudence' as public law brings together a conception of the modern State as caught between two modes of association: as a civil association of rules and an enterprise that pursues common goals. In addition to a conception of political power as both checked by this rule-based association (potestas) and the actual power of governmental resources to pursue these common projects (potentia). For Loughlin, public law is the pragmatic outcome of these tensions, where the government function of public law is directed toward the achievement of both the public need, understood as the citizens' enjoyment of political liberty, and social solidarity of the political community. See further pp.157-180 *Foundations* (2012).

[63] In *Foundations* Loughlin draws upon range of Sieyes, Oakeshott, Spinoza, Bodin and others in constructing an account of the nature of government's legitimate authority to rule. See, for example pp.159-164 and 231-237.

[64] Wilkinson and Dowdle (n 41) 6.

explanation of public law's legitimate authority. The activity of governing is the practice that orders internal antagonisms (low-intensity conflicts) and protects against external threats (high-intensity conflicts). In this sense, conflicts are visible either as a threat to social cohesion, or as a productive opportunity to effectively govern and reproduce the legitimacy of government. They are dealt with either by responding to social expectations (e.g., welfare and social reforms) or by excluding existential threats (terrorism, alternative political futures, or civil war). The appropriate response will depend upon the conflict's intensity but in any case, according to this approach, it is the government that responds by exercising its function through law.

The problem, for our purposes, is this approach contends that public law must organise modern society's many groups, including "associations, trade unions, and corporations"[65] and co-ordinate their relationship with government. This is a conception of public law grounded in the rationality[66] of government to order social conflict. While I have reconstructed Loughlin's account as holding onto a functionalism that can only present an internal perspective of governing processes and cannot capture the effect of social conflict on these processes. For Wilkinson and Dowdle, the absence of more concrete social analysis in Loughlin "betrays a residue of formalism"[67]. This refers to the fact that Loughlin's account of the political authority of law in modern societies does not provide any consideration of material social relations, such as class relations, politico-economic inequalities or entrenched interests[68]. The commonality between these two critiques is the identification of an overreliance in Loughlin on the functions of the State or a formal account of its ruling practices. In other words, Loughlin's constitutionalism presents a coherent[69] scheme of law and politics that focuses on internal ordering processes and provides only a partial view of the potentially disruptive effects of social conflict.

It is Loughlin's overreliance on the ordering processes of government that make his account monolithic and insufficiently complex to account for the ways that social struggles engage

[65] Loughlin, *Foundations of Public Law* (n 62) 459.
[66] This rationality is grounded in the prudential practice of politics. Loughlin follows Machiavelli, stating that "prudence is an ability to assess the situation and adopt the most appropriate course of action." (p.40 Loughlin 2004) This exercise in practical reason is the calculation of the best means to achieve specified ends with the minimum influence of passions or moral deliberations of right and wrong.
[67] Wilkinson and Dowdle (n 41) 12.
[68] Michael A Wilkinson, 'Public Law and the Autonomy of the Political: A Material Critique' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018) 182–3.
[69] Wilkinson and Dowdle (n 41) 9.

with constitutional structures. In Loughlin's constitutionalism social conflict appears only as a claim about public need or a threat to political unity. It does not account for the aims of civil society organising, or the capacity of political subjects to engage with governmental practices[70]. Social conflicts appear only as in a 'corporatist' sense whereby their needs or threats are managed by the government. For example, social conflicts will seek to engage strategically with legal structures and mechanisms to encourage either immediate remedies or social reforms within the legal system. Loughlin's top-down approach to constitutionalism excludes the constitutional effect of such strategic and tactical actions by social conflict and vests constitutive potential solely in the politico-legal functions of government.

Political struggles have played a key role in the history of social transformations in the modern State and social movements continue to challenge governing processes. And yet, under Loughlin's account we cannot contend the role of any such social struggles in civil society that are capable of self-organizing and struggling toward their normative objectives; instead civil society is something that produces conflicts that are simply ordered by government. To put it otherwise, the political in political jurisprudence is reduced to the functions of government and does not account for a more radical politics that is not captured by the State's ordering practices. Rancière expresses this distinction as between the logic of police which includes the legal and political systems and the practices of 'democratic' participation and the practice of politics which is that which challenges or disagrees with the present organisation of society[71]. The disagreement between the structures of the political order (police) and the social conflicts (politics) highlights the struggles for recognition that exist within society that cannot be captured by governing processes[72]. In the present case we can see that Loughlin's account provides limited space to the role of social struggles in social reproduction. Importantly, Loughlin's project does not set out to recognize the role of material social forces but is explicitly concerned with an account of political jurisprudence[73]. Nonetheless, we can recognise the absence of political and social forces that play a key role in the construction and reproduction of social, political and legal structures.

[70] Marco Goldoni, 'The Materiality of Political Jurisprudence' in Michael A Wilkinson and Michael W Dowdle (eds), *Questioning the Foundations of Public Law* (Bloomsbury Publishing 2018) 175–9.
[71] Jacques Rancière, *Disagreement: Politics and Philosophy* (University of Minnesota Press 1999) 29–37; Jean-Philippe Deranty, 'Jacques Rancière's Contribution to the Ethics of Recognition' (2003) 31 Political Theory 136, 147.
[72] Deranty (n 71) 137.
[73] Goldoni (n 70) 176.

As we can see, what is at stake for constitutional theory in determining its methodological aims is the capacity to either focus on the functions of government or to comprehend these practices whilst also giving a voice to the ways that social groups confront and use constitutional structures. My inquiry challenges top-down constitutionalism's focus on government functions and encourages a theoretical approach that expands the horizons of 'constitutive potential' to include instances of strategic action by social actors. The starting point is a shift in theoretical perspective and aim. I am not searching for the legitimate authority of constitutional functions but a better understanding of the strategic opportunity in law. In search of a more receptive constitutional method, I will move to analyse the treatment of strategic legal action by constitutional theory 'from-below'.

2 Constitutionalism-from-below: Identifying the constitutional relevance of social conflict

In this section we turn our attention to constitutional scholarship that investigates the relations between social struggles and constitutional structures. I will set a methodological approach to constitutionalism from the bottom-up that identifies the constitutional-relevance of social struggles. The identification of a methodology that is sensitive to the constitutive role of social struggles from-below is essential for our present enquiry. In the remainder of this chapter, I will argue that the commitment of constitutionalism-from-below to documenting the practices of social struggles and challenging the present limits of constitutional knowledge provides a methodology that is capable of analysing the ways that labour movements engage effectively with law.

Constitutionalism-from-below (or CfB) is the name that Gavin Anderson[74] has given to a constitutional method that identifies the role of social struggles in constitutionalism. As Anderson defines it:

> [T]he generally occluded phenomena of 'constitutionalism from below' [is] found variously in innovative governance practices in the global South, non-institutional forms of politics, and the struggles of the marginalised and relatively powerless.[75]

[74] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 901.
[75] Gavin W Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' in Upendra Baxi, Christopher McCrudden and Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridge University Press 2015) 145.

The aim of CfB scholarship is to reveal the various constitutional experiences that can be found in society. This scholarship contends that constitutionalism is shaped from the bottom-up by social forces as well as 'top down' institutional practices. This is an approach to constitutional study that inverts top-down constitutionalism's focus upon the functions of government by analysing the ways that social struggles (broadly defined) engage with constitutional structures from the 'bottom-up'. In line with my critique of Loughlin above, it argues that established conceptions of constitutionalism have failed to recognise the constitutive practices of social struggles. A bottom-up constitutionalism recognises the political power exercised by social conflicts and seeks to comprehend their role in constitutional transformation. It is committed to exploring the alternative mechanisms of realizing political aims in law and unfolding a constitutionalism that reflects the myriad of social, political, and legal forces that constitute society.

While CfB is a term coined by Anderson the work of Boaventura de Sousa Santos[76] dominates the field. In order to comprehend the contribution of this bottom-up approach to an understanding of strategic legal action in constitutional theory, we must introduce and examine Santos' commitment to a broader, socio-legal conception of constitutionalism. During the past three decades Santos has produced various conceptual innovations with each seeking to rationalise the sociological experience of law, politics and social struggle. The most important for our purposes is 'subaltern cosmopolitan legality'[77] because it centres on the experience of grassroots political actions and their relation to hegemonic legal and political institutions.

Subaltern cosmopolitan legality shifts the analytic focus of law away from hegemonic structures of transnational globalisation to sites of resistance that struggle against top-down governance, legal institutions, and rules that buttress hegemonic political ideologies. As Santos and Rodríguez-Garavito put it:

> In addition to hegemony theories that explain why global legal structures are as they are, we need sociolegal approaches capable of telling why and how they change. This entails turning our analytic gaze to plural forms of resistance and embryonic legal

[76] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 903–4; Anderson, 'Beyond "Constitutionalism Beyond the State"' (n 14) 380–1; Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 161–4; Santos, *Toward a New Legal Common Sense* (n 35); Boaventura de Sousa Santos and César A Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).
[77] Santos, *Toward a New Legal Common Sense* (n 35) 465.

> alternatives arising from the bottom the world over. This is the goal of subaltern cosmopolitan legality.[78]

This concept provides a socio-legal method of constitutional investigation that places the social experience of law and social struggle at the centre of its analysis. As the dominant conceptual account of constitutionalism-from-below, I will examine how subaltern cosmopolitan legality grounds a method capable of recognising the constitutional relevance of strategic uses of law by social movements. I will consider each of its three components and how its understanding of 'subaltern', 'cosmopolitanism', and 'legality' shape a method of constitutional analysis 'from-below'. However, a mere description of what these terms mean to their author will not sufficiently elaborate the importance of the CfB method for our present purposes.

I will explain this approach by highlighting two key concerns in subaltern cosmopolitan legality. First, the subaltern shifts the analytic focus onto counter-hegemonic struggles and their role in legal, political and constitutional transformation. This is important for our purposes because it brings the role of social conflict in constitutionalism to the fore and provides an opportunity to identify how agents engage effectively with legal and political structures. Second, the concern for cosmopolitanism is best understood as a commitment to revealing new legal, political and constitutional epistemologies. This commitment to new knowledge rejects existing definitions, concepts and theories that determine our identification of a constitutionally relevant act and bring new conceptions of constitutionalism into the frame of analysis. These two concerns underpin a method of constitutional analysis that is committed to examining the role of social struggles in constitutionalism and, importantly, it provides the framework to examine the potential effectiveness of strategic legal action.

Before we begin, let us consider an early objection to this method of legal analysis that provides an opportunity to be clear about our approach to CfB and its contribution to an understanding of social conflict in constitutionalism. For some scholars, identifying the role of the subaltern and cosmopolitan legality means relying on notions of social struggle that are insufficiently concrete in their call for alternatives to present legal and political realities, and reliance on the capacity of social actors to contest the political power of top-down constitutions. As such, these abstract approaches to legal analysis fail to provide an

[78] Santos and Rodríguez-Garavito (n 76) 12.

understanding of the precise forms of action required to contest contemporary legal and political challenges. For instance, Joel Handler has criticised postmodern legal and political scholarship for deconstructing modern society without providing definite alternative forms of action[79]. Handler praises postmodern scholarship for identifying the limitations of modern law, the existence of alternative forms of political power in society, and the fallacy of universal projects. However, the problem, Handler argues, is that deconstructive politics is "disabling"[80] because it cannot provide "belief systems, meta-narratives that allow theories of power, of action."[81] While Handler's project shares the same objective as Santos' – the identification of a transformative politics –they disagree about the forms of action that are required to achieve it and the role of scholarship in this task[82].

Santos does present his analysis in utopian terms[83] and embraces precisely the sort of deconstruction and reflexivity that Handler is sceptical about. However, Santos' criticism of modern law and concern for the conditions of social emancipation are not disconnected from concrete solutions as Handler suggests. On the contrary, as I will argue below, the importance of the CfB method lies in the identification of opportunities and effective forms of action that can respond to contemporary political challenges. In order to expand the perspective of constitutional studies it is necessary to engage in a degree of deconstructive work and move beyond the universalising impulses and exclusionary effects of top-down methodologies. The price of broadening the horizons of top-down theory may be that Santos and CfB do not provide a grand narrative about the means of legal and political transformation; however, its benefit lies in providing a method that can identify concrete emancipatory opportunities that remain under-analysed in traditional legal studies. In other words, CfB is a methodology that brings certain practices and opportunities into view precisely because it resists the temptation to impose pre-determined conceptions of the emancipatory project.

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[79] Joel F Handler, 'Postmodernism, Protest, and the New Social Movements' (1992) 26 Law & Society Review 697; Rosemary J Coombe, 'Finding and Losing One's Self in the Topoi: Placing and Displacing the Postmodern Subject in Law: Comment' (1995) 29 Law & Society Review 599.; For Coombe, the potentiality of a postmodern politics is not found in the identification of the 'South' or the oppressed but in the political practices that present opportunities for social transformation. Coombe's critique is that the postmodern analysis appears to be detached from any time, space or cultural context (599-600).

[80] Handler (n 79) 698.

[81] ibid 726.

[82] ibid 705.

[83] William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000) 200.; cf. Boaventura de Sousa Santos, 'Towards a Socio-Legal Theory of Indignation' in Upendra Baxi, Christopher McCrudden and Abdul Paliwala (eds), *Law's Ethical, Global and Theoretical Contexts: Essays in Honour of William Twining* (Cambridge University Press 2015).

2.1. The subaltern and social struggles in constitutionalism

The methodological focus on the subaltern brings social conflict into the frame of constitutional analysis and identifies the productive relation between social struggles and constitutional structures. I will set out three key elements of CfB's methodological commitment to the subaltern. First, it draws out the role of social struggles in constitutionalism and recognises the capacity of the former to engage with law from the bottom-up. Second, CfB is built upon a scepticism about modern law and government's capacity to deliver social reforms. This scepticism recognises the historic role of social struggles in constitutional transformations, from the presentation of demands and protests to strategic legal mobilisation. Third, it highlights an opportunity to identify the ways that social conflicts engage with constitutional structures through legal struggle. By identifying the productive tension between top-down regulatory practices and the use of legal tools by the agents of social struggles, CfB encourages our concern for the potential effectiveness of strategic legal action.

Our comprehension of 'subaltern' in Santos should be placed within the context of his concern for the experience of law in the 'South'. The concern for the subaltern encapsulates the shift in perspective from top-down to bottom-up or, as Santos prefers, from North to South:

> [T]he South express[es] not a geographical location but all forms of subordination (economic exploitation; gender, racial, and ethnic oppression; and so on) associated with neoliberal globalisation. The South, in short, denotes the form of suffering caused by global capitalism. In this sense, the South is unevenly spread throughout the world, including the North and the West.[84]

This 'subaltern' perspective informs a method that is capable of recognising emerging social phenomena, such as social movements, because its analytic lens is focused upon acts of legal and political resistance in society. These social struggles are understood to engage in a diverse range of 'constitutional' functions, including: Providing legal services to political groups, mobilising advocacy for rights protections and against rights abuses, and instituting their own legal and political systems. This constitutional method provides an opportunity to

[84] Santos and Rodríguez-Garavito (n 76) 14.

analyse the potential effectiveness of the interaction between grassroots social struggles and constitutional structures.

Social movements bring into view the role of agency in constitutional analysis that is dominated by structures and functions of government[85]. The social movement perspective moves away from the limits of institutional analysis and embraces the experience of social movements that widen our conception of constitutionalism. Indeed, Stammers has drawn on the creative interaction between agency and structure in the development of human rights norms 'from-below'[86]. For Stammers, social transformations are not the result of uniform structural processes but are also the product of contingent and complex social processes[87]. By highlighting the ways that social movements both resist legal and political norms and struggle for reforms to institutional structures we can begin to see the agency of civil society groups in social transformation. Importantly, this highlights the potentiality of social struggles which encourages our bottom-up perspective on the productive relation between conflict and ordering processes that cannot be seen in top-down constitutional analysis.

Santos' concern for the subaltern informs a socio-legal perspective that aims to analyse the social experience of social struggles and their relation to legal and political structures. This defines a method that focuses on 'counter-hegemonic' struggles and draws attention to the constitutive potential of social struggles at the grassroots level. Santos' methodological concern for social struggles is built out of a scepticism[88] about modern law and its capacity to deliver social emancipation.

The desire to shift the investigative focus to the constitutive role of social struggles can be summarised by identifying the dissonance between the promise and experience of modern law. If the modern constitutional State is premised on popular sovereignty expressed through parliaments, the reality of parliamentary democracy has been far from an idealised notion of democratic rule by the people. Santos draws on critical readings of modernity that capture the uneasy accommodation of a civil society replete with political demands and modern law's failure to represent social demands through regulation. I do not intend to recreate

[85] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 905–6.
[86] Neil Stammers, *Human Rights and Social Movements* (Pluto Press 2009) 38.
[87] ibid 27. On the relation between structure and agency see further 24-39.
[88] Santos, *Toward a New Legal Common Sense* (n 35) 39–61.; Twining (2000) at 197 has summarised this approach as: "Santos's standpoint is that of a sociologist and social theorist advancing a thesis about the breakdown of modernity and the emergence of a new 'paradigm'."

Santos' historical reconstruction of the modern State's failure to address social needs and it is beyond our present task to provide a more detailed examination of the relevant literature[89]. Instead, for the purpose of comprehending Santos' State scepticism, I will draw out three charges against modern law that are central in his analysis.

First, the modern State's use of law was developed as a rational tool of government that maintained political unity[90], a phenomenon that is captured in Weber's conception of rational-legal authority and the development of the modern bureaucratic State[91]. As such, law in the modern State is understood as an instrument of government as opposed to a tool of social emancipation or channelling political demands of civil society. Second, modern law facilitated the State's foundational commitment to capitalist interests. Law developed as a means to protect private property and guarantee contractual obligations that facilitated trade and capital accumulation. This was, of course, qualified through social reforms that reached their zenith in the post-war 'welfare State' but these are ultimately seen as secondary to the entrenched interests of capital in the liberal State[92]. Third, the collapse of State regulation since the 1970s has facilitated the organisation of social life according to market-based logics and the absence of meaningful checks and balances on capitalist interests whose practices have resulted in vast social and economic inequalities in the global North and South[93].

This brief historical overview of modern law guides Santos' scepticism about the State's capacity to re-organise social life in response to contemporary challenges. To be clear, Santos does not criticise State law on the basis of a romanticised notion that law ought to be the product of the 'will of the people', but highlights law's preoccupation with the self-reproduction of legal authority, enabling capitalist interests and, State law's more recent retreat from the site of social and economic regulation[94]. It is the lack of redress mechanisms for citizens (and non-citizens) and State law's seeming inability to confront the exclusionary effects of capitalism that lead Santos to consider the capacity of social struggles to re-

[89] Poggi (n 7); Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press 1978); Alan Hunt, *The Sociological Movement in Law* (The Macmillan Press Ltd 1978).; See also Ellen Meiksins Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (Verso Books 2016); Nicos Poulantzas, *State, Power, Socialism* (Verso Books 2014).
[90] As per Loughlin's public law in section 1 above.
[91] Weber (1978) in Santos, *Toward a New Legal Common Sense* (n 35) 41.
[92] ibid 40–51.; For a detailed history of this trajectory see Poggi (1992), Ch.5 and 6.
[93] ibid 51–61.; On the rise of market-based logics and the absence of law, see Emilios Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (2013) 14 German Law Journal 2005.
[94] For an example of the effects of the decline in regulatory systems and corporate governance in Germany in particular, see Streeck (n 10) 77–87.

politicise the content of law and law-making practices. In other words, it is the historical social experience of State law and its failures with respect to social emancipation that motivate Santos to call for 'a new legal common sense'.

These criticisms do not mean that the CfB method rejects the Nation State as a site of social emancipation. According to Santos, to abandon law on the basis of its historical inadequacies fails to recognise its potential to provide the means for social transformation. This capacity for social movements to transform social experience through legal and political reforms at the State level has been evidenced through the 20th Century with welfare reforms, public education and labour protections. Indeed, the CfB method highlights the role of the civil rights movement in the promulgation of the Civil Rights Act, the Suffragettes/Suffragists in the achievement of universal suffrage, the trade union movement is vast improvements to labour standards, and so on. As such, Santos insists upon the importance of law as an emancipatory tool. It is the aim of CfB scholarship to identify the opportunity, effective practices and capacity of social struggles to achieve positive legal transformations.

For Santos, and CfB, the failures of modern law necessitate a turn to the subaltern that struggles against inadequate social provision and challenges governments to deliver social reforms. The subaltern is important because it reveals a subject who, through its actions, has engaged productively with constitutional structures. Rather than approaching constitutionalism as a top-down practice that delivers social reform through the performance of its functions, the focus on the subaltern identifies the role of social forces in bringing about legal and political transformations.

The problem with modern law and its failure to deliver social emancipation is, for Santos, largely attributed to a process of depoliticisation[95]. This is a process through which political

[95] The depoliticisation of modern law is attributed to its three factors. First, once law was monopolised by State regulation became evermore premised upon scientific knowledge. Santos spends a great deal of time exploring the role of science in social regulation. His argument proposes that due to the complex task of managing modern societies the cognitive-instrumental rationality of science replaced politics as the field for determining the scope of emancipation. As such, politics was reduced to scientific calculations about the regulations required to manage social conflict. Accordingly, regulation became determined not by the political aspirations about increasing social expectations, but the function of governance performed by the institutions of government in the modern State. Second, law was depoliticised by the distinction between State and civil society and motivates Santos' declaration that: "emancipation ended up absorbed by regulation." This contends that law became the instrument of regulating civil society, which maligned any shared concern and interaction about social demands in favour of managing social conflict and reproducing legitimacy. Third, law's monopoly over social regulation in the Nation State was negatively affected by the reduction of legitimacy to legality. The positivist evaluation of legitimacy according to formalist conditions limited national legal system's concern for the substance of regulation. See further p.7, 39-44, and 47-49 Santos (2002).

demands from civil society have been side-lined in favour of policy determined by scientific calculations and an over-emphasis on the reproduction of social order. Constitutionalism-from-below is the reaction against this process and re-orients the constitutional imagination toward social conflicts and movements that seek to repoliticise the content of law and the process of law-making.

The identification of the subaltern in the determination of law can be seen in Santos' conception of the tension between regulation and emancipation. For Santos, law is caught between the following tension: Regulation ←→ Emancipation. Regulation means "the set of norms, institutions, and practices that guarantee the stability of expectations"[96]; emancipation refers to the aspirations and practices that seek to transform social experience according to particular aspirations. There is, of course, a tension between regulatory practices and emancipatory aspirations which presents both an opportunity and limitation for social struggles engagements with law:

> The success of emancipatory struggles is measured by their capacity to constitute a new political relationship between experiences and expectations, a relationship capable of stabilising the expectations on a new and more demanding and inclusive level. […] The success of emancipatory struggles resides in their capacity to transform themselves into a new form of regulation[97].

This provides a schema through which social movements' engagements with law are to be understood, it comprehends the potentially productive relation between law and civil society. Santos argues that the promise of law as an instrument for emancipation can only be reclaimed when there is a productive tension between regulation and emancipation. The productive tension is the practice of politics whereby social regulation is determined not by science but political conflict. While top-down theory provides a coherent account of regulation, CfB is committed to uncovering the important interaction between regulation and social struggles. Indeed, this call for politics identifies the potentially effective role that social struggles can have in the determination of regulations.

The methodologically important contribution here is to centre on the role of social struggles in constitutionalism. CfB brings social conflict within the frame of analysis in constitutional theory and enables a more detailed conception of the ways social struggles engage with law.

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[96] Santos, *Toward a New Legal Common Sense* (n 35) 2.
[97] ibid.

Once we recognise the importance of the relation between social struggles and law, it is possible to identify their potentially productive role in the enforcement of piecemeal regulations to the delivery of wholesale reform. In the remainder of this thesis we will draw on this methodological focus on social struggles to develop a conception of the potentially effective ways that labour movements engage with law.

2.2. New epistemologies of constitutionalism

The second key aspect of the CfB methodology is its commitment to identifying and documenting alternative constitutional practices that have been excluded by top-down constitutionalism. This method rejects the pre-dominance of the Western legal tradition and aims to shift the analytic lens of constitutional theory onto previously unseen constitutional practices. I will unpack CfB's commitment to expanding the range of constitutionally-relevant practices. I argue that by focusing on those subjects, practices and experience of constitutionalism that have been excluded from top-down theory, CfB's methodological frame encourages my concern for labour movement's strategic engagements with law and politics. The structure of this discussion will begin by explaining Santos' specific approach to 'cosmopolitanism' and how this underpins a methodological perspective that is committed to highlighting the absence of constitutional knowledge. This will lead into the importance of Santos' symbolic enlargement of absence and exclusion for the purpose of drawing attention to emerging sociological phenomena that ameliorate our understanding of the relation between social struggles and law.

Subaltern cosmopolitan legality is described as an oppositional variety of cosmopolitanism[98]. A key part of its 'oppositional' character is its rejection of cosmopolitanisms that are understood to impose pre-determined conceptions of the cosmopolitan project. The principle concern here is that a cosmopolitanism that imposes universal conditions, or an ideology that determines what is emancipatory, civilising or integral to the human condition risks presenting a limited conception of cosmopolitanism. An example provided by Santos is that of Christian missionaries whose 'emancipatory' project was in fact an imperialist project that subordinated populations and imposed Western ideals at the expense of indigenous or other local knowledge[99]. Western law is seen to commit a similar error as its imposition of human rights presupposes that there are no non-

[98] Santos and Rodríguez-Garavito (n 76) 14.
[99] Santos, *Toward a New Legal Common Sense* (n 35) 269–270.

Western determinations of human dignity[100]. And, as a result, the cosmopolitanism of universal human rights standards can subordinate indigenous conceptions of collective rights to Western notions of individualism and environmental preservation[101]. This concern influences Santos approach to the modern State where, as we have seen, the emancipatory promise of liberal constitutionalism is collapsed into regulation and the failure of social reform. Rather than tying his method to any pre-defined cosmopolitan project Santos argues for a methodology that is committed to transcending existing boundaries of the constitutional. In other words, the 'oppositional' approach rejects any prior categorisation of cosmopolitanism in favour of a method that includes practices and experiences that have been excluded by top-down constitutionalisms.

The unique and challenging nature of Santos' cosmopolitanism can be seen in the difficulty for other cosmopolitanisms to break free from the influence of the Western legal tradition. To illustrate this point, we can draw on Gavin Anderson's insightful account of the influence of methodological nationalism on contemporary constitutionalisms.[102] Anderson presents Matias Kumm as a representative example here, whose scholarship has recognised the pluralised and fragmented nature[103] of contemporary constitutionalism. Kumm's analytic focus shifts attention away from the Nation State and includes the range of constitutional forms at the transnational level including international law, global governance mechanisms and Global Administrative Law[104]. However, for Anderson, this "cosmopolitanism may pluralise the sites of constitutionalism, but it does not necessarily pluralise our understanding of the constitutionalism which unfolds there."[105] Despite the move away from the Nation State the methodology remains grounded in the tradition of national constitutionalism. This means that the normative structures of transnational law remain tied to rights discourses, the role of courts in dispute settlement, the importance of common (demo-liberal)

[100] Santos and Rodríguez-Garavito (n 76) 14.
[101] César A Rodríguez-Garavito, and Luis Carlos Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilisation: The Struggle of the U'wa People in Colombia' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).
[102] Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 154–8. For example, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); See further, David Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream Teaching from the Left: A Conference at Harvard Law School: Part V: International Law' (2006) 31 New York University Review of Law & Social Change 641.
[103] Kumm (2009) 262 in Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 156.
[104] ibid 156–7.
[105] ibid 157.

communicative standards[106], and the general influence of French and American constitutional traditions.[107] In contrast, the cosmopolitanism of constitutionalism-from-below is committed to:

> [B]roadening what is encompassed within constitutional discourse beyond formal or even functional indicia. Nothing is ruled in or out as to the possible reach of the constitutional axes of inclusion and exclusion, and so there can be nothing immutable about the subject of constitutional discourse.[108]

It is, at its root, the attempt to document the practices of those that struggle against social exclusion and demand a form of inclusion that has been denied by the structures of modern law and politics.[109] For our purposes, this commitment to uncovering what has been immutable in constitutional discourse presents an opportunity to counter the exclusionary effects of top-down constitutionalism. And, as a result, begin to analyse the subjects and practices of social movements as constitutionally-relevant.

In order to better comprehend the opportunity presented by Santos' methodological commitment to alternative constitutional knowledges and its aim to transcend the limits of the Western legal tradition, let us consider a key criticism of his approach.

> Santos's work is important because it presents a much broader and more complex view of legal phenomena than are to be found in orthodox Western legal theory and scholarship. His work opens up new perspectives, and fresh lines of enquiry. This vision seems to be directly related to the rejection of orthodoxies that have dominated 'modernist' treatments of law. However, to subvert an orthodoxy or provide a fresh perspective does not necessarily need a change of metaphysics or epistemology or a new 'paradigm'.[110]

For William Twining, Santos' postmodernism appears to embrace a metaphysical position that draws a distinction between modern epistemologies (Western legal tradition) and the epistemologies of the south[111]. Rather than viewing all scientific knowledge as part of a whole, Santos is read by Twining as calling for competing epistemologies of the world. For Twining, this is a postmodern trope that should be rejected because all scientific knowledge

[106] See for example, the capacity for co-operation between post-national constitutional structures in Krisch (n 39).
[107] Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 155.
[108] ibid 160.
[109] Santos, *Toward a New Legal Common Sense* (n 35) 460.
[110] Twining (n 83) 210.
[111] ibid 208.

contributes to one epistemological field of science within which there is room for critical voices[112]. This criticism leads Twining to challenge Santos' assertion that his call for 'epistemological openness' is 'paradigmatic'. For Twining, Santos' contribution of previously excluded perspectives is important but remains within the existing paradigm of legal knowledge[113].

Twining's argument that there is one paradigm of scientific knowledge is difficult to disagree with, however, to focus on this issue risks downplaying or missing the radicality of Santos' provocation. While Twining suggests that Santos is at his best when read as challenging existing knowledge with new scientific knowledge[114]; we must recognise an important symbolic and methodological point in Santos' claim about the distinction between the scientific and non-scientific and the call for new constitutional knowledge. Santos' symbolic enlargement of exclusion places an analytic focus on the practices and experiences of law and politics that have been excluded from traditional 'Western' legal studies. In order to comprehend Santos' specific methodological approach to excluded constitutional experiences, I will summarise three of subaltern cosmopolitan legality' features (or, 'procedures'): The sociology of absences, the sociology of emergences, and ecology of knowledges[115]. Each of these factors will appear familiar as they have informed our preceding analysis of Santos' method, the following draws out its specific aims and distinguishes it from more traditional approaches to legal studies.

First, the sociology of absences, Santos claims, is concerned with uncovering what is presently 'absent'[116] from scholarly knowledge by focusing upon those social experiences that have, as yet, been unconsidered or excluded by scientific knowledge. For Santos, the absence of knowledge stems from the exclusionary effects of qualifying criteria that include and exclude social phenomena from scientific evaluation[117]. The predominance of Western knowledge means that its analytic tools exclude or render 'invisible' that which does not conform to its standards and relegates non-Western knowledge to the realm of the non-existent[118].

[112] ibid.
[113] ibid 209.
[114] ibid 210.
[115] Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge 2015) 164.
[116] ibid 181.
[117] ibid 167.
[118] ibid 172.

Second, the sociology of emergence is committed, in its analytic approach, to the possibility that something can be understood as a legal practice[119]. This means abandoning preconceived conceptions about what is legal (or constitutional) and holding open the possibility about the form and nature of legal practices. This underpins CfB's commitment to empirical analysis of practices and forms of law that tests the limits of current legal knowledge[120]. Third, the ecology of knowledge can be summarised as a method that seeks a diversity of conceptions by combining scientific with non-scientific knowledge. This brings social experience into the frame of analysis and, in turn, contributes to the internal plurality and complexity of scientific knowledge[121]. Plurality here refers to the multiplication of diverse understandings that confront reductive accounts of social experience in scientific knowledge. The aim is to generate rich discussion between a range of knowledges that provide an opportunity to learn about alternative ways of doing that may, in turn, inform new approaches to law and social transformation[122].

In response to Twining's critique we can see that Santos' argument is not so much that there are different scientific epistemologies but that law has been understood by both scientific and non-scientific epistemologies[123]. This draws attention to the fact that there are legal and political knowledges outside of those given by the Western legal tradition[124]. And, for Santos, we cannot comprehend alternative, 'southern' or excluded experiences of law if we subscribe solely to a 'scientific knowledge of law'. In this sense, the claim that there are epistemologies outside of the Western legal tradition serves as a symbolic enlargement that identifies the alternative ways that grassroots movements engage with law and politics[125]. In other words, it may be that there is one scientific knowledge but by categorising the legal tradition as 'Western' and 'scientific' Santos shines a light on the exclusion of multiple legal and political forms and experiences. Furthermore, there is, within Santos' approach and contrary to Twining's proposal, an implication that the Western legal tradition cannot include all forms of 'legal' knowledge owing to its normative commitments to certain social

[119] ibid 182–7.
[120] Austin Sarat, 'A Prophecy of Possibility: Metaphorical Explorations of Postmodern Legal Subjectivity' (1995) 29 Law and Society Review; Beverly Hills, Calif. 615, 619–20.
[121] Santos, *Epistemologies of the South* (n 115) 189.
[122] ibid 190.; On the shared concern with other legal traditions, e.g., TWAIL, see José-Manuel Barreto, 'Contextualising Boaventura de Sousa Santos's Post-Colonial Legal Theory - Reviews on Boaventura de Sousa Santos , Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition (New York: Routledge, 1995)' (2017) 13 International Journal of Law in Context 558., Zoran Oklopcic, 'The South of Western Constitutionalism: A Map Ahead of a Journey' (2016) 37 Third World Quarterly 2080.
[123] Santos, 'Towards a Socio-Legal Theory of Indignation' (n 83) 130.
[124] Santos and Rodríguez-Garavito (n 76) 14.
[125] Santos, 'Towards a Socio-Legal Theory of Indignation' (n 83) 129.

interests. Therefore, the role of alternative epistemologies in Santos also recognises and highlights the inclusionary and exclusionary effects of modern law. We will return to and develop the significance of this point for legal strategy in chapter two when we consider law's deficit of task.

While Santos and Twining have praised one another's approaches and they share a commitment to broadening the scope of legal knowledge by analysing either epistemologies of the south[126] or southern voices[127]; there is a key distinction in their methodological approach to legal studies. Santos' approach to law from the 'bottom-up' is more radical than Twining's because it is committed to a re-conceptualisation of law using experience and knowledge that has been excluded from the Western legal tradition[128]. Whereas Twining is committed to advancing legal theory and expanding the canon of Western jurisprudence[129]. In other words, Twining and Santos diverge because the former is committed to modern law and the latter sees it as part of the problem[130]. For our purposes, it is Santos' radical commitment to the challenges presented by modern law to emancipatory social struggles that make it an important methodological frame. This method aims to provide a socio-legal constitutionalism that details how social conflicts interact with and contribute to the practices of constitution. It is this commitment to new knowledges and a focus upon counter-hegemonic actors that make constitutionalism-from-below an intriguing approach for scholars interested in the constitutional capacity of labour movements. In sum, it is a call to adopt an alternative methodological perspective on legal practices that draws out the relation between social struggles and law that have been excluded or under-estimated in traditional legal theory.

The final issue to consider is the types of 'legality' that are under investigation in subaltern cosmopolitan legality. Given its commitment to the sociology of absences, emergences, and ecology of knowledge this method takes a broad approach to the identification of legal actions by social struggles[131]. The 'legal' aspect of SCL seeks to extend a conception of legal

[126] Santos, *Epistemologies of the South* (n 115).
[127] William Twining, *Human Rights, Southern Voices: Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi* (Cambridge University Press 2009).
[128] Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 150.
[129] Twining (n 83) 198.
[130] Anderson, 'Towards a Cosmopolitan Pluralist Theory of Constitutionalism' (n 75) 153.
[131] Hans Lindahl has described the 'emergence' of alter-globalisation movements as fundamentally a 'retaking' or reappropriation of space. See Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (1st edn, Cambridge University Press 2018) 110.

knowledge and practice that is capable of accounting for the ways that subaltern movements engage with law. In Santos and Rodríguez-Garavito's words:

> [S]ubaltern cosmopolitanism calls for a conception of the legal field suitable for reconnecting law and politics and reimagining legal institutions from below.[132]

In general terms, a legal system determines legality when it includes and excludes certain actions by classifying them as either legal/illegal. Santos does not wade into these classical debates about *how* a law can be legitimately recognised as a law in a Western legal system. For instance, whether legality should be a merely positivist determination[133] or whether legality is tied to substantive principles of a given legal culture[134]. Subaltern cosmopolitan legality is not concerned with identifying an absolute mechanism for determining valid law. The concern for legality in SCL is centred on a politics of legality that questions the ascription of legal rights to certain acts or persons and the criminalisation of others. As a type of legal action, SCL approaches law as either a tool for political struggles to combat social exclusion or, considers the possibilities and examples of 're-imagining' legal institutions through practices from below.

Importantly, for our purposes, SCL's approach has recognised the use of strategic legal action but, this has not been its sole concern. The method has diverted the majority of its energies into the study of alternative legal orders and the capacity for political movements to realise counter-hegemonic institutions and governing practices. Case studies detailing acts of self-determination and autonomy have come to dominate constitutionalism-from-below scholarship. For this reason, I will draw a distinction within the CfB method between that which does and does not aid our investigation into strategic legal action.

The literature has produced multiple case studies that explore the ways that social movements have challenged the present distribution of legality in various jurisdictions[135]. The case studies have taken two clear and distinct paths. On the one hand, the case studies have analysed either emergent legal orders that uncover innovative governing practices and political struggles for self-determination. For example, Santos' investigation into the dispute

[132] Santos and Rodríguez-Garavito (n 76) 15.
[133] For example, Lon Fuller, *The Morality of Law* (Yale University Press 1969); HLA Hart, *The Concept of Law* (OUP Oxford 2012).
[134] For example, Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 Oxford Journal of Legal Studies 1; Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (Verso Books 2017) 3–109.
[135] Cf. Coombe (n 79).

resolution and prevention mechanisms of the Pasargada Residents' Association, an unofficial (non-State) legal system in a Brazilian favela[136]. And, Santos' analysis of participatory budgeting practices in Porto Alegre, an example of innovative governing practices by a relatively autonomous citizen assembly that presents its own budget proposal to the city's legislature.[137]

On the other, they have detailed the ways that social movements challenge existing legal rules by engaging in strategic legal action. For example, Rodriguez-Garavito's case study that documents a coalition of anti-sweatshop movements and TNCs and their use of international labour rights[138]. In addition, the U'wa people's struggle against oil-drilling in their territory[139] whose use of collective rights to territory, nature, and cultural defence provide important insights about strategic engagements with legal and constitutional norms.

The former set will not be considered further in these pages because their overriding focus on autonomy[140] and pluralism leaves little or no space for the role of strategic legal action. I will focus on the latter as it provides a methodology that holds onto the effective potential of strategic legal action at the State level. The commitment to constitutional knowledge provides an important opportunity to identify the ways that social struggles confront legal and political structures and to re-define our understanding of the productive relation between law and social forces. I will return in the next chapter to evaluate in detail CfB's lessons about the constitutive capacity of strategic legal action.

3 Conclusion

The aim of this chapter has been to identify a methodological approach that is capable of recognising the potentially effective role of social conflict in constitutionalism. I have argued that such action by social struggles tends to be obscured in constitutional theory owing to

[136] Santos, *Toward a New Legal Common Sense* (n 35) 100.
[137] Boaventura de Sousa Santos, 'Two Democracies, Two Legalities: Participatory Budgeting in Porto Alegre, Brazil' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005) 310.
[138] César A Rodríguez-Garavito, 'Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).
[139] Rodríguez-Garavito, and Arenas (n 101) 261.
[140] José-Manuel Barreto, 'Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice' (2014) 21 Indiana Journal of Global Legal Studies 395.; See further A Dinerstein, *The Politics of Autonomy in Latin America: The Art of Organising Hope* (Springer 2014).

narrow top-down methodological perspectives. The top-down perspective privileges government as the sole agent of constitutionalism and rationalises all legal and political actions through the practice of governing. For example, Martin Loughlin's constitutionalism focuses on the governing practices that manage social conflicts and reproduce the legitimate authority of government. Loughlin's reduction of constitutionalism to governing provides an internal perspective on the practices of constitution, but it cannot account for the potentially disruptive effects of social conflict. There are social forces that do not simply leave constitutional structures alone but actively engage with and challenge the processes of societal reproduction. The significance of these actions cannot be documented from a methodological perspective that views social conflicts as either a threat to the political community or a demand about public needs.

In search of a suitable method, I have argued for a renewed commitment to constitutionalism-from-below that brings legal strategy and the role of social struggles into the methodological frame. Constitutionalism is an explanation of the practices of constitution and the CfB method expands the range of constitutionally-relevant practices. If Loughlin's constitutionalism is the practice of State-building by government, bottom-up constitutionalism focuses on the ways that social struggles intervene in the functions and structures of government and contribute to the processes of social reproduction. It is a method committed to uncovering the relation between constitutional government and social conflicts that is both antagonistic and productive. This is facilitated by an expansive approach to constitutionalism that is not limited to government functions but includes the experiences of social struggles engaged in legal and political transformation.

This perspective is built upon two key methodological commitments. First, a commitment to the study of the practices of social struggles as constitutionally-relevant. CfB uncovers the historical role of social struggles in the achievement of social, political and economic rights and rejects the notion that government is the sole agent of constitutional transformation. Importantly, it locates the productive relation between social struggles and the structures of law and politics. This highlights the potentially effective role that social struggles can play in the determination of law and encourages our investigation into the ways that labour movements engage with law.

Second, the CfB method rejects the limited conception of top-down constitutionalism and is committed to uncovering new constitutional knowledges through the study of the legal and

political practices of excluded populations. This means expanding our knowledge of constitutionalism by studying the ways that social struggles effect legal and political transformation. A central methodological insight is the importance of empirical investigation to a socio-legal constitutionalism.

Constitutionalism-from-below provides a perspective from which the potential effectiveness of strategic legal actions by labour movements can be become a subject of constitutional analysis. The CfB method is committed to studying the ways that social struggles engage with constitutional structures and, to building a comprehensive account of constitutionalism that includes both internal ordering and effects of social forces. Importantly, as a socio-legal method committed to bringing together conceptual and empirical study it provides a suitable perspective from which to situate our analysis of labour movements. This thesis will draw on this methodological approach by bringing together both conceptual accounts of effective legal strategy and empirical legal analysis. In the next chapter we will consider in greater detail CfB's conceptual and empirical treatment of the ways that social struggles engage effectively with law.

Chapter 2. Constitutionalism-from-below as strategic opportunity

The aim of this thesis is to investigate the constitutive potential of labour movements' strategic and tactical engagements with law. In chapter one we examined the key methodological commitment of 'constitutionalism-from-below' (hereafter CfB) to understanding the constitutive nature of legal and political practices by grassroots social struggles. The aim of the present chapter is to synthesise important lessons about the effectiveness of legal practices 'from-below' in the CfB literature and to identify the issues that require further elaboration in the remainder of this thesis.

The chapter is divided into two parts. In the first, I reconstruct the treatment of legal strategy in CfB and argue that Santos provides four key insights. First, Santos recognises the importance of social struggles' engagements with legal systems and places legal strategy within the scope of the CfB literature. Second, Santos sets legal mobilisation within the context of social struggles' wider political intentions. This recognises how legal action will be used as a tool to achieve a social struggles' political aims. Third, Santos' legal pluralist approach is alive to the many facets and sites of legal regulation that could be more accommodating of social struggles' legal claims and capable of providing effective protections. Fourth, a conceptual analysis of law introduces the strategic opportunity that resides in law's abstract nature and provides an introduction to the jurisgenerative capacity of social movements. This final insight identifies the tension between law's excess of meaning and deficit of task from which we will draw out an understanding of the opportunity and limitation that defines social struggles' engagements with law.

In part two, our evaluation moves to an internal critique of CfB's conception of legal strategy that builds on the importance of CfB's methodological approach by exposing its current limitations. I identify three concerns that limit the explanatory capacity of CfB in relation to contemporary labour movements and legal mobilisation. First, Santos' ideological commitment to post-modernity leads him to embrace State scepticism in a way that diverts attention away from the range and significance of law's strategic opportunity. I argue that Santos' critical approach to legal mobilisation is inattentive to legal tools that might be profitably deployed by social struggles 'from-below'.

Second, CfB's insights are important but limited to an abstract account of the ways that social struggles engage with law. We require a sobering analysis of the ways that legal arguments can be mobilised by social struggles. Drawing upon CfB's methodological commitment to empirical study, I will bring together its conceptual insights with empirical legal analysis to provide an account that is sensitive to the contextual factors that will affect legal mobilisation 'from-below'.

Third, the decision to underplay the significance of labour as a political subject or protagonist of social transformation in constitutionalism-from-below is problematic. I argue that labour is both empirically and normatively absent in the current constitutionalism-from-below literature. The absence is normatively problematic because labour is a field of human activity that carries great engagement and investment, and to ignore it from field of social struggle diminishes its significance. The absence is empirically problematic because it is at odds with labour's historical and contemporary role in the fundamental social struggle between capital and labour. I will set out the treatment of labour in CfB and argue for the need, in subsequent chapters, to provide a conceptual and empirical analysis of the ways that labour has engaged in effective legal strategy. This will take the form of a realist conception of legal mobilisation that identifies and evaluates labour's engagement with legal and political practices 'from-below'.

1 Constitutionalism-from-below and legal strategy: Four insights

In *Toward a New Legal Common Sense* Santos set out eight theses of subaltern cosmopolitan legality (hereafter, SCL)[141]. As we have seen in chapter one, SCL describes the legal and political struggle for social emancipation by excluded social groups. The theses present an understanding of the ways grassroots political organisations engage with law as part of a wider struggle for emancipatory social transformation. While some case studies have described the contribution of tactical litigation to political struggles[142], Santos' 'conditions of SCL is the foremost conceptual treatment of the relation between law and social movements in the CfB literature. For this reason, I draw principally from his conception of

[141] Santos, *Toward a New Legal Common Sense* (n 35) 465–471.
[142] Rodríguez-Garavito, and Arenas (n 101); Peter Houtzager, 'The Movement of the Landless (MST), Juridical Field, and Legal Change in Brazil' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005).

legal strategy as representative of the wider CfB literature. For Santos, we can identify the following eight theses:

1. 'It is one thing to use a hegemonic instrument in a given political struggle. It is another thing to use it in a hegemonic fashion.'
2. 'A non-hegemonic use of hegemonic legal tools is premised upon the possibility of integrating them in broader political mobilisations that may include legal as well as illegal actions.'
3. 'Non-hegemonic forms of law do not necessarily favour or promote subaltern cosmopolitanism'.
4. 'Cosmopolitan legality is voracious in terms of the scales of legality'.
5. 'Cosmopolitan legality is a subaltern legality targeting the uncivil and the strange civil society[143].'
6. 'As a subaltern form of legality cosmopolitanism submits the three modern principles of regulation to a hermeneutics of suspicion'.
7. 'In spite of the deep differences between demo-liberal legality[144] and cosmopolitan legality, the relations between them are dynamic and complex'.
8. 'The gap between the excess of meaning and the deficit of task is inherent to a politics of legality. Cosmopolitan legality is haunted by this gap.'

In what follows I will evaluate how these 'theses' conceive the relation between grassroots political struggles and existing 'hegemonic' legal systems. The aim of the next section is to draw from these important insights about the ways social struggles 'from-below' mobilise effective legal strategies. These insights will be divided into four distinct claims: (i) Hegemonic law is a tool of social struggle 'from-below'; (ii) Effective legal mobilisation is reliant on the politicisation of law; (iii) Legal pluralism identifies multiple potentially effective sites of action; (iv) The abstract nature of legal rules reveals both an opportunity and a limitation.

Santos has categorised as 'hegemonic' the Western legal tradition of modernity that is grounded in the principle of State sovereignty and includes the supranational and transnational legal systems that have proliferated in post-modernity[145]. The hegemony of certain legal systems in Santos refers to the dominance of modernity and its entrenched normative interests of capitalism and liberalism[146] and structures of liberal constitutionalism.

[143] On the distinctions between the uncivil and strange civil society in Santos, see Santos, *Toward a New Legal Common Sense* (n 35) 457–8.
[144] For Santos 'demo-liberal' legality describes legal systems that protect liberty over equality and are representative of the national legal systems of modernity, ibid 470–1.
[145] ibid 71–82.
[146] ibid 39.

At its simplest, 'hegemonic law' refers to the predominance of certain legal institutions over local, indigenous or other normative orders in society. For instance, the contemporary scope of 'hegemonic' legal system includes not only States but also the European Union and the transnational global legal regimes of public and private international law. The present analysis is concerned not with the definition of a 'hegemonic legal system' but in the ways that Santos has conceived a strategic relation between social struggles for emancipation and these 'hegemonic' legal systems. In the following analysis, I will make repeated reference to 'hegemonic legal systems' or 'hegemonic law' when analysing Santos' insights. For clarity, I am principally concerned with the continued importance of State legal systems and reference to 'hegemonic' ought to be read as an insight about the State, except where otherwise stated.

1.1. Social struggle and hegemonic law

In the first thesis, Santos claims that State law, or other 'hegemonic' sites of legal authority, can enable the emancipatory objectives of grassroots actors. This places legal strategy within the remit of constitutionalism-from-below literature and identifies the potentially effective interaction between social struggles and hegemonic legal structures. The value, or importance, of engaging strategically with law is that struggles over the meaning of law or the interests that it ought to protect are central to the organisation of society. Santos' first thesis recognises that social struggles 'from-below' must engage in conflicts about the content of the constitution and the aims of legal rules. The broader issue of how social struggles might begin to confront law's meaning and challenge the vested interests that are at the heart of modern law's telos is of critical importance to this thesis and will be confronted in due course. For now, we must unpack CfB's identification of legal engagements as a strategic opportunity to pursue political objectives.

> [A]ccording to subaltern cosmopolitanism, law is not reduced to State law nor rights to individual rights. This, however, does not mean that State law and individual rights are to be excluded from cosmopolitan legal practices. On the contrary, they may be used if integrated into broader struggles that take them out of the hegemonic mould.[147]

The Western legal tradition is the target of Santos' claim about the possibility of a 'non-hegemonic use of law'. For Santos, a hegemonic view comprehends law as an internally coherent legal system that determines the scope and limits of law and rights. Law is

[147] ibid 466.

understood to be an autonomous system because its validity is determined by the internal function of each government institution[148]. The autonomy of law refers to a legal systems' monopoly over the production and content of law and rights within its jurisdiction. The challenge for social struggles is to recognise the opportunity and effective means to engage with and challenge the present content and application of law and rights.

For Santos, the opportunity resides in a 'politics of law' and/or a 'politics of rights'[149] that involves challenging law's current content of law and presenting alternative conceptions of what it ought to be. For Santos, the content of law and rights are determined and guaranteed by hegemonic legal systems, but they need not be reducible to their current form under hegemonic law. In other words, the content of law and rights are not reducible to their present determination by the legal system where the content of law is contested by social movements. This invites social struggles to present alternative interpretations of legal meaning and challenge the idea that the content of law is something determined only by the State.

Robert Cover's conception of social movements' engagements with law as a practice of 'jurisgenesis'[150], or the production of legal meaning, captures the opportunity in Santos' call to engage with hegemonic law. Cover's concepts of 'jurisgenesis'[151] and 'jurispathic'[152] highlight the tension between the opportunity to present new legal meanings and the limitation on any such re-interpretations of law. Social movements are 'jurisgenerative' in so far as they present new legal claims or propose alternative ways to interpret existing laws. Legal normativity is plural, according to Cover, and there are more interpretations of law than those given by the official legal system and backed by State violence[153]. In contrast, the concept of jurispathy explains how judges 'kill off' these alternative legal meanings. For Cover, the jurispathic tendency of courts means that certain legal meanings are recognised and others are excluded. Cover's insights about the tension between new legal meanings and law's existing normative boundaries are key issues that social struggles will have to confront and manage effectively. We will return to the importance of jurisgenesis in legal strategy in relation to the excess of meaning below (1.4). For our present purpose both Santos and Cover

[148] ibid.
[149] ibid.
[150] Robert M Cover, 'The Supreme Court, 1982 Term' (1983) 97 Harvard Law Review 1.
[151] ibid 11.
[152] ibid 40.
[153] Cover has a specific conception of nomos that refers to the normative approach taken by a social group or political movements, it is their interpretation of the law or rights. The legal meaning of a social group reflects its own 'nomoi', ibid 63.

contend that the content and aims of law are subject to competing interpretations and that State law will be a key site of this struggle over meaning.

We are given a more precise insight into the ways that social struggle could benefit from an engagement with hegemonic law in the seventh thesis. Santos suggests that in 'a period of negative social expectations' the implementation of existing rights and duties may lead to a vast improvement of social experience[154]. This is a pragmatic insight into the opportunity presented by law. Social struggles may present arguments about constitutional rights or insist on the enforcement of existing regulation. For example, it could be argued that the current provision of social welfare either fails to satisfy the government's regulatory duties or amounts to a violation of constitutional rights to healthcare, education, minimum subsistence, work, etc.

The challenge for Santos' proposal is to reconcile an understanding of law's organising concepts – coherence, autonomy, validity, etc – that play a key role in the functioning of the legal system, with the call to confront precisely these organising assumptions and insert new legal meanings. In other words, given that legal systems have a monopoly over the production of law and rights, any social struggle engaging in jurisgenesis must be capable of competently navigating the means of redress in a legal system. And, beyond competent formulation of legal claims and satisfaction of procedural requirements there are questions about the extent to which law can be used to challenge law. The precise opportunities and limitations of such strategic engagements with law are not, at this stage, detailed by Santos' theses. For now, we can comprehend that the first thesis identifies the opportunity for social struggles to challenge the present content of law and rights.

Before moving to the next insight, we must acknowledge that Santos' endorsement of the potentially productive relation between social struggles and hegemonic legal systems operates alongside a more robust belief in the long-term need for alternative legal institutions. For instance, the proposal that social struggles ought to challenge the content of law and rights in hegemonic legal systems is a precursor to his more radical call for a legal system organised around the value of social emancipation. As we have already considered, Santos approaches hegemonic law as organised around capitalist and liberal interests that have proven incapable of delivering the conditions of social emancipation. I have drawn out the strategic potential at the State level in the theses but, both Santos and CfB scholarship

[154] Santos, *Toward a New Legal Common Sense* (n 35) 470.

actively encourage the possibility that a truly counter-hegemonic use of law may reside in the construction of an alternative institution. For example, rather than challenging the property regimes of national legal systems by proposing a more re-distributive approach or contesting liberal constitutionalism's protection of capital's productive interests; CfB scholarship has tended to endorse a re-foundation of legal and constitutional orders that could be organised around the interests of subaltern populations. Therefore, we must recognise that within the first thesis there is both a claim about the use of existing law as a tool and a more radical claim that it is possible to conceive the content of law and rights outside of hegemonic semantics and imaginaries of law. For the avoidance of doubt, my analysis is concerned with CfB's treatment of social struggles from below and their engagements with State law. The effect of such State scepticism and preference for post-State institutional arrangements on Santos' conception of legal mobilisation will be dealt with in detail in part two.

Santos thus recognises the possibility of tactical litigation and remains realistic about the limits of any counter-hegemonic engagement with hegemonic law. This reveals a tension between the opportunity for social struggles engaging with hegemonic institutions and the aspiration toward autonomous counter-hegemonic institutions. This tension runs throughout Santos' treatment of social struggles and their engagement with existing legal institutions and will feature heavily in our forthcoming evaluation of Santos' approach to legal strategy.

1.2. Counter-hegemonic legal action and political mobilisation

Santos' second contribution to an understanding of legal strategy is that legal action needs to be paired with political action and seen within a broader context of political mobilisation. The second thesis accepts that State law and rights function through top-down political and legal processes, and includes a warning to social struggles about the danger of co-optation. This warning recognises the difficulty of selective engagement with law and that a social struggles' politically motivated legal arguments will be unavoidably rationalised by the internal normative structure of a State legal system. As we have seen in Loughlin, legal systems respond indirectly to social conflicts through internally coherent abstract norms. We can summarise the issue of co-optation as referring to the loss of a social struggles' political telos to the logic and meanings given by law. Legal norms provide a legalistic response to political demands and, within the legal sphere of action, a social movement's normative aims cannot be heard.

The issue of co-optation is not present in Santos' conditions solely as a warning but to suggest a means of counter-acting its potentially negative effect of legal mobilisation. Santos argues that social movements ought to politicise their legal action to resist the loss of their normative aims to legal functions and decisions[155]. In order to avoid the depoliticising effects of legal action or juridification of political claims, legal actions should be integrated within a wider political struggle. Santos claims that by politicising the current boundaries of law, a political struggle's legal mobilisation can also put pressure on the political system and encourage privileged political actors (all branches of government) to provide more inclusive legal norms.

> Once law and rights are resorted to, political mobilisation must be intensified, so as to avoid the depoliticization of the struggle which law and rights, left alone, are bound to produce. A strong politics of law and rights is one that does not rely solely on law or on rights.[156]

Santos' argument that any legal mobilisation must be set within a within a wider political movement has been widely endorsed by empirical studies in the constitutionalism-from-below literature[157]. Peter Houtzager praises the explanatory capacity of Santos' insight in relation to the strategy pursued by the Movimento sem Terra (MST) in Brazil. Houtzager documents how the MST's strategic litigation has enforced existing legislation and encouraged innovative interpretations of existing law and rights. A key part of this successful struggles has been, Houtzager argues, the MST's broad political mobilisation that is not tied to one particular legal battle:

> The movement's capacity to concentrate the talents of diverse juridical actors on defending its claims has made it an important catalyst for legal change through the juridical field. It has been able to concentrate juridical talent by pursuing a strategy that Santos (1995, 2002) argues is most likely to succeed in the counter-hegemonic use of law and rights: it integrates juridical action into broader mobilisation, politicising struggles before they become juridified, and mobilising sophisticated legal skills from diverse actors. This strategy enabled the MST to engage in […] sustained and broad litigation.[158]

[155] ibid 467.
[156] ibid.
[157] See Santos and Rodríguez-Garavito (n 76).
[158] Houtzager (n 142) 219–20.

This means that the political movement is not reduced to the outcome of one litigation and its normative claims stand out from law's own rationalisation of the conflict. In other words, the political strategy of a social movement should not be exhausted in a single line of litigation nor its future struggle entirely dependent on a judicial decision. We can see here the distinction between legal processes and a wider political struggle. For Santos, this distinction enables a political movement to not only insulate itself from legal determinations but to simultaneously engage in a politics of law.

The second insight provided by Santos' thesis, or simply a more radicalised version of the same insight, is that political pressure can be applied using a variety of options that could include direct action and illegal acts. This means engaging in "civil disobedience, strikes, demonstrations"[159] and whichever actions are deemed contextually appropriate. Santos argues that the success of legal action may be contingent upon the concurrent use of political tools. This means that tactical litigation should be understood as one tool to be deployed alongside other political tools.

Santos provides an important starting point from which to understand the relation between a movement's political aims and their engagement in law. We will return to the issue of co-optation in chapter 3 with a detailed consideration of the functional processes of law and their impact on political struggle from below. The present insights about the productive interaction between political mobilisation and legal engagements provide the foundation for later analysis.

1.3. Legal pluralism in counter-hegemonic uses of law

The third insight recognises the role of legal pluralism. Santos criticises the record of national legal systems in relation to progressive social reforms but is equally cautious about a blanket endorsement of all 'non-hegemonic' legal systems. The key issue that Santos introduces here is that social struggles must make a decision about where to launch their legal challenge, and how non-State legal systems and innovative legal practices might offer strategic opportunities.

Thesis three warns that not all non-hegemonic sites of law are 'counter-hegemonic'. Having advanced a criticism of the modern State, Santos warns that not all legal pluralisms provide

[159] Santos, *Toward a New Legal Common Sense* (n 35) 467.

the opportunity to challenge the status quo.[160] To use Santos' examples, supra-State law, such as the lex mercatoria, may not enjoy the same power as a Nation State but it does advance the same politico-economic agenda. Similarly, traditional forms of law 'from-below' – such as indigenous laws or other cultural normative systems - may be more able to protect entrenched social hierarchies than offer opportunities for social transformation. The lesson for social struggles is that, while traditional State-based legal systems may have failed to deliver social transformation, movements ought to recognise that not all legal pluralisms are necessarily organised around emancipatory interests.

The fourth thesis encourages political struggles to use different 'scales', or sites, of legality. As Santos puts it: "the forms of political mobilisation and their concrete objectives will determine which scale must be privileged (local, national, global)."[161] This recognises that legal systems from the local to national and global level will provide a range of different remedies, enforcement capacities and/or symbolic power. Santos endorses legal pluralism as an alternative to national and supranational legal systems that have not delivered either adequate social reform or more wholesale social transformation. Legal pluralism presents an opportunity to pursue legal claims in a legal system that is more receptive to interests that could not be accommodated within hegemonic legal systems. For example, if a national legal system fails to implement or hollows out labour standards, a legal challenge may be more successful in a supranational court that has consistently upheld the importance of a higher standard of labour regulation.

Beyond this practical opportunity to search for a favourable site of legal action, legal pluralism enables social groups to engage with legal systems that are more suited to their claims. As we have seen, Cover insists in his analysis of social movements that legal normativity is plural and needn't be limited to that which is contained in hegemonic legal systems. Legal pluralism represents an opportunity for different social groups to set their own legally-binding agendas and/or pursue new interpretations of current laws. For example, within national legal systems devolved or parallel legal systems will be able to pursue interests at their local level that receive limited concern at the national. In this respect social struggles should see legal pluralism as an opportunity to introduce legal claims that might not be recognised in other legal systems.

[160] ibid 468.
[161] ibid.

We can see from Santos' theses that 'pluralism' is an important factor in legal strategy for two reasons. First, it affects decisions about which legal systems will be most receptive to certain legal claims. Second, there is a plurality of legal meaning and social movements will seek to have their interpretation of what law ought to be recognised and implemented. These insights identify the importance for social struggles of engaging with legal systems that could recognise their legal claims as belonging to the legal system and provide protections for their political actions. However, the theses do not go on to question the capacity of legal pluralisms to enforce their normative claims. Santos' endorsement of legal pluralism does not take into account the institutional capacity of non-State legal systems, meaning their material and symbolic power to issue socially authoritative legal claims and/or physically enforce its decisions. In chapter three we will build on the insights that social struggles ought to target legal systems that are capable of satisfying their political objectives by asking critical questions of the capacity of different legal systems and its effect on legal strategy.

1.4. The abstract nature of legal rules: The promise and limit of legal mobilisation

In thesis eight Santos moves to more abstract explanations of the relation between social struggles and hegemonic law. It suggests that in using law as a tool to achieve its political aims a social struggle must negotiate law's 'excess of meaning' and 'deficit of task'. The excess of meaning refers to law's "symbolic expansion through abstract promises" and the deficit of task to "the narrowness of concrete achievements"[162]. We could fill these pages discussing the idea of law's 'excess of meaning' and 'deficit of task', but we must make do with a summary of Santos' intended usage. These concepts highlight both the opportunity and limitations of engaging with law for labour movements. We will see how alternative interpretations of law can be used to confront the scope and meaning of existing legal rules and why law's vested interests make these strategic practices difficult.

The concepts of law's excess of meaning and deficit of task are key considerations in post-structuralist analysis of law that recognise an opportunity and limitation for social struggles in the determination of law's content[163]. While Santos' reference to these concepts is rooted in post-structuralist and post-modern debates I will not enter into the internal preoccupations of these traditions. Instead, I will unpack the tension between the emancipatory promise in

[162] ibid 469.
[163] Emilios Christodoulidis, 'Strategies of Rupture' (2009) 20 Law and Critique 3, 17.; See also Peter Fitzpatrick, 'New Constitutionalism: The Global, the Postcolonial and the Constitution of Nations' (2006) 10 Law, Democracy and Development 1.

the excess of meaning the role of entrenched interests in the deficit of task. A detailed account of this tension will reveal both the opportunity and limitation inherent to the mobilisation of legal claims that is central to this thesis' investigation. In order to draw out the stake of this tension, I will present an understanding of law's excess of meaning that recognises the abstract nature of law as an interpretative opportunity and the warning that there will always be an excess of meaning that law cannot include.

The abstract nature of legal rules refers to their general-applicability. For the avoidance of doubt, I am not referring to the 'generality of law' which is understood to be a key determinant of law's formal validity and refers to the need for there to be laws[164] that are publicly available and enable people to act voluntarily and exercise rational social control[165]. This idea of law's generality is related to but not the same as the idea that legal rules are generally-applicable (or abstract). Law's generality refers to the requirement that a valid legal system be governed by publicly available legal rules. In the Fullerian sense of law's formal validity, law is identifiable on the basis of its generality. The general-applicability (or abstract nature) of legal rules goes further and explains how a legal system manages social complexities by responding to social conflicts using abstract rules that are applicable to a range of scenarios. The interesting point here is that there is something in the abstract form of law that presents an opportunity for its meaning to be interpreted and re-articulated. In what follows we will expand on the fact that legal rules are abstract and universal because it provides an important conceptual insight into how law's form enables social struggles to pursue their political goals.

The lesson that we need to unpack is that social struggles have an opportunity of engaging with the content of abstract legal rules so as to benefit from their available remedies. The idea of targeting law's abstract form involves presenting an argument that is recognisable to the legal system. In other words, grassroots social struggles should seize on law's general-applicability by attempting to frame their political demands within law's legal symbols or by presenting an alternative interpretation of its objective standards[166]. As such, a politically motivated act might be categorised by law as falling within the scope of an abstract rule whose available remedies are expedient to a social struggle.

[164] Fuller (n 133) 46–9.
[165] Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1.
[166] Santos, *Toward a New Legal Common Sense* (n 35) 434.

This returns to the contention in Santos' theses and Cover's jurisgenesis that social struggles ought to recognise a plurality of legal meaning in society. The excess of meaning is present in the idea that social movements are engaged in the practice of challenging law's current determination by presenting alternative conceptions of what it ought to be. Law can be interpreted in a multitude of ways, whether that is grounded in the constitutional text or claims about the normative purpose of law. Therefore, the idea that law contains an excess of meaning that is not currently represented in concrete legal protections embodies both the plurality of legal meaning and the opportunity to redeem certain values and insist on their application.

The types of abstract promises that represent an opportunity can be seen at the level of constitutional values. It is a generally held view in constitutional theory that constitutions are a repository of values. The normative aims of a society are set out in the constitutional text and legal rules ought to embody the aims and spirit of the constitution. The promise of abstraction lies in the constitution's promises about equality, dignity, solidarity, etc. Interpretation of the constitutional text is key to drawing on these values and presenting arguments about law's excess of meaning. Attempts to re-insert constitutional values at the level of concrete legal protection will challenge the present effects of law's meaning vis-à-vis the supposed aims set out in the constitution. For example, if in constitutional abstraction the law promises dignity when workers are treated with indignity the law offers a remedy. Abstract values such as dignity are a repository of excess meaning that can be used by labour movements to present legal arguments about what the law ought to be.

Moreover, it is not just values but constitutional rights that are sufficiently abstract as to offer certain opportunities to present alternative conceptions of what law's meaning ought to be. Constitutions will contain competing rights claims, such as the right to work, right to minimum subsistence, right to family life and, the right to private property. The implementation and enjoyment of these rights in concrete legal rules will be subject to interpretative conflict. For example, where a legal rule about the re-distribution of property aims to satisfy the constitutional right to subsistence and threatens to infringe the rights of those that hold property title, we can see that there will be competing legal claims about the proper meaning of the constitution's abstract promises about rights. The abstract nature of constitutional values and rights means that their interpretation become a battleground for competing normative visions of society.

Furthermore, in an extreme case, a claimant might not ground their claim about what the law ought to be in the constitutional text. In this case the claimant purposefully denies the authority and/or substance of the present normative boundaries of law. For example, Nelson Mandela's invocation of an 'superior law', a post-apartheid law that stands apart from the then law of South Africa[167]. Law's excess of meaning here is drawn from a broader principled conception of what law ought to value and protect.

The excess of meaning presents an opportunity for social struggles to contest legal meaning and encourage new regulatory standards or rights protections. As Christodoulidis puts it, in the determination of law there is a 're-entry' moment where what was previously excess will become part of law[168]. There is, at this moment, a re-determination of the content and/or interpretation of the law. Importantly, Christodoulidis' analysis insists that alongside any opportunity in law we must also recognise the inherent danger that comes with 'excess'. The excess of legal meaning also identifies what is outside law, that which has not been accommodated within law[169]. In the act of determining the substance and meaning of a law, an alternative interpretation is always left out.

Law cannot include all interpretations, it must determine which actions are permissible and which are proscribed. This begs the question, what prevents law from recognising certain interests? For instance, if the constitution is committed to the principle of equality before the law and promises to protect both the right to work and to private property, why does law offer greater protections to private property and the productive interests of capital than to labour? The answer, I will argue, lies in the tension between law's excess of meaning and its deficit of task.

The tension between law's emancipatory promise and the content of concrete legal rules is essential to an understanding of legal strategy. Santos' recognition of law's deficit of task draws out two limitations on the opportunity presented by law's excess of meaning: The practical limits on interpretation imposed by available legal rules and the effect of entrenched interests on law's emancipatory promises.

The first problem is that the scope for social transformation is limited to the legal rules and remedies that are already prescribed by law. While it is possible to use law as a tool of social

[167] Fitzpatrick (2006) in Christodoulidis, 'Strategies of Rupture' (n 163) 18.
[168] ibid 21.
[169] ibid 17.

struggles this is limited to the implementation of existing law. Any demands for social transformation are rationalised and responded to within law's finite normative boundaries. In other words, law can only respond to a social demand by reference to an existing legal rule's prescribed remedies. For example, a perceived violation of labour standards and claim that law ought to provide a higher level of protection needs to be grounded in either a statute that guarantees a certain regulatory standard or, as we have previously seen, in the constitutional value of dignity and the right to work. There is a practical deficit in law's task that means it only comprehends claims and issues responses on the basis of rules or values that can be drawn from existing legal or constitutional sources.

The deficit of task has a second meaning that explains law's incapacity to deliver unfettered social transformation. The deficit of task refers back to Santos' conception of law as caught between the task of regulation and the promise of emancipation. Emancipation is the promise that law will respond to society's demands and effect the conditions of social transformation. Regulation maintains social control through the enforcement of laws that defuse social conflicts and maintain social expectations. The tension between these two goals is revealed where emancipatory demands come into conflict with entrenched social interests. In situations where emancipatory demands threaten to destabilise social expectations the limit of what can be done in law – or its deficit of task – is reached. Let us unpack this issue further.

Law is organised around the protection of vested (or, entrenched) social, economic and political interests. Law might contain the promises of dignity and equality but the actual interpretation and implementation of these values in the form of regulation will be shaped by these interests. For example, the liberal constitutions of modernity maintain the social and economic interests of productive capital through the inviolability of private property, the enforcement of contractual obligations and individual rights that promote formal (cf. substantive) freedom and equality[170]. This means that modern law has been organised around the protection of property title and the productive interests of capital and not the emancipation of the subaltern. Therefore, the constitutional promises of social emancipation are limited to those demands that do not compromise the expectations of dominant social interests.

[170] Hardt and Negri (n 7) 57–8.

The tension between law's emancipatory potential and the entrenched interests that shape regulation says something about what normative claims can and cannot be accommodated within law. In practice, social struggles will have to accept certain structural restraints when engaging with law. For example, if a legal system is organised around the entrenched interests of capital then we can assume that the deficit of task will arise in relation to legal claims that seek to radically reform the legal rules relating to economic individualism, private property and the productive conditions of capital generally. For labour movements, this means that their legal claims will appear to law within the confines of capital-labour relations. They might demand improved labour standards in line with the constitution's commitment to dignity, but a labour movement whose legal strategy interprets the constitution as advocating emancipation from the conditions of capitalist exploitation is unlikely to be recognised by the legal system of a demo-liberal Nation State.

Labour movements can draw upon this advice and their legal mobilisations should proceed with an awareness of both law's possibility and its limitations. An awareness of the irresolvable tension between the excess of meaning and deficit of task, and the limiting effects imposed by the latter, highlights the need to engage with law in a manner that is capable of satisfying strategic objectives. In order to expand upon the reality of strategic engagements with law and how an 'excess of meaning' might be deployed and shaped by law's 'deficit of task', chapters three and four will be dedicated to an in-depth and sobering analysis of the factors that shape effective engagements with law.

2 Constitutionalism-from-below and legal strategy: Three concerns

The theses of subaltern cosmopolitan legality have provided important insights to an understanding of the ways that social struggles might engage law from below. In particular, the CfB method captures the relation between political struggles with normative demands and the challenges that are presented by engagements with State law. In the remainder of this chapter I will present an internal critique of CfB that highlights the literature's explanatory limitations and sets out the issues that require further dedicated analysis and elaboration.

I present three concerns about CfB's current treatment of labour and legal strategy. First, I argue that by starting from the presupposition that State institutions cannot deliver social transformation CfB has been unable to consider the strategic and tactical engagements between social struggles and State law. Santos' embrace of post-modern criticisms of

modern legal systems has caused the analytic lens to move hastily toward alternative institutional arrangements when legal mobilisation at the national level remains an important opportunity for legal reform and protection. A general criticism that runs through the following analysis is that in its critical sweep CfB scholarship has been inattentive to important legal tools that might have been profitably deployed at the State level. I will set out the importance of both strategy and tactics to an understanding of the ways that labour movements engage with State law. The distinction between strategy and tactics builds upon our conception of legal mobilisation in CfB and provides a framework from which this thesis can comprehend both: The relationship between political strategy and legal mobilisation; and, evaluate the effectiveness of legal tactics that seek to win legal protections and/or reform the organising aims of legal regulation.

Second, the account of legal mobilisation given in Santos is reliant on abstract principles that, I argue, have only a limited explanatory capacity in respect of strategic and tactical engagements with law that occur in practice and are subject to contextual contingencies. I will set out the need to pair conceptual analysis with empirical study. This will draw out CfB's initial insights about the potentially effective relation between social struggles and law and return us to its methodological commitments.

Third, I evaluate CfB's approach to labour as a subject of social struggle. I will detail how CfB has overlooked the role of labour in social conflict both empirically and normatively. Given the fundamental importance of the conflict between labour and capital to the legal, political, economic and social relations of contemporary society, I argue that labour's contribution to an understanding of strategic and tactical engagements with law needs to be inserted into an understanding of legal mobilisation from-below.

2.1. State law and legal strategy

An overreliance on critical accounts of the State in CfB scholarship mean that strategic engagements with State law are treated sceptically and it is prematurely dismissed as a site of social transformation. Although Santos' State scepticism reveals important insights about the limitations of legal strategy at the State-level; it is both inattentive to instruments that could be profitably deployed and misses the ways that labour movements continue to engage at this level. In this section I will argue that legal strategy and tactics are key to understanding the ways grassroots labour movements engage with State law. By identifying the strategic objectives that drive tactical engagements with law we can build a textured conception of

legal mobilisation from-below. Before turning to the role of strategy and tactics in effective legal engagements, we will assess CfB's focus on alternative representative formations and governance mechanisms.

In chapter one we considered in detail the importance of Santos' criticism of modernity to his particular approach to legal scholarship. Santos is sceptical of the State due to the failures of social reform and the historical facts of social exclusion that have been propagated under the conditions of modernity. Rather than approach the tension between regulation and emancipation at the national level as something to be engaged with, Santos diagnoses an irresolvable tension that mitigates against the State's capacity to deliver socially transformative law[171]. In setting out this position I will argue that by focusing on alternative institutions CfB presents a narrow account of the ways that social struggles engage with law in practice.

A focus on alternative governance mechanisms[172] flows from a rejection of the State as a site of emancipatory law.[173] In pursuit of socially transformative conditions, Santos argues for an approach that transcends dominant power relations in society and turns to alternative forms of social organising – be it law, market, community – as a site of political and social power capable of delivering social transformation[174]. In his empirical studies, we can find numerous examples of this turn away from State-based analysis of social movements. Constitutionalism-from-below is focused instead on an array of alternative legal forms from the World Social Forum[175] to community organisations in Brazilian favelas[176] and participatory budgeting innovations[177]. We can learn a great deal from these case studies about innovative governing mechanisms[178] but very little about the ways social movements continue to engage with traditional legal institutions.

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[171] Cf. Twining (n 83).
[172] For Santos engagements with law includes unofficial legal systems. Boaventura de Sousa Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press 2005) 61.
[173] Santos, *Toward a New Legal Common Sense* (n 35) 469.
[174] "The objective of cosmopolitan legality resides in empowering subaltern markets and subaltern communities. Together they are the building blocs of subaltern public practices." Ibid., 469. See further pp.471-493 for examples of 'cosmopolitan legality in action'.
[175] Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' (n 172).
[176] Santos, *Toward a New Legal Common Sense* (n 35) 99–162.
[177] Santos, 'Two Democracies, Two Legalities: Participatory Budgeting in Porto Alegre, Brazil' (n 137).
[178] Austin Sarat has praised Santos' embrace of post-modern alternatives because it pushes the boundaries of legal thought. And, more than simply testing the limits of our imagination, Sarat argues that these alternatives do reflect the reality of post-modernity. Sarat (n 120) 618–21.; see also Twining (n 83) 210.

As Gavin Anderson's analysis of the literature indicates, constitutionalism-from-below has more readily aligned itself with the radical grassroots political struggles of alter-globalisation[179] than the State-based socio-legal tradition. The type of social movements envisioned under constitutionalism-from-below are the type that will refuse to engage with hegemonic legal systems but engage with 'unofficial' legal systems[180]. In other words, constitutionalism-from-below has been methodologically committed to analysing certain non-State or post-modern types of legal engagement by social movements.

In an attempt to draw out the legal experience of socially excluded groups Santos has focused on non-Western or post-modern forms of law at the expense of a more rounded consideration of how such grassroots social struggles 'from-below' will engage with law. In line with this approach, Twining has asked critical questions of the division drawn in Santos' scholarship between Western and non-Western epistemology and ontology[181], which we can summarise as a social group's knowledge and experience of law. For Twining, Santos too readily aligns socially excluded groups, such as indigenous groups, to a non-Western legal experience and assumes their complete exclusion from the Western legal tradition. While Twining's argument focuses on the fact that there can be no such distinctions (Western/non-Western) in scientific knowledge[182], we can also see that in practice no social group can be exclusively non-Western, except in extreme circumstances. For example, indigenous groups will engage with modern State law and, even if they ultimately reject its structures, their strategic or tactical approach to law and politics need not be purely non-Western.

If CfB is to engage with contemporary experiences of legal mobilisation, its focus on the conditions of post-modernity needs to be tempered with analysis of the continued role of modern law and politics in social struggles. Rosemary Coombe has questioned Santos' embrace of post-modernism and argued that analysis of society must recognise the universalising effects of modern law[183].

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[179] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 903.
[180] Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' (n 172) 61. in Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 904.
[181] Twining (n 83) 208–9.
[182] William Twining (2000, pp. 208-9) casts doubts about both Santos' general criticism of modernity and the tendency to view Western and non-Western legal epistemology/ontology separately. For Twining, Santos errs when he draws a cleavage between Western and non-Western legal experiences when in reality the epistemology and ontology of social groups, whether Western or non-Western, will often be intermingled. Only in extreme circumstances will a social group's epistemology/ontology be shaped by only one and, importantly, excluded social groups will attempt to engage with the epistemology of Western law.
[183] Coombe (n 79) 601.

> I fear that it is not enough to recognise the South, go south, and learn from the South… It may be too late to disrupt the privilege of the North or displace its assumption of perspective as universal. The moment of suffering, the moment of rebellion, and the moment of continuity of oppressor and victim may already be too coded by abjection, degeneracy, and sentimentality.[184]

In other words, post-modern approaches to social struggles may seek to take social struggles out of a particular time and place but the effects of identities and structures that are already in place are not easily avoided. For example, the use of local or unofficial law may offer an opportunity to escape entrenched interests at the State level, but the ubiquity and force of modern law means that, in practice, social struggles cannot avoid it and may be forced to engage with it to challenge its effects. Therefore, we need an approach to legal mobilisation 'from-below' that is sensitive to both the plural sites in which groups will make legal claims and the continued role of State legal systems in both determining social relations and as a site of legal action by grassroots social struggles.

I do not deny the veracity of Santos' critique of modernity; his analysis provides important guidance about the limitations of engagements with law from-below. However, we must be aware of the tendency in Santos to focus on post-State alternatives when, in practice, social struggles continue to engage existing legal systems. If the constitutionalism-from-below literature is to properly conceive how social struggles engage with law in practice; it cannot exclude State law on the basis of preconceived scholarly scepticism about its effectiveness. While such scepticism should inform an understanding of the limitations at the national level, with regard to the role of law's protection of property title and capital interests, we cannot comprehend the ways that labour movements engage with law using an approach to social struggle that pays insufficient consideration to the realistic conditions of struggle in the Nation State. On the contrary, we require an approach that learns from theoretical and conceptual inquiry but is informed by empirical legal analysis and equally sensitive to the pragmatic reality of social, political and legal struggle.

In order to grasp the ways that grassroots social struggles will engage with State law, we must turn to an issue that is central to this thesis- the role of strategy and tactics in effective legal engagements. In the following analysis, I will present an understanding of legal strategy as referring to long-term political objectives and tactics as an instrumentalisation of law for the purpose of providing important legal protections. This will highlight an important

[184] ibid 606.

distinction between the objectives that motivate legal engagements and the types of legal action that are taken in pursuit of them. This will also provide a framework from which to evaluate the type and effectiveness of legal engagements and whether they contribute toward strategic objectives. Moreover, the dynamic interaction between tactics and strategy will provide further insight into both the opportunity and limitation of legal mobilisation at the State level.

Robert Knox[185] has drawn attention to the tendency in scholarship to blur the lines between long-term strategic objectives and tactical engagements with law:

> [S]trategy concerns the manner in which we achieve and eventually fulfil our long term aims or objectives, whereas tactics concerns the methods through which we achieve our shorter term aims or objectives.[186]

The 'manner' of a strategic engagement with law, as we shall expand upon below, does not submit to the terms of legal argument set by the legal system but involves a wider structural critique of the law itself. Whereas, the 'method' of tactical engagements involves instrumentalising existing legal provisions. A problem arises, according to Knox, where tactical methods are misunderstood as strategy. This refers to a scenario where a 'strategic' engagement with law uses (as its 'method') the terms set out in law without having a longer-term political aim. For Knox, when there is no wider critique of the legal system engagements with law are merely tactical.

Knox uses the example that those who argued against the 2003 Iraq invasion because it was 'illegal' in international law ceded to the terms of liberal legalism and abandoned the political and ethical arguments against invasion[187]. In this sense, the decision to use international law as a means to prevent the invasion was tactical and "the adoption of liberal legalism was in fact an implicit capitulation to liberal legalism."[188] On this basis, tactics need not be excluded from a social struggle's playbook as the instrumentalisation of law may provide important protections. However, tactical engagements should proceed with an awareness that such actions lack a lasting critical edge and reinforce both existing legal structures and law's legitimate authority.

[185] Knox (n 28).
[186] ibid 197.
[187] ibid 205–7.
[188] ibid 227.

Tactical engagements with law might cede to its organising assumptions and offer limited critique of its structures but, the instrumentalisation of law can deliver important protections. Taking this stance involves letting go of the stricter theoretical concerns about legitimising existing legal structures and focusing on the practical opportunities provided in law which can be engaged to the benefit of a social movement. For example, a letter condemning the Iraq invasion may be criticised for lacking a deeper structural critique of international law but its provisions might have satisfied the ends of preventing an invasion.

A further important element of tactical engagement introduced by Knox is 'principled opportunism' which involves a situation where the law is used tactically but for the purpose of a longer-term political strategy. Knox's account of tactical opportunism is tied to a wider Marxist debate about the reasons for and against engaging with liberal legal systems[189]. While this literature provides important consideration to the theoretical complexities of legal engagement and its potential contribution to either reformism or revolution; I do not propose to engage with it beyond its contribution to an understanding of the distinction between strategy and tactic.

To comprehend tactical opportunism's role in effective social struggle let us consider as an example Jacques Vergès' 'strategy of rupture'[190]. As the defence lawyer for members of the Algerian National Liberation Front, Vergès engaged with the French legal system with the purpose of exemplifying the contradictions of implementing French Criminal Law in Algeria. Vergès argued that the imposition of the State of Exception by the French Government exposed the truth of the conflict as one between Algerian identity and French colonialism, as opposed to the French Government's attempts to subordinate matters to an ordinary instance covered by criminal law. Moreover, Vergès' decision to highlight the use of torture by French officials and the flagrant rights abuses this involved challenged the idea that a violation of the criminal law was at issue in the cases brought against the ANLF. Vergès' engagement with law was tactical in so far as it involved engaging with the terms of law, but it was opportunistic and served a wider political strategy in so far as it sought to draw out French Law's internal contradictions, subvert its legitimate authority[191], and present a political critique of the law to the wider public[192]. The example, although extreme, shows how a political struggle with a critical approach to State law and political objectives

[189] See, ibid 222-227.
[190] Christodoulidis, 'Strategies of Rupture' (n 163) 3–4.
[191] For a more detailed analysis, see ibid 4-9.
[192] Knox (n 28) 226.

that radically challenge its vested interests may still find an opportunity to engage effectively with it.

For a labour movement, law might offer certain protections that do not challenge the structures of capital-labour relations but do, nonetheless, provide an opportunity to pursue either a wider political aim or insist on specific legal remedies. For example, lawful industrial action might provide a legally defensible position from which to challenge the present state of work regulations, from low-pay to insecure pension funds. The proposed industrial action might not deliver a structural critique of law's protection of capital interests and, there may be concerns that taking lawful industrial action accepts and legitimises current industrial action legislation that is heavily weighted against the mobilisation of labour. However, it does offer an opportunity to challenge legal rules and present a political critique of the market logic[193] that has replaced legal/constitutional values as the rationale for legal rules. Above all, lawful industrial action remains a tactic that provides employees with a legal right and political opportunity to pursue either a long-term strategic objective or, insist on the implementation of existing rights and standards. Therefore, as a tactical engagement with law it offers the opportunity of greater, and much needed, legal protection in the short-term but also carries with it a wider critique of law's present objectives.

Having set out the basis for legal tactics, let us return to the role of strategy and how its political objectives dovetail with tactical actions. As we have seen above, while legal strategy that does not contain a broader structural critique submits to the dictates of the legal system; a 'critical' strategy is one that engages with law for the purpose of challenging its content. As Knox puts it:

> Critical scholars can help shape the direction of campaigns of other radicals, who often cleave to a rhetoric of liberal legalism, seemingly by default. In this way, critical scholars can attempt to shape the debate, without reinforcing the very legalism which needs to be undermined.[194]

The presence of a critique of the legal system and a long-term aim to challenge its organisational interests are the markers of a critical legal strategy, or one whose objectives are not limited to reproducing the legal system along its current structural and substantive lines. Importantly, a legal strategy's aim may be to subvert the legal order but the practices

[193] On law and market logic, see Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (n 93).
[194] Knox (n 28) 228.

that are taken in its name may take the form of tactical engagements that appear, ostensibly, to present a limited political critique. Drawing on insights from Rosa Luxemburg, Knox states that:

> [T]he only way in which the social democratic movement is not simply one that engages in 'a vain effort to repair the capitalist order' is in its strategic goal of overthrowing this capitalist order.[195]

For instance, the long-term strategic goal may be a legal order that is organised around the protection of labour, however the barriers to such a radical outcome mean that, in practice, a labour movement will seek shorter-term reforms and protections. At this stage, we need to synthesise how these insights about strategy and tactics inform an understanding of the ways that labour movements will engage with national legal systems. In practice, the strategic aims of labour movements will often be somewhat less radical than the sort envisioned above. Few labour movements will, realistically, aim toward the overthrow of capitalism and/or propose a revolutionary agenda. For this reason, I propose that strategic aims are more likely to be pitched at the level of constitutional values and attempt to re-balance the relations between capital and labour. This will, no doubt, be received with criticism from Knox who has insisted on strategy being tied to more radical structural critiques. However, in light of the practical difficulties involved with a revolution, we can better comprehend legal strategy by taking a more nuanced approach and accept the less radical but materially significant aims of contemporary labour movements. This shift also returns our concern to more recognisable legal analysis at the State level. This does not mean abandoning Knox's insights; on the contrary, the lesson that strategy and tactics will be paired with a wider political aim is essential. The political objective of strategy may not be to overthrow capitalism but to insist on the constitutional values of solidarity and dignity, to re-balance the relation between the right to work, and to challenge those legal rules that prioritise the productive interests of capital.

The aim of this section has been to redeem the State level as a key site of struggle for contemporary social movements and encourage further analysis of State law's capacity to deliver social reforms and protections. CfB scholarship has not considered the role of strategy and tactics at the national level because it has started from the position that the State is incapable of delivering social transformation. The first step in our conception of effective engagements has been to comprehend the productive interaction between tactical

[195] ibid 218-219.

engagements with State law and social movements' political objectives. In sum, strategic objectives are enabled through tactical engagements with law. It is an exercise in challenging the present content of law and attempting to institute an alternative set of rules and organisational aims. In the remaining chapters of the thesis I will consider: How strategic and tactical engagements with law play out in practice? What factors constitute an effective engagement with law? And, what does this tell us about the opportunities and limitations of action within law? In chapter 3 we will address these issues by drawing on the insights from socio-legal mobilisation scholarship.

2.2. CfB and contextual analysis

In the first part of this chapter I set out the important insights of CfB to an understanding of legal strategy by social struggles, and in the beginning of the second I argued that an investigation into effective legal strategy needs to pay more attention to strategic and tactical engagements at the national-level. In the remaining two subsections I set out two further issues that will shape the research agenda for the remainder of the thesis. In the next section we will consider the need for a detailed focus on the relation between labour and legal mobilisation as an instance of constitutionalism from-below. Before that, I argue that a representative conception of the relation between labour movements and law will require us to move from abstract concepts to context-specific analysis of the ways that legal strategy will be deployed in practice. Indeed, we will need to bring conceptual and empirical insights together to re-connect Santos and constitutionalism-from-below to their original insight about the political and legal potential of engaging with hegemonic legal systems.

In part one we analysed Santos' theses and drew out important insights about: The potential effectiveness of legal engagement, the need to politicise the content of law, the opportunities presented by legal pluralism, and the opportunity in law's excess and the limitations of its deficit. These conceptual insights have provided both a methodological approach that values legal mobilisation 'from-below' and recognised the potentially productive outcome of legal engagements that are paired with a broader political objective. However, the explanatory capacity of grand theory and abstraction extends only so far when we are dealing with legal engagements that will occur in practice.

To build upon our conceptual analysis, we need to move to a more sobering consideration of what constitutes an effective engagement with law. A suitable approach will be sensitive to the reality of social struggles and how labour movement's strategic and tactical

engagements occur in the context of legal, political, social and economic contingencies. Our analysis will need to consider those factors that determine the effectiveness of legal mobilisation such as, the capacity for a movement to present cognisable legal arguments, the opportunities presented by either legislative provisions or constitutional values, and the socio-political context, etc. We can only improve our conception of legal strategy by introducing specific questions about: How labour movements ought to frame their engagements with law? What legal systems will prove productive? And, how can strategic and tactical engagements with law hold onto their political objectives?

In order to answer these questions, we will move from conceptual analysis of the opportunity to engage with law from-below to mid-level analysis that prioritises practical insights from socio-legal mobilisation literature and empirical analysis. A great deal of empirical work has been encouraged and delivered by Santos and the constitutionalism-from-below literature with case studies on popular assemblies in Brazil[196], the World Social Forum[197], the legal strategy of the MST[198], and trade union organising in Mexico[199]. A unique characteristic of constitutionalism-from-below scholarship has been its use of specific examples of organising that have shone a light onto previously unseen and unknown legal practices. However, as I have argued above (2.1), the focus in these case studies are alternative forms of social, political and legal organising. In the CfB literature there has been, as yet, limited analysis of a labour movements' continued engagement with national legal systems.

In the final chapter of this thesis we will analyse how a labour movement in Argentina engaged with law and evaluate its strategic and tactical decisions in relation to its social, political and material context. This will provide an opportunity to bring together our conceptual and empirical analysis and forge an understanding of legal strategy at the national level as one that is both theoretically informed and adaptable to the practical realities of legal mobilisation.

2.3. Labour and constitutionalism-from-below: An absent political subject?

In spite of CfB's concern for counter-hegemonic grassroots struggles, labour has not been identified as a central protagonist in either political or legal mobilisations from-below. The

[196] Santos, 'Two Democracies, Two Legalities: Participatory Budgeting in Porto Alegre, Brazil' (n 137).
[197] Santos, 'Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality' (n 172).
[198] Houtzager (n 142).
[199] Rodríguez-Garavito (n 138).

normative absence of labour is problematic because labour has been and remains central to the activity of social struggle and, in particular the fundamental social struggle in modern societies between capital and labour in particular. If CfB is to offer insights about the ways that labour movements have engaged with law, it must be included within its normative approach to social struggle and receive adequate case study analysis. In this section I will set out how labour has been excluded normatively and empirically in CfB, and why this matters to an understanding of the political and legal mobilisation of grassroots social struggle.

Before we begin it is necessary to qualify my criticism of CfB's lack of concern for labour. Labour's absence can be partially explained by Santos and other CfB scholars' suspicion about trade unions and all organised labour movements in the first world. Trade unions have ensured their own workers' interests at the expense of workers in the third world, or failed to deliver emancipatory conditions for their workers due to, for example, their close relations to employer interests. In the analysis that follows, I recognise that some CfB scholars have recognised the role of labour movements in social struggles, and that CfB is not inimitable to the study of labour as a social struggle per se. Indeed, the potential contribution of the CfB method to an understanding of the ways that labour has engaged with law 'from-below' is explicit in my preceding analysis. However, it is necessary to highlight a gap in CfB scholarship with respect to labour's role in legal mobilisation 'from-below'.

2.3.1. Empirical absence of labour

In this section, I will show that labour has been largely absent from CfB's case studies of alter-globalisation movements and, where labour has been the subject of analysis it has not considered the role of legal strategy or legal mobilisation. CfB's methodological approach is dedicated to uncovering new understandings of the innovative ways that social struggles have engaged with law as a tool against social exclusion and for social emancipation. There is, however, an empirical gap in CfB's analysis concerning the ways that labour movements have engaged effectively with law from-below. I will argue that, empirically, labour remains a protagonist in contemporary social struggles which ought to be reflected in our analyses of grassroots political struggles and their legal engagements. In what follows I will highlight this absence and set out the need for a renewed focus on labour as a key subject in the study of legal mobilisation 'from-below'.

There are case studies in the literature that document how labour movements have been engaged in counter-hegemonic struggles against neoliberal globalisation, however it is transnational pluralism and activism that are the central analytic focus, with limited concern given to the role of labour as a specific form of political struggle from below and its engagement in legal mobilisation. For example, Rodriguez-Garavito's[200] analysis of the workers' struggle for trade union recognition in Kukdong is an excellent study of transnational political mobilisation's capacity to apply pressure and influence favourable political and legal outcomes at the national level. This is representative of the tendency in constitutionalism-from-below case studies to focus on political activism or alternative legal institutions at the expense of greater concern for more traditional forms of social struggle. In section 2.1 and 2.2 we noted the limited concern for the State, but here we can see that even where labour has been the subject of struggle the analysis has focused on the alternative forms of CfB. CfB's commitment to uncovering the innovative practices and potentialities of legal and political organising by grassroots movements would benefit from an additional focus on labour and the continued importance of the State.

Labour movements have played a historic role in political struggles against socio-economic oppression wrought by dominant social classes. They have won important reforms to working standards in the legal and political systems that had enabled the conditions of oppression and excluded labour and other social groups from the structures of political representation[201]. There is ample analysis of labour's historical[202] and contemporary role in political struggle[203] and sociological analysis of labour's present problematic[204]. All of which provide excellent insights about the contemporary challenges facing workers and the wider struggle for alternatives to neoliberal globalisation and legal and political structures that are not consumed by 'total market' thinking[205]. However, labour has been given a peripheral role in much scholarship documenting and theorising contemporary grassroots struggles against neoliberal globalisation.

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[200] ibid.
[201] Ronaldo Munck, *Globalization and Contestation: The New Great Counter-Movement* (Routledge 2006) 94–102; Supiot (n 1) 104–116; James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press 2008).
[202] Eric Hobsbawm, *Primitive Rebels* (Abacus 2017) 167–198; EP Thompson, *The Making of the English Working Class* (Penguin UK 2002) 781–820.
[203] Marina Sitrin and Dario Azzellini, *They Can't Represent Us! Reinventing Democracy From Greece To Occupy* (Verso Books 2014).
[204] Streeck (n 2); Andrea Komlosy, *Work: The Last 1,000 Years* (Verso Books 2018); Maurizio Lazzarato, *The Making of the Indebted Man: An Essay on the Neoliberal Condition* (Semiotexte/Smart Art 2012).
[205] Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (n 93).

Santos and other CfB scholars are not alone in focusing on social struggles in general terms without paying specific attention to labour's potential to confront the present politico-economic and legal status quo. For example, in each of Pleyers[206] and Falk's[207] leading texts on alter-globalisations there are few mentions of labour[208]. While the spectre of capital and its devastating effects are never far from their diagnoses, labour is no protagonist in their proposed solutions. In spite of labour often bearing the brunt of capital's insistence on a race to the bottom in regulatory standards and maximisation of the profit motive, labour's political agency and collective strength in challenging market diktats and changes to work is passed over at the expense of generalised diagnoses and calls for pan-social forms of resistance. As such, beyond applying general conceptions of the relation between social struggles and law to labour, we have a limited analysis of the ways that contemporary labour movements have engaged with law. I do not intend to diagnose the reasons for such a broad trend, each author has their own research aims and foci, however, we can identify a move away from labour in studies of alternative political and legal futures and a need to bring labour back to the forefront of our analysis.

In setting an agenda for the type of analysis that is required we can draw upon the influence of Ronaldo Munck[209] whose approach to globalisation places labour movements at the centre of any future struggle against global capital. Munck's analysis stands out from those highlighted above because it identifies the role of labour movements in transformative political struggles and recognises their desire to contest the undignified working conditions imposed by neoliberal globalisation.

> Workers are clearly divided by national, regional, gender, ethnic and other fault-lines. The growing internationalization of capitalist rule may increase competition along national, regional and even city lines, but globalization has also created a more numerous global working class and, arguably, a common focus for workers worldwide.[210]

[206] Pleyers' analysis focuses on grassroots organising generally and alternative global ideologies to neoliberal capitalism, such as the rise of environmental protection and gender equality and the formation of alternative institutional forums for global social and political agency. Geoffrey Pleyers, *Alter-Globalization: Becoming Actors in a Global Age* (John Wiley & Sons 2013).
[207] Falk's analysis situates labour amongst one of the threats presented by globalisation-from-above and as one of the possible sites of resistance 'from-below'. Richard Falk, *Predatory Globalization: A Critique* (Wiley 1999).
[208] For a detailed discussion and summary of the 'alter-globalisation' literature, see Lindahl (n 131) 109–151.
[209] Munck (n 201); Ronaldo Munck, *Globalization and Labour: The New 'Great Transformation'* (Zed Books 2002).
[210] Munck (n 201) 98.

Munck has argued that labour is uniquely placed to challenge the smooth functioning of neoliberal globalisation owing to its position in a globalised economic supply chain. We are told that alter-globalisation struggles need not necessarily occur at the global level, but that labour has an opportunity to organise local interventions that have transnational consequences[211]. To support his claims Munck provides three examples, one of which is the industrial action taken by the United Auto Workers in the United States in response to General Motor's attempts to change working conditions and impose 'downsizing' measures. The strikes had a significant impact on the production and supply chains of General Motors and exemplified how localised action in Flint, Michigan could have global consequences[212]. As Munck states:

> A strike by barely 9,000 UAW members in a small US community in a matter of days had impacted on 27 of the 29 GM assembly plants in North America, Mexico and Singapore… The company lost nearly US$2.5 billion and half a million vehicles as a result of this dispute. By successfully mapping the production and supplier chains of the multinational corporations, workers were able to locate the pressure points that they all inevitably possess… The power of the local to impact on the new global capitalism is clear from the GM strike.[213]

In sum, Munck shows how labour confronts the conditions of neoliberal globalisation in practice. Although the example details politico-economic and not legal forms of struggle, the mobilisation of labour as a political group is recognised as a protagonist of contemporary social struggle. Munck's analysis refocuses our attention to the specific experience of labour and its practical role in constituting new political and legal alternatives to globalisation. The next step in understanding the potential effectiveness of labour movements is to analyse its specific strategic and tactical engagements with law and politics, and the role of contextual factors.

2.3.2. Normative absence of labour

In this section, I argue that labour's engagement in the field of human activity means that it ought to be central to our analysis of social struggle 'from-below'. The importance and specificity of labour to an understanding of social struggles is rooted in the centrality of work to human life, all societies are built on labour and as a political subject it has played a historic

[211] ibid 94–6.
[212] ibid 95-6.
[213] ibid 96.

role in social reform[214]. A sufficient account of labour's constitutive potential will require a normative concern for labour that identifies its specific demands for and approach to legal and political organising 'from below'.

The reason, I argue, for labour's normative absence in Santos' analysis is due to a definition of 'social exclusion' that shapes the scope and focus of his research. The problem, from the perspective of labour, in Santos' analysis is that radical social exclusion is viewed in formal terms which privileges an analytic concern for those without legal and political standing and excludes a more nuanced consideration of the substantive marginalisation experienced by other social groups. This is not to discredit the insights that Santos' concern for the subaltern have uncovered, on the contrary, this is an internal critique of CfB that attempts to expand its methodological reach. In order to comprehend the normative focus in Santos and the absence of labour we need to consider his turn to 'abyssal thinking' which represents his more recent conception of social exclusion.

In early Santos[215], the political subject is generalised as the 'counter-hegemonic' or 'subaltern' and, while there are few explicit references to labour it can be included within the concept of subaltern cosmopolitan legality and its insights applied to labour, as I have done in the first part of this chapter. However, in later work the subject of social struggle has been refined to focus on those that suffer 'abyssal exclusion'[216] and how social groups struggle against it. For Santos, the abyssal distinction of modern society is between social inclusion (regulation/emancipation), on the one hand, and exclusion (appropriation/violence), on the other[217]. The latter introduces a new distinction to the former which we considered at length in chapter one. The social experience of appropriation and violence was introduced in Santos' more recent work to temper his more optimistic conceptions of the tension between regulation-emancipation, and to bring un-redressable social exclusion within the analytic frame of socio-legal studies.

> Modern Western thinking is an abyssal thinking. It consists of a system of visible and invisible distinctions, the invisible ones being the foundation of the visible ones. The invisible distinctions are established through radical lines that divide social reality into two realms, the realm of "this side of the line" and the realm of "the other side of the line." The division is such that "the other side of the line" vanishes as reality, becomes nonexistant, and is indeed produced as nonexistant. Nonexistant means not existing in

[214] Supiot (n 1) 93–7; Hobsbawm (n 202) 267.
[215] See Chapter 1 for distinction between Santos' earlier and more recent scholarly focus.
[216] Santos, *Epistemologies of the South* (n 115) 118–124.
[217] ibid 125.

> any relevant or comprehensible way of being. Whatever is produced as nonexistant is radically excluded because it lies beyond the realm of what the accepted conception of inclusion considers to be its other.[218]

The purpose of these distinctions, for Santos, is to reveal the radical inclusion and exclusion that organises the contemporary social experience of law. Abyssal social exclusion is defined by the absence of political representation, rights protection or means of legal redress[219]. While societies, or aspects of social life, that are still governed by the tension between legal regulation and social emancipation can be considered 'included' or open to democratic decision-making; those societies, or aspects of social life, that are ordered by the logic of appropriation or violence are excluded from the decision-making process. Following Santos' examples, the excluded are not citizens but refugees, migrant workers or terrorists. And, their claims are not 'visible' to the included because they do not have a voice within the logic of regulation/emancipation.

Importantly, for Santos, the abyssal line represents a radical exclusion of those on the abyssal side[220]. By centring on the abyssal Santos' attention shifts away from social transformation within the Nation State and onto alternative means of representation that mitigate the experience of exclusion from modern law and politics. Traditional organised labour or even ad hoc labour movements that occur at the State level does not qualify as abyssally excluded where they enjoy access to rights and have some form of political representation. Whereas workers in sweatshops of the global South and the undocumented migrant worker in Europe are abyssally excluded, their lack of citizenship rights and restricted labour protections mean they suffer radical, or abyssal, exclusion from legal and political systems.

Non-abyssal exclusion is at the fringes of Santos' analysis. As such, labour movements in the 'global north'[221] are not given any specific treatment because they fall outside the frame of abyssal social exclusion. The central concern is radical abyssal exclusion, with the political and social exclusion of groups within Nation States left largely unconsidered. For example, an unemployed worker sacked for challenging new 'efficiency-savings' falls in the schema of non-abyssal exclusion as they still enjoy access to political representation and

[218] ibid 118.
[219] ibid 126-128.
[220] Boaventura de Sousa Santos, 'The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law' (2017) 22 Tilburg Law Review 237, 251.
[221] For Santos, the 'South', which does not refer to a geographical region, is defined by abyssal exclusion and the 'North' is a site of non-abyssal exclusion. In these terms, membership of the North is determined by a social experience governed by regulation/emancipation and the South is the social experience of appropriation/violence. Santos, *Epistemologies of the South* (n 115) 10.

have rights, even if the level of legal protection or access to political representation is being rapidly undercut. It is because organised labour is not invisible to the legal and political structures of representation and is the subject of certain rights that labour as a social struggle from-below has fallen outside of Santos' analytic lens. The problem, for our purposes, with Santos' abyssal line is it enlarges the plight of the abyssally excluded but cannot capture the social experience of those groups that are formally included within the State's legal and political institutions but suffer substantively from economic, political and legal inequality.

As a result of this specific conception of social exclusion, Santos' approach to contemporary social struggles is focused exclusively on those that contest radical social exclusion, and, in particular, on pan-social forms of organising. The problem, I will argue, is this narrow approach is built on an ostensibly agreeable principle but fails to contend with the realities of contemporary social struggle. Santos claims that social struggles by non-abyssally excluded social groups need to be repurposed according to the principle that their practices provide positive effects to the abyssally excluded. This stems from the following rationale:

> [A]s long as abyssally defined exclusion persists, no really progressive postcapitalist alternative is possible.[222]

For Santos, social struggles for liberation or improved conditions are insufficient so long as their successes are not shared by all excluded populations equally. For example, Santos suggests drawing on the political strength of labour and tying its claims to women's rights, environmental protection, cultural and social protections, etc[223]. This sets the scene for Santos' normative support for a collective universal subject as the means to tackle social exclusion. This idea is premised on "a global emergence resulting from the fusion of local, progressive struggles with the aim of maximising their emancipatory potential in loco (however defined) through translocal/local linkages."[224] There is a lot underpinning these assertions and it is beyond our present task to unpack the breadth of Santos' intention in detail, however, for our purposes his proposal argues that what is required is a unification of all victims of social exclusion in a collective global struggle for social transformation.

It is difficult to disagree, in principle, with Santos' fundamental claim that social groups with legal and political standing should not take actions that do not also benefit those that are abyssally excluded. However, in practice, we need to recognise that political and legal

[222] ibid 133.
[223] Santos, *Toward a New Legal Common Sense* (n 35) 481.
[224] Santos, *Epistemologies of the South* (n 115) 135.

struggle will take different forms depending on the specific grievance and normative demand of a social group. In other words, there are autonomous social groups (e.g., labour) that will take group-specific actions tailored to their grievance/demand. Contemporary social struggles from-below do not necessarily compound abyssal exclusion but challenge the conditions of non-abyssal exclusion. For instance, labour will have specific normative demands directed toward re-ordering their social relation with capital, be it concerns about labour standards, the shift towards contractual precarity, or the insecurity of pensions, etc. These are all important demands and representative of labour's struggle against social exclusion.

The demand that we consider only those social struggles that are paired with a struggle against radical social exclusion risks leaving us with a restricted account of social struggles 'from below'. In sum, by viewing social struggle from the perspective of a universal subject motivated solely by combatting abyssal exclusion we don't begin to engage with the myriad of social struggles by groups that are formally included with legal and political systems but substantively excluded. CfB ought to be capable of recognising the condition of abyssal exclusion without compromising its capacity to analyse the ways that supposed rights holders and citizens engage with legal and political structures.

The absence of labour is not merely the consequence of conceptual barriers or a focus on universal social struggle. Santos has presented a more pointed critique of labour that contrasts its normative demands with the call for universal struggle against radical social exclusion.

> A postabyssal [*sic*] conception of Marxism (in itself, a good exemplar of abyssal thinking) will claim that the emancipation of workers must be fought for in conjunction with the emancipation of all the discardable populations of the global South, which are oppressed but not directly exploited by global capitalism. It will also claim that the rights of citizens are not secured as long as noncitizens go on being treated as subhumans… The recognition of the persistence of abyssal thinking is thus the conditio sine qua non to start thinking and acting beyond it. Without such recognition, critical thinking will remain a derivative thinking that will go on reproducing the abyssal lines, no matter how antiabyssal [*sic*] it proclaims itself.[225]

The target of Santos' attack is not a particular variant of Marxism but the category 'working class' and its specific normative demands that perpetuate the distinction between abyssal

[225] ibid 134.

and non-abyssal social groups. While the earlier Santos recognised the role of different social groups and their engagements with hegemonic law, the latter shift to the post-abyssal thinking takes a more radical form that views progressive social struggle in purely radical non-Western terms. Santos argues that there must be a "radical break with modern Western ways of thinking and acting" which means moving away from Western social groupings and struggling for an "subaltern insurgent cosmopolitanism". We can see in plain view here the reason for labour's exclusion from Santos' schema. Marxism and working-class internationalism come in for criticism because they are Western ways of thinking. They are seen as couched within a Western tradition that does not speak on behalf of the oppressed and fails to struggle against the conditions of abyssal exclusion.

As I stated in the introduction to this section, Santos' scepticism about the emancipatory aims of organised labour ought to be understood in the context of the failures of trade unions in the first world and the subsequent mistrust about their political and legal intentions. For example, the close relation between trade unions and entrenched capital interests prevented the former from pursuing a genuinely radical agenda in line with the principles of the labour movement. And, at certain times trade unions may have pursued policies of economic nationalism that had a detrimental effect on workers in the third world.

The charge against labour is that as a social group it has had a tendency to further their own self-interest to the detriment of others. These generalisations make sense if directed at particular examples of working class struggle whose actions have had a negative impact on social groups elsewhere. For example, labour unions that disregarded the environmental impacts of certain industrial ventures owing to their positive effects on employment. However, this assumption is not generally-applicable and is falsifiable according to both historical fact and labour's normative commitment to solidarity with other social struggles. The normative point of the labour movement is centred around the struggle for human dignity. And, while the focus of Marx's analysis was the oppression suffered by workers at the behest of capital and not the oppression of other social groups such as indigenous populations, this does not mean Marx should be read as promoting social exclusion for all social groups apart from the working class.

Furthermore, Santos groups 'working-class internationalism' within a 'long tradition in Western culture' along with earlier universalising ideas of the *res publica christiana* and Renaissance humanism that have culminated in expansionism, colonialism and

imperialism'[226]. Working-class internationalism is presented here as perpetuating a Western form of cosmopolitanism that does not serve the interests of oppressed groups. And yet, working-class struggles have been avowedly internationalist and have extended their solidarity to other socially excluded groups. In fact, historical examples of labour internationalism[227] have followed Santos' prescription that social struggles must aim for emancipation in other locales. For example, the refusal of Scottish workers to repair Rolls-Royce engines that had been used in the coup d'état against Chile's Socialist government. Indeed, there are numerous historical and ongoing examples of such international solidarity[228].

Santos' conception of abyssal exclusion uncovers a radical perspective on social exclusion and struggle but, we need to introduce some nuance if we are to include labour movements at the State level into the CfB method. CfB provides the methodological tools to engage with the relation between law and social struggles 'from-below' but it needs to be careful not to pass over the experience of social struggles at the State level. In the remainder of this thesis I will draw on these insights and re-insert labour as a social group that struggles against the conditions of their legal, political and social exclusion.

3 Conclusion

This thesis seeks to comprehend the ways that labour movements engage effectively with law. A central issue to this investigation is the extent to which law can be deployed against itself, or to put it otherwise, how legal arguments can be used to challenge the content of existing legal rules. In this chapter, I have drawn on Santos' theses of subaltern cosmopolitan legality and synthesised four important insights about the ways that social struggles engage with law.

[226] ibid 134-5.
[227] There are important distinctions between the First International that lasted up to 1968 and is viewed as a 'national internationalism' (Linden 2003 in Munck 2007) because of its Eurocentric focus upon solidarity between national trade unions, and later incarnations of the international labour movement. For Munck, the international trade union movement has become more diverse and premised upon transnational solidarity between workers. This has been precipitated by the globalisation of capital that has drawn workers in different locales closer together due to global supply and production chains. As a result, the transnational labour movement is not tied to national borders or formal labour unions. As Munck puts it: "There is, in reality, no 'one right way' to practice internationalism and we need to recognise that it is a complex, shifting and transnational phase we are currently experiencing." Munck (n 201) 95.
[228] Thompson (n 202) 911–12; Michael Hardt and Antonio Negri, *Empire* (Harvard University Press 2000) 45–52.

CfB scholarship has recognised the potentially productive relation between hegemonic law and social struggles and set out a conceptual account of the opportunities and limitations of engaging with law 'from-below'. This first insight recognised the importance of legal engagements by social struggles to the CfB method. The second insight highlighted the essential relation between political strategy and legal mobilisation that runs throughout CfB scholarship. The role of political action and the importance of politicising the content of law provide important lessons about the form and nature of effective legal strategy. For instance, civil demonstrations and other forms of political action and publicity enable social struggles to draw legal conflicts outside of law's restrictive and self-referential framework and into the realm of politics. As such, the nature of the conflict is transformed into a matter of socio-political significance beyond the courtroom. We will return continually in the forthcoming chapters to the need for effective legal mobilisation to politicise the terms of legal engagement and the content of law. Importantly, we will need to consider in more detail the ways that legal disputes are politicised and the extent to which political action might affect legal processes.

A third insight from CfB has been to recognise the potential importance of legal pluralism to social struggles. This introduces the opportunity to engage with legal orders that will be more accommodating to certain legal claims. The potential for legal strategy to shape legal and political systems need not occur at the national level to be considered effective, the plurality of contemporary legal orders that are organised around their respective interests – be it, the protection of human rights, market-freedoms, etcetera - represent opportunities for social struggles to present legal arguments and receive potentially favourable judgments.

The concepts of excess of meaning and deficit of task provided a fourth insight. The former highlights the interpretative opportunity in legal argument and identifies law and the constitutional text as a repository of emancipatory promises. At the level of constitutional values (dignity, equality, solidarity, etc) social struggles can challenge the present scope and content of legal rules as failing to meet the standards set out in the constitution. The plurality of legal meaning, or the capacity for the law to be interpreted otherwise, is an essential characteristic of potentially effective legal strategy that targets constitutional and legal change. The deficit of task, on the other hand, introduces an important limitation on the interpretative opportunities in law. The entrenched interests that determine the organisational aims of law, such as the inviolability of private property and the productive

interests of capital, impose a limitation on the types of legal arguments that will be capable of challenging existing legal rules.

The relation between law's excess of meaning and deficit of task highlights a critical tension between the emancipatory promises of constitutional values and the law's protection of certain interests. The political aims of a social struggle will have to be reconciled with the insight that only certain interpretations of the law and constitutional values will be recognised by a legal system. Or, to put it otherwise, the deficit in law's task exposes a threshold for legal claims that can be accommodated without infringing entrenched interests. The challenge for the study of legal strategy is to consider the effect of this threshold on the effectiveness of legal mobilisation by social struggles, and whether, under certain conditions, strategic and tactical engagements with law can challenge law's protection of entrenched interests. The answer to these issues drives at this thesis' preoccupation with the potential for labour movements to re-constitute the legal relation between capital and labour.

In order to build on these key insights from CfB, the second part of this chapter has considered the issues that require further elaboration if we are to provide a detailed conception of the ways that labour movements engage effectively with law. I have presented an internal critique of CfB that considers three concerns about its present approach to legal mobilisation from below.

First, CfB's embrace of State scepticism passes over the continued importance of strategy and tactics at the Nation State level. While a guiding assumption of post-modernism is that alternative forms of law already exist and require scholarly attention[229], this shift in attention should not dispense with the potential effectiveness of engagements with State law. In order to recognise the opportunity and limitation of legal mobilisation at the State level, we will analyse its capacity to provide short-term legal protections and/or insert new legal meanings over time. The remainder of this thesis will be dedicated to drawing out the factors that affect both strategic and tactical engagements with law and, how the productive interaction between them reveals the potential of law in the struggle for political objectives.

Second, at present, CfB provides an important conceptual account of the relation between hegemonic law and social struggles. In order to build on its methodological commitments, we will bring together CfB's more abstract accounts of legal mobilisation with empirical

[229] Sarat (n 120) 618–21.

legal analysis. This will provide a textured account of strategy and tactics that is responsive to the contextual factors that will shape their effectiveness.

Third, labour's empirical and normative contribution to social struggle has been de-emphasised by CfB's focus on radical social exclusion and alternative forms of social organising. There will be shared insights about the ways that social movements and labour movements in particular engage will law, however the current orientation of CfB scholarship has underplayed the contribution of labour to these general insights. In chapter four, we will bring together the role of labour in social struggles 'from-below' and the need for empirical analysis by evaluating the strategic and tactical decisions of an Argentine labour movement.

In the next chapter, I will present three tenets of legal strategy 'from-below' that attend to the issues that have been identified in the course of the present chapter by presenting a detailed consideration of the ways that labour movements might engage effectively with law. I will examine: The ways that labour movements ought to frame their legal arguments so as to be recognised by law and deliver either immediate protections or challenge the present organisational aims of law; the effect on legal strategy of a legal system's capacity to recognise certain legal claims and enforce its own judgments; and, how a movement's political objectives can be shielded from the danger of legal co-optation.

Chapter 3. Labour movements and the potential effectiveness of legal strategy: Three tenets

The aim of this chapter is to analyse the conditions of effective engagements with law. While the previous chapter has acknowledged the potential effectiveness of legal mobilisation, our current concern is the ways that labour movements access the opportunity presented by law. I will argue that the productive interaction between labour movements and law will be dependent on the former's ability to engage competently with legal tools, and recognise the types of benefit that law can provide for its political objectives. A further aim of this chapter is to identify why national legal systems continue to play a key role in legal mobilisation from-below. I will argue that State law's ability to impose legal obligations makes it an essential site of struggle for labour movements. In order to address each of these concerns I will present three tenets of effective legal strategy that will assess the role of (i) effective legal arguments, (ii) law's institutional capacity, and (iii) law's tactical contribution to a movement's political objectives.

Tenet one is concerned with the ways that labour movements articulate effective legal claims. To begin our conception of effective legal engagements, I argue that legal strategy and tactics need to be evaluated broadly, which means recognising that legal mobilisation can deliver both direct legal protections and indirect benefits to the wider political struggle. In addition, the distinction between direct and indirect effects of legal mobilisation provides a conceptual tool that will recur throughout the tenets to explain the potential effectiveness of legal engagements. The second part of our analysis turns to the issue of framing and how labour movements present their claims in law. Central to our understanding of effective engagements with law is the fact that, in order to access law's general applicability labour movements must present legally cognisable claims. I will argue that the effectiveness of legal mobilisation is contingent upon presenting legal claims whose content can be recognised by the legal system and/or benefit a movement's political objectives.

Tenet two argues that labour movements must engage law in an effective context. The context of legal mobilisation matters because the institutional capacity of law varies between national legal systems and plural alternatives. I argue that labour movements must engage with legal institutions that have the capacity to impose legal obligations on employers and (potentially) re-order the social division of labour. The material and symbolic power of national legal systems means that State law remains a key site of struggle for labour. A

nuanced approach will recognise that the context of legal mobilisation will also have to respond to the limited means of redress at the national level. Therefore, in each circumstance, the most effective context of labour's engagement with law will be a pragmatic accommodation between the demands of institutional capacity and the practical realities of legal mobilisation.

The third tenet argues that legal mobilisation is a tactic that has the potential to deliver a movement's political objectives. This tenet is important in the context of the supposed danger of co-optation posed by legal mobilisation. I will detail these potential limitations and recognise the need for labour movements to avoid their potential pitfalls. However, I will draw on several rebuttals of the co-optation critique and argue that legal mobilisation need not mitigate against political objectives. In order to grasp the nuances and complexities of the productive relation between legal mobilisation and political struggle, we will return to the role of indirect effects and the relation between tactics and strategy. The former redraws our perspective on the effectiveness of legal mobilisation and recognises how a movement's political objectives are benefitted in ways that extend beyond direct legal protections. And, by distinguishing between tactical engagements with law and a movement's wider political strategy, we can see how a labour movement's political objectives are not exhausted by or dependent upon the outcome of litigation. In fact, the conditions under which labour can maximise the effectiveness of legal mobilisation and hold onto their political intent will be dependent upon a concurrent mobilisation of both law and politics.

1 Tenet one: Effective legal argument

In chapter two we considered the tension between law's excess of meaning and deficit of task that defines the opportunity and limitation of legal mobilisation by social struggles. In this tenet I build upon this understanding by considering how social struggles manage this tension and engage effectively with law to meet their strategic and tactical objectives. In order to determine what we might mean by an effective engagement with law, I will make two claims. First, I draw on Michael McCann's distinction between direct and indirect effects to provide a pragmatic understanding of the potential benefits that legal mobilisation presents to labour movements. The aim of this section is to present an understanding of the potential effectiveness of legal mobilisation and the reasons why law is engaged strategically and tactically. Second, I will consider the act of engagement and the importance of

formulating effective legal arguments. It is not enough to say that engaging in legal argumentation is potentially effective, what is at stake in legal mobilisation is the effective articulation of a claim that the legal system can both recognise and respond to affirmatively. I will argue that effective engagements with law are premised on competently framing arguments as legal claims that can be recognised as belonging to the legal system. This two-stage argument will provide a conception of the type of benefits that legal mobilisation can deliver and a practical understanding of the form of effective legal argumentation.

1.1. Evaluating effective legal mobilisation: In/direct effects

Michael McCann's legal mobilisation framework has provided important insights about how social movements use law from the bottom-up[230]. The legal mobilisation approach, as it is presented by scholars such as McCann and Sally Engle Merry, recognises that law can be both a resource for social struggles and a constraint on it[231]. These legal mobilisation scholars accept the critical insights about the limitations of legal mobilisation but hold onto its potential importance as a tool in social struggles. This approach is important for our present purposes because it accepts the potential effectiveness of legal mobilisation. It does not blindly endorse law as a site of social transformation, but it recognises that, under certain conditions, law provides opportunities to social struggles seeking to realise their political objectives. I will draw on McCann's distinction between the direct and indirect effects of legal mobilisation as a means to comprehend the types of opportunities that can be sought through strategic and tactical engagements with law.

In order to better comprehend the importance of McCann's nuanced approach and how this draws out the strategic and tactical reasons behind legal mobilisation, let us briefly situate it within the socio-legal mobilisation, or 'social movement and law' literature[232]. As we shall see, there have been staunch criticisms of legal mobilisation's effectiveness as a tactic that positively contributes to social struggles' political objectives. I will emphasise and endorse a more nuanced approach that keeps open the importance of legal mobilisation and will enable a detailed concern for the strategic and tactical opportunities presented by litigation's in/direct effects. Indeed, a common thread that runs through each tenet is an approach to

[230] Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2 Annual Review of Law and Social Science 17, 24; Scott L Cummings, 'The Social Movement Turn in Law' (2018) 43 Law & Social Inquiry 360, 22.
[231] Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994) 12; Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (University of Chicago Press 1990).
[232] Cummings (n 230).

legal mobilisation that is alive to its limitations but insists on the potential effectiveness of law as a tool for political struggles.

In the post-*Brown vs. Board of Education* era socio-legal scholars evaluated the effects of different judges on litigation and their propensity to support different legal arguments[233]. As the initial progressive activism of the United States Supreme Court shifted toward conservative restraint in the 1980s, scholarly positivity about tactical litigation's capacity to deliver socially progressive strategic goals drifted from optimism to scepticism. For instance, Gerald Rosenberg dismissed the *Brown* court's importance in the struggle for desegregation and argued that cause-lawyering could do more harm than good to a political movement, citing low implementation rates for litigation compared to legislation and the threat of a strong political counter mobilisation against judicial activism.[234] Moreover, Stuart Scheingold has argued that cause-lawyering was a good tool for mobilising political discussion about rights but that ultimately it was legislators that were needed to effect meaningful change[235]:

> Without support of the real power holders… litigation is ineffectual and at times counterproductive. Without that support litigation is unnecessary.[236]

For Scheingold, legislation and the political support required to pass it, were more likely to implement the social transformation desired by movements than litigation. In addition, Scheingold claimed that lawyers relied on the 'myth of rights'[237] in liberal legal orders that all victims can have their day in court and resolve their perceived rights infringement. The problem with this approach, for Scheingold, was that in practice litigation misrepresented social struggles' claims and often failed to deliver meaningful redress or social change[238]. Other scholarship began to document the specific barriers that made litigation a difficult terrain for social movements to negotiate. For example, Marc Galanter's seminal study of structural inequality in the legal system that privileged 'repeat players' and undermined the

[233] For example, Jeffrey A Segal, 'Measuring Change on the Supreme Court: Examining Alternative Models' (1985) 29 American Journal of Political Science 461; Cummings (n 230) 45.
[234] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition* (University of Chicago Press 2008).; See also Steven E Barkan, 'Legal Control of the Southern Civil Rights Movement' (1984) 49 American Sociological Review 552; Jonathan Simon, '"The Long Walk Home" to Politics' (1992) 26 Law & Society Review 923.
[235] Stuart A Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press 2010).
[236] ibid 130.
[237] ibid 131.; See further Cummings (n 230) 15–17.
[238] Scheingold (n 235) 5.

effectiveness of tactical litigation for parties with few resources and little experience[239]. These critical accounts of legal mobilisation provided important insights by highlighting limitations to the idea that rights or justice were owed and that injured parties would necessarily 'have their day in court'. For our purposes, Michael McCann's Rights at Work[240] shifted the focus from scepticism or rejection to recognise the continued potentiality that resides in legal mobilisation for social struggles.

> [T]he prevailing critical posture has provided important insights about the social control functions of law that impede justice and democratic change in modern America; yet, I do fear that such a view may too easily ossify into a cynical "myth of non-rights" that is neither justified by historical experience nor helpful for confronting present political challenges.[241]

While Michael McCann concurs with earlier criticisms about legal mobilisation, he insists that criticism must not result in a reactionary dismissal of litigation as a potentially effective site of struggle for social movements. The problem with scepticism about law's capacity to deliver social transformation, according to McCann, is that such a position not only denies law's historical role in grassroots social struggles, it would also deny the same opportunities to contemporary political struggles.

McCann's study of the pay equity movement's use of law in the United States endorsed a textured approach to the relation between law and social movements. A key contribution of his empirical findings was that the effectiveness of litigation lies in its direct and/or indirect effects on a social struggle. The direct effect of litigation can provide "short-term remedial relief for victims of injustice or to develop case law precedents capable of producing long term institutional change."[242] In this respect social struggles can harness the potentially

[239] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95., Galanter's analysis revealed that one-time users of the justice system would often have fewer financial resources and lack the tacit knowledge required to successfully negotiate a favourable judgment. This was framed as the difference between 'haves' and 'have nots' and revealed resource mobilisation as a key barrier to challenging powerful interests in court; See also the debates between resource mobilisation theory that remained tied to the importance of litigation as a means to advance a social movement's cause. For example, John D McCarthy and Mayer N Zald, 'Resource Mobilization and Social Movements: A Partial Theory' (1977) 82 American Journal of Sociology 1212., cf. Political process theory that took a long-term view of struggle and prioritised the importance of political opportunities (new alliances and alternative political tactics such as protests) over the role of resources and legal argument. Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (University of Chicago Press 1985); Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (Cambridge University Press 1994).; For an overview see Cummings (n 230) 18–20.
[240] McCann, *Rights at Work* (n 231).
[241] McCann, Michael, 'Legal Mobilisation and Social Reform Movements: Notes on Theory and Its Application' (1991) 11 Studies in Law, Politics and Society 225, 226.
[242] McCann, *Rights at Work* (n 231) 10.

direct effects of law by drawing on legal remedies, new precedents that contribute to their political objectives, or indeed, any direct legal protection that stems from litigation.

McCann also claims that there are indirect effects, or secondary effects, of tactical litigation that can positively contribute to a social struggle in three ways. First, legal mobilisation helps to build a social movement through organisational expansion and the articulation of specific demands. Following insights from legal consciousness studies, the deployment of rights claims is understood to increase a movement's awareness of legal obligations and an entitlement to certain rights claims[243]. Therefore, by mobilising legal arguments and framing their perceived injustices in the language of rights, a movement both builds its identity and develops legal claims that serve its political aims.

This builds on our insight from Santos in chapter two that the strategic and tactical importance of legal mobilisation extends far beyond the outcome of one case, or even one line in a judgment. Santos focused on the need to politicise any legal engagement so that its effect on political objectives might extend beyond legal processes and legalistic decisions. McCann's approach expands this insight and recognises the range of legal mobilisation's potential effects on political objectives. We will return to the role of political mobilisation and indirect effects in tenet 3 where we will consider how they enable social struggles to avoid the dangers of co-optation by law.

Second, litigation can generate public support for a social struggle. McCann emphasises the fact that "legal mobilisation does not take place in a social vacuum"[244] and a movement gathers momentum (or not) when its legal arguments have traction with the social experience of others. The publicization of a legal struggle is directed toward generating support from other social struggles, the common bonds of solidarity between social groups are critically important[245]. For instance, the support of other social struggles at demonstrations, picket lines, and in the provision of financial or other assistance can be essential to the political mobilisation and survival of a movement.

Third, litigation, or the threat of taking it, can provide leverage to support other political tactics and wider strategy[246]. The leveraging role of legal mobilisation seeks to compel

[243] ibid 276.; See further pp.227-277; Merry (n 231); Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).
[244] McCann, *Rights at Work* (n 231) 137.
[245] ibid 110–1.
[246] ibid 10.

concessions from other government institutions and from private parties such as employers or other dominant social actors[247]. For McCann, the discursive capacity of rights means that leverage does not require winning and it may not even require going to court[248]. Instead, there is an interplay between the formal act of initiating litigation and the informal bargaining that occurs between parties. Thus, law is an important resource for political struggles because the threat of potentially damaging legal action can be used as a bargaining chip in negotiations.

The recognition of indirect effects provides a textured account of the ways that legal mobilisation can be effective for a social struggle[249]. The key claim in McCann's conception of direct and indirect effects is that the effectiveness of legal mobilisation must be evaluated broadly, which means taking into consideration its varied contributions to a political struggle's objectives. In reference to criticisms of legal mobilisation, the courts' limited enforcement capacity or issues of resource mobilisation are not, according to McCann, the sole arbiter of litigation's effectiveness[250]. For McCann, litigation is used tactically and provides 'judicial endowments' that are used by social struggles for either short or long-term gain. The insight provided by litigation's in/direct effects encourages a more nuanced approach to critical accounts of legal mobilisation's negative effects, one that recognises its limitations but does not discard the effectiveness of such engagements altogether.

Rather than viewing 'winning' at litigation as the strategic or tactical reason for engaging with law, we can now see that engaging law for the purpose of enforcing an existing rule and drawing a 'direct effect' may not serve a movement's long-term strategic aims. For example, if a labour movement's political objective is to re-constitute the legal rules relating to capital-labour relations, its tactical engagements with law might challenge current judicial precedent and/or the content of a legal rule. And, while it is possible that a direct effect could flow from an effective legal argument it is also possible that the benefit of legal mobilisation for more radical strategic objectives reside in indirect effects. For instance, indirect non-

[247] ibid 138, 175-9.
[248] ibid 139.
[249] An objection to the issue of indirect effects is that it favours the symbolic capacity of law and underestimates its capacity to deliver direct effects. See Orly Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics' (2007) 120 Harvard Law Review 937, 961–2.; By highlighting the role of indirect effects I do not suppose any hierarchy with direct effects but recognise a wider scope for litigation's effects on a political struggle. I do not align with the more extreme approach to indirect effects that celebrates movement politics and organising over attempts at securing legal reforms. For a detailed account of this trend, see Scott L Cummings and Ingrid V Eagly, 'A Critical Reflection on Law and Organizing' [2000] UCLA Law Review 443.
[250] McCann, *Rights at Work* (n 231) 178.; See tenet three for a detailed considered of these potential limitations.

legal factors such as politicisation or the formation of a political identity around normative demands can positively contribute to a movement's political objectives.

I will work from a conception of effective legal engagement that is based on the idea that social struggles can draw both in/direct effects. And, that strategic and tactical engagements with law will be organised around and directed at attaining these effects. Indeed, the in/direct effects of legal mobilisation will define the extent to which legal strategy can shape the content of legal rules and have a wider effect on the constitutional relation between labour and capital. In other words, the constitutive potential of legal mobilisation can be understood within the framework of in/direct effects because it provides the tools to explain the range of possible outcomes and their relative effectiveness. I will return to this distinction throughout the tenets to provide a more nuanced account of the ways that law can be engaged by labour movements and as a means to comprehend certain strategic and tactical decisions. Having set an understanding of the potential effectiveness of legal mobilisation, we will build on this conception by considering, in realistic and pragmatic terms, the form and content of effective legal claims.

1.2. A sober consideration of the relation between labour movements and legal argumentation

In the remainder of this tenet I will examine *how* labour movements articulate claims in law in search of in/direct effects. In what follows, I will consider how social struggles draw on the opportunity to *frame* their normative claims in law and the role of *recognition* in the effectiveness of a given argument. I will argue that, where direct effects are the objective of legal mobilisation, the legal recognition of a social struggles' claim is essential; whereas, social struggles that have more radical political demands may weigh the importance of legal recognition against their strategic objectives. Moreover, the issue of legal recognition will shed light on the opportunity and limitation of legal mobilisation. Returning to concepts from chapter two we will consider how the effectiveness of a legal claim is reliant on managing the tension between excess of meaning and deficit of task. The final insight about effective argumentation will acknowledge how labour movements present their arguments in practice, and therefore, in response to available legal rules, political aims, the material necessities of workers, and a range of contextual contingencies that will affect a legal claim's effectiveness.

The idea that legal argument can be used as part of a social struggles' political strategy is nothing new, although, as we have seen in chapter two, some scholars have sometimes overlooked its potential importance. Law provides a universal language in which a group's specific normative demands can be generalised and subject to judicial adjudication. Michael McCann has argued that law is useful for social struggles because it enables communication between dominant and oppressed groups[251]. For example, McCann shows how the pay equity movement "drew its very normative logic as a rights claim from the evolution of antidiscrimination law in the postwar era."[252] As such, existing rights and laws will present an opportunity for movements to articulate their perceived injustices and normative demands as a justiciable claim. Legal rules provide an important opportunity to labour movements because they provide a framework within which legal claims can be presented. For instance, an argumentative approach targeting direct effects will be predicated on the successful articulation, or framing, of political demands as rights claims and/or other legal arguments directed at a legal rule's remedies.

At the same time, the use of law to frame political demands may not be aimed at delivering direct effects. For Alan Hunt, the use of rights claims by counter-hegemonic struggles is important because they serve as both the "articulation and mobilisation of collective identities"[253]. Hunt views rights claims as a means for a social movement to formulate and put into action its political struggle. And, the universal nature of rights language enables a movement to attract wider support for its normative claims. As per the first type of indirect effect detailed by McCann, effective framing can help to build a movement's identity around certain legal claims and galvanise a wider political struggle.

Before we continue, I acknowledge that there is a wider debate about whether social struggles ought to 'frame' their claims in legal terms[254]. This debate returns legal mobilisation scholarship to first principles by questioning whether the use of law and rights

[251] Cf. Tushnet has criticised rights discourse because it lacks the necessary determinacy to enforce a rights claims against powerful social actors. Moreover, Tushnet claims the abstract nature of rights allows hegemonic actors to pick and choose rights interpretations that best serve their own interests. Mark Tushnet, 'Essay on Rights' (1983) 62 Texas Law Review 1363.
[252] McCann, *Rights at Work* (n 231) 88.
[253] Alan Hunt, 'Rights and Social Movements: Counter-Hegemonic Strategies' (1990) 17 Journal of Law and Society 309.
[254] There are debates in both legal mobilization literature that are concerned with the potential effectiveness of law as a tool of social struggle and in the social movement literature'framing' carries a wider meaning that I do not engage with, I am using the term in the more modest sense of presenting arguments in the form of law. On the latter see further, Marc Lavine, J Adam Cobb and Christopher J Roussin, 'When Saying Less Is Something New: Social Movements and Frame-Contraction Processes' (2017) 22 Mobilization: An International Quarterly 275.

discourse is beneficial to social struggles or, if it undercuts their aims by transposing their struggle into the legal sphere where they lack 'experiential knowledge'[255]. I do not intend to replay debates about whether social struggles should or should not engage with law here, I will return in tenet three to the potential limitations of legal mobilisation. For now, I will set out a detailed conception of the conditions in which the framing of claims in law can be effective. Toward this end I engage with the framing debate to describe what it means to draw on law's excess of meaning in practice.

The act of framing involves the articulation of a legal claim. In this regard, framing is the practical instantiation of law's excess of meaning as it involves presenting interpretations of law and drawing on constitutional values. At stake in the articulation of a legal claim is the capacity for a labour movement to receive legal protections or not. Law recognises[256] some claims as legal and worthy of protections whilst others are illegal, excluded, and even punished. This transforms the recognition of legal claims into an essential battleground for labour movements seeking to impose legal obligations or win new rights protections[257]. I argue that the key factor in the articulation of a directly effective legal claim is that the content of that claim can be recognised as belonging to the legal system. In what follows, I will examine how certain content is included and excluded in the process of recognition, and how strategic objectives will also determine the content of a labour movement's claim.

To aid our understanding here, we can turn to the effect of legal recognition in Hans Lindahl's account of normative boundary-setting in a legal system. Hans Lindahl has presented a phenomenological account of the process of legal recognition that shows how something appears as law in a legal system[258]. For Lindahl, something that appears as legal is included within the legal system and that which is illegal is excluded. This is important

[255] For example, for Freeman engagement with law means "cut[ting] people off from access to their own experiential knowledge" Alan Freeman, 'Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay Responses to the Minority Critiques of the Critical Legal Studies Movement' (1988) 23 Harvard Civil Rights-Civil Liberties Law Review 295, 322–3. cf. Polletta challenges critical legal scholarship's concerns about the relation between law and social movements by arguing that legal meaning can be engaged innovatively and shaped to the means of social struggles. And, where social struggles develop rights consciousness they can use rights discourse to articulate their claims and express a movement's identity. Francesca Polletta, 'The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966' (2000) 34 Law & Society Review 367, 402.

[256] I will not offer a theory of recognition or delve into the specific treatment this has received in legal theory, instead I will consider in more practical terms how registering a claim in law shapes tactical engagements by labour movements. On the debates about the nature of recognition in law, see further Lindahl (n 131); Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (John Wiley & Sons 2018); Nancy Fraser and Axel Honneth, *Redistribution Or Recognition?: A Political-Philosophical Exchange* (Verso 2003); Christodoulidis, 'The Objection That Cannot Be Heard' (n 30).

[257] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge 2007) 83.

[258] Lindahl (n 38).

for Lindahl because it explains how the determination of something as (il)legal is a process that sets the normative boundaries of a legal order. Lindahl's argument is about the authority of legal orders in globalisation, it is beyond our present task to develop the issues that surround collective self-identification or reciprocity that motivate and inform his thesis. For our purposes, it provides insights about what is at stake in the recognition of a something as (il)legal. Moreover, Lindahl's phenomenological approach assumes the law's perspective of the practice of legal ordering. My perspective on this practice is taken not from law, but outside law, from the perspective of a grassroots labour movement. This develops our understanding of law as a tool of social struggle by identifying the fundamental role recognition will play in successful engagements with law.

> Legal understanding is re-understanding, is re-cognition; legal interpretation, re-interpretation. A fuller formulation of legal intentionality is, therefore, the following: we [ought to] jointly disclose something as something* anew.[259]

Lindahl identifies how each legal determination involves the re-iteration of something as legal. The cognition of an action as legal is a process that re-cognises something as belonging to the normative structure of the legal order. For Lindahl, what is at stake in the identification of something as belonging to the legal order is the collective self-identification of a legal order. In the determination of what is legal, law re-inserts claims into law that re-identify its normative content. This process of determination is the self-identification of a legal orders' collective identity and is simultaneously a process of setting the normative boundaries of law. In other words, a legal order's normative aims are continually re-affirmed by the inclusion and exclusion of certain acts as legal. This means that an effective legal argument is one that is capable of being recognised by law as belonging to the normative structure of the legal order. If a movement manages to have its claims recognised as legal its normative interpretation is included within the legal system, but if it is rejected its normative claims are excluded and law provides no direct effects.

For our purposes, Lindahl provides three pairs of terms that guide our conception of effective legal argumentation: Recognised/unrecognised, included/excluded and legal/illegal. This is important because it provides a means of understanding how claims that are not recognised are excluded and are therefore illegal. This sense of illegality refers to the fact that claims do not belong to the normative structure of the legal order. Rather than referring to the infringement of a rule, illegality is the exclusionary effect of a claim that cannot be re-

[259] ibid 130.

cognised in law. In other words, an unrecognisable claim cannot be re-identified by law as belonging to the legal order. As we shall see, this is of practical importance to social struggles whose legal strategy is premised on winning legal protections.

Lindahl's insights sharpen our understanding of the tension between law's excess of meaning and deficit of task. As we know, the former highlights the opportunity for social struggles to re-interpret law's meaning and the latter identifies the limits on the normative claims that law can recognise due to its commitment to certain entrenched interests. It has been our task to comprehend what determines whether a claim will successfully draw on law's excess of meaning or fall victim to its deficit of task. The issue of recognition highlights the importance of a legal claim's content and that, in the struggle over what ought to be legal, a movement must pay attention to law's normative boundaries. The lesson for labour movements is that, while legal ordering is a continual process of re-cognition that presents an opportunity for labour movements to challenge the present content of law, claims that challenge law's normative commitments (entrenched interests) cannot be recognised by law as legal. To put it otherwise, if the opportunity of legal mobilisation lies in the articulation of legal claims whose content is recognisable as something in law, labour movements must draw selectively on legal rules, rights and values that are capable of eliciting a positive response from law.

Let us consider an example where a social struggle did manage to win legal protections but its legal claims were not recognisable. Drawing on the example of the U'wa people's confrontation with Colombian Law, we will demonstrate two issues relating to recognition in the articulation of effective legal arguments. First, what happens when the content of a legal claim cannot be recognised by law. Second, how a social struggle's decision about the content of their claims will not be determined solely by what is recognisable in law but will also be subject to political calculations.

The U'wa people, an indigenous group whose lands fall within the jurisdiction of the Republic of Colombia, brought a case against both the Colombian Government and Occidental Petroleum opposing their decision to pursue oil drilling within the U'wa's territory[260]. The U'wa's opposition to oil drilling was grounded in their alternative conception of collective land rights. This involved a normative claim that land is central to U'wa culture, not as property or a productive resource but, because environmental

[260] Rodríguez-Garavito, and Arenas (n 101) 261.

preservation is important for their indigenous identity and culture[261]. The U'wa's principal legal argument claimed that oil drilling was a violation of their collective indigenous rights to their lands.

The Constitutional Court rejected the administrative decision to allow exploratory drilling rights on the grounds of article 330 of the 1991 Colombian Constitution that requires indigenous peoples to be involved in any decision relating to the exploitation of natural resources in their territories[262]. While the U'wa found it difficult to understand why their radical reconstruction of rights could not be heard, the Colombian Constitutional Court's decision was taken on the grounds of their constitutional right to participate in a consultation process before any oil exploration licenses can be issued[263]. The Court was unable to acknowledge the U'wa's normative claim because this would require the Court to step-outside of itself and abandon the constitutional rules relating to indigenous groups. To accept the U'wa's claims would have required the Court to accept the wider implication of the U'wa's normative demands that the application of Colombian Law over U'wa land is illegitimate[264]. As such, the Colombian Constitutional Court could only take a decision on the basis of existing Colombian Law or values that were consistent with the Colombian Constitution.

The first issue that the U'wa case demonstrates is what types of claim can and cannot be recognised in law. It shows the effect of presenting normative claims that are not framed using existing legal rules and/or rights that belong to the legal system. I have argued above that recognition is important in effective legal argumentation because, if a claimant wants to receive direct legal protections the content of a claim needs to be recognisable in law. Returning to the three pairs of terms given by Lindahl, we can see that the U'wa's claim is not recognised and is excluded as a something that cannot be identified as legal. In the U'wa case the recognisable claim was the one that referred to the constitutional rule about indigenous rights in the consultation process (i.e., article 330). The U'wa sought to expand the meaning of law but the content of its claim was not recognised as belonging to the Colombian legal system. Of course, the U'wa did receive direct legal protections but,

[261] ibid 246.
[262] Lindahl (n 38) 61.
[263] Rodríguez-Garavito, and Arenas (n 101) 250–3.
[264] Lindahl (n 38) 61–4.

importantly, the legal response of the Colombian Court referred to the available provisions in Colombian Law and not to the U'wa's claims.

This provides a practical insight into the relation between the opportunity in law's excess of meaning, the limitation in law's deficit of task, and how (un)recognisable claims by social struggles determine the tension between them. The U'wa presented an alternative interpretation of what law ought to be (excess of meaning), but it could not be recognised because it challenged the Republic of Colombia's entrenched interest (deficit of task) in ownership and control over U'wa land. In this regard, legal argumentation presents an opportunity to deliver legal protections only in so far as it does not confront law's normative interests. As we know, law is engaged in a process of re-identifying its collective identity by including and excluding certain claims. This means that labour movements must be aware of law's normative boundaries and ensure that in the articulation of a claim it is capable of being re-cognised in law as the re-articulation of a legal claim. In sum, the lesson for labour movements is that there is a threshold for what can and cannot be done in law, and in the articulation of directly effective legal claims they must avoid confronting law's normative commitments.

The above should not be read as an argument against the U'wa's legal strategy. On the contrary, the U'wa's legal claims provides a second insight about the important role of strategic and tactical decisions in the articulation of an 'effective' legal claim. The U'wa's decision to insist on its normative claims about collective rights to land serve as an example of a tactical decision to hold onto long-term strategic objectives. Rather than cede to the existing parameters of 'indigenous rights claims' set by law, the U'wa's legal arguments are not framed in Colombian Law but insist on its own normative demands. This means that the U'wa's argumentative strategy explicitly rejects any guidance about how law re-cognises claims and re-affirms the collective identity of law. On the contrary, the U'wa's strategy explicitly challenges the collective identity of Colombian Law as not including the identity of the U'wa. This, of course, means that the U'wa's normative claims are not recognised, are excluded and are illegal but, this does not mean that their argumentative strategy is ineffective. It means that it cannot realistically expect direct legal effects to flow from its legal claims, but, as we shall see, its approach ensures the normative integrity of the U'wa's struggle and may elicit indirect effects.

We have briefly considered in chapter two and will expand in tenet three the reasons why holding onto normative demands resists the co-optive effects of law. For now, we can see

that if the U'wa had abandoned their more radical claims and simply invoked their rights under the Colombian Constitution this would have amounted to an acceptance by the U'wa people that they are rights-holders subject to Colombian Law. And, would have served to legitimise Colombian Law's jurisdiction over U'wa land and contradict the U'wa's normative claims. In short, the U'wa's legal claims were articulated not on the basis that their content would be recognisable to Colombian Law, but for the purpose of insisting on its normative rejection of Colombian Law. Following from the U'wa's example, we cannot take a zero-sum approach to what constitutes an effective legal claim. On the contrary, the content of a legal claim will be the product of a labour movement's strategic decision about the perceived benefit of either winning legal protections or confronting law on its own terms.

Returning briefly to indirect effects, we must remind ourselves that a movement's legal arguments may not intend to deliver direct legal protection but seek publicity and/or to mobilise a general movement for legal reform. In certain circumstances, there may limited scope for registering a claim in law or, a movement may perceive that challenging the present content of law better serves their struggle. Where such conditions exist, a labour movement may decide against formulating legal arguments that will have legal traction and aim to benefit from the indirect effects of legal mobilisation.

The final issue to recognise is the role of non-legal factors and how a conceptually effective legal claim might be ineffective in practice. The point here is that, while this tenet can provide a guide to effective legal arguments, the ultimate outcome of legal mobilisation will be subject to factors outside of a movement's control. In order to comprehend the role of contextual contingencies, let us consider an example of a labour movement whose legal argument was recognisable but ineffective due to an unexpected judgment.

In Wards Cove v Atonio 1989[265] a class action was brought against an Alaskan Salmon Cannery on the basis of their discriminatory employment practices in the United States of America. The case was presented under Title VII of the Civil Rights Act 1964[266] and argued that the employers' hiring practices discriminated against workers on the basis of race. At the time of initiating proceedings (1974) the precedent in cases brought under Title VII were generally favourable to workers. Cases were decided on the basis of 'disparate impact' and

[265] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) in George I Lovell, Michael McCann and Kirstine Taylor, 'Covering Legal Mobilization: A Bottom-up Analysis of Wards Cove v. Atonio' (2016) 41 Law & social inquiry 61.
[266] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964).

the burden of proof lay with the employer. Following the precedent set in Griggs[267] (1971), discrimination was proven where practices had a disparate impact on a racial minority which meant that employees had to show statistical evidence of racial disparity in an employers' practices.

In Wards Cove, the workers presented evidence that low-paid canning positions were filled almost exclusively by non-whites and skilled positions were filled by white workers. The Supreme Court rejected the evidence as unsuitable evidence of prima facie discrimination and did not pass the burden of proof to the employer. Instead, the Court argued that discrimination could only be proven in the case by comparing the number of non-whites in the skilled non-cannery jobs with the percentage of appropriately skilled non-white workers on the labour market. Discrimination could only be proven where evidence was presented of non-white applicants being disproportionately rejected or where practices deterred skilled non-whites from applying. In addition, the Court ruled that the 'burden of persuasion' always lay with the plaintiff and they must prove a causal connection between disparate impact and the accused employment practices. This changed the longstanding precedent that where a prima facie discrimination was demonstrated the burden of proof lay with the employer.

Rather than applying existing case law, the Supreme Court in Wards Cove decided to close down the use of Title VII by workers in antidiscrimination cases. As Lovell et al claim, the jurispathic nature of the Wards Cove decision contributes a "sober scepticism"[268] about the capacity for courts to close off legal opportunities. Importantly, Lovell et al argue, the decision in Wards Cove could not be blamed on poor legal tactics, instead two factors contributed to the change in precedent: The macropolitical changes of the late 1970s and 1980s which resulted in a conservative majority on the Supreme Court bench, and the legal mobilisation of business interests to counter progressive legal precedent[269]. Notwithstanding the specifically political composition of the Supreme Court in the United States of America and its effect on legal precedent; we can draw the general conclusion that favourable legal precedent does not guarantee that future legal mobilisation by social movements will be effective. A labour movement may construct a legal argument that would have previously been accepted but, in some cases contingent factors will determine legal mobilisation's effectiveness. Therefore, a labour movements' use of available legal resources needs to be

[267] Griggs v. Duke Power, 401 U.S. 424 (1971) in Lovell, McCann and Taylor (n 265).
[268] ibid 33.
[269] ibid 22.

understood as a complex process determined by tactical and strategic objectives but are equally subject to the potentially jurispathic nature of judicial decision-making.

In sum, I have argued that registering cognisable, or justiciable, claims in law is central to a labour movement's engagement with law. From the perspective of providing direct effects an effective claim is one that is recognisable to law as belonging to the legal system. I have sought to show how recognition reveals a threshold for what claims can and cannot be made in a given legal system. A recognisable, or cognisable, legal claim is one that is compatible with the scope of existing legal rules, guaranteed by the constitution and/or does not contradict entrenched interests. Labour movements seeking to benefit from direct legal protections must competently articulate claims within these parameters. In addition to concerns about recognition, social struggles will need to accommodate their strategic and tactical objectives in the articulation of an effective legal argument. While a certain legal argument might deliver legal protections and be legally effective; it might be politically ineffective should it contradict or harm longer-term strategic aims. Therefore, the effectiveness of a legal argument will be determined by the issues of recognition, political objectives, in/direct effects and contextual contingencies.

2 Tenet two: Law's institutional capacity and effective legal mobilisation

Having argued in tenet one that the effectiveness of a legal strategy will be contingent on legal claims that have the ability to generate in/direct effects, tenet two turns to the role of institutional capacity in legal mobilisation. In what follows, I will highlight the institutional capacity of State law as a central tenet of legal mobilisation 'from-below' and, importantly, a key site of action for labour movements. Under conditions of globalisation and pluralism it is necessary to reiterate the continued importance of State law as a tool of social struggle. Institutional capacity refers to law's material and symbolic power to issue and enforce normative claims in society. National legal system's supreme authority over such power means that it has the capacity to impose legal obligations and constitute social relations. By identifying the supremacy of State law's institutional capacity, we can see that in spite of globalisation and pluralism the Nation State still determines the relation between capital and labour[270]. Therefore, for labour movements, the State is a strategically important site of

[270] Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013) 2.

action because labour's strategic objectives will often involve either the imposition of legal obligations on employers or the re-articulation of the legal relation between capital interests and labour.

The general rule presented in this tenet is that effective legal mobilisation ought to engage with legal institutions that have the capacity to enforce its claims. However, we must acknowledge that in certain circumstances national legal systems may offer limited means of redress. In order to present a textured account of the effective contexts of legal engagements, it is necessary to consider the role of alternative sites of struggle. In circumstances where the institutional capacity of State law is inaccessible or unhelpful, the effectiveness of a labour movements' tactical decisions will be contingent on engagements with plural legal institutions or in the taking of political action, each of which may provide indirect effects to their strategic objectives. In the second part of this tenet I will set out the role of such alternative types of action and how they indirectly engage the State's material and symbolic power.

2.1. Institutional capacity

Since modernity national legal systems have been the principle legal authority in their jurisdiction and continue to be chiefly responsible for regulating working conditions that occur within national boundaries. The modern State has monopolised law for the purpose of maintaining control over social conflicts within its territorial boundaries[271]. While the rise of legal pluralisms and a turn to more radical autonomous forms of social organising[272] present a challenge to State law's capacity to order social conflicts and determine social relations, I argue that social struggles must not lose sight of law's material and symbolic power. In spite of supposed alternatives, State legal systems still hold the institutional

[271] Poggi (n 7) 1.

[272] See for example: Negri's conception of the multitude and the constitution of disutopia in Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press 1999) 313–324.; Santos' subaltern cosmopolitan legality; and for an overview of radical legal pluralisms see, Mariano Croce and Marco Goldoni, 'A Sense of Self-Suspicion: Global Legal Pluralism and the Claim to Legal Authority' (2015) 8 Ethics and Global Politics 1.; There is also a body of literature espousing the importance of non-State or extra-legal forms of activism and the role of civil society organising. These forms are non-legal, separate from the Nation State, and centre around civil society as a site of organising. They do not endorse a form of legal pluralism but centre on societal organising as a means to transform society. For example, they promote the potential productivity of a space beyond both government and the market that includes community organising, NGOs and the role of transnational mobilisation. See Critical Legal Studies' extensive criticism of law as liberal legalism as a catalyst for a move toward these alternatives to the State as a site of social struggle, Cummings and Eagly (n 249) 451; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End* (NYU Press 1996).; For an detailed summary of the civil society movement literature see Lobel (n 249) 959–69; Scott L Cummings, 'The Politics of Pro Bono' (2004) 52 UCLA Law Review 1.

capacity to set labour's regulatory standards and order social relations between capital and labour. In what follows, I will set out an understanding of 'institutional capacity' and why it ought to be a key concern in labour movements' strategic and tactical decision-making.

Scott Veitch succinctly captures the capacity of State law when he states that "legal normativity brings with it a socially effective institutionalised force and the claim that this force is right or just"[273]. For Veitch, institutional force and a claim to right enables law to set the terms of legally-enforceable responsibility and the ascription of legal responsibility, or not, that shapes the various legal obligations owed by different social groups and individuals[274]. In other words, the institutional capacity of law determines legal obligations and social expectations about how someone or a definable group of persons ought to act. For our purposes, the implementation and enforcement of labour standards and the means of legal redress will determine the relation between employers and employees, and the relation between capital and labour generally. The distribution of legal responsibility and how this constitutes social relations ensures that State law remains a key site of struggle for social movements whose strategic aims seek to insert new legal protections, impose duties and/or re-constitute certain legal relations.

In order to develop these claims about the capabilities of modern law and the role of institutional capacity in effective legal mobilisation, I will follow Veitch's account[275] of the three characteristics of the juridical architecture: Coercion, correctness and social priority. The first guarantees law's efficacy by exercising the 'basic functions' that ensure rules are implemented according to the rule of law.

> [Coercion] is that which makes law socially efficacious. It does this by channelling force through the form of authorised legal institutions, thereby differentiating it from other forms of normative or physical coercion or social forces.[276]

We can understand this process as guaranteeing law's social function by ordering interactions and managing expectations. The coercive aspect of institutional capacity has also been referred to as the material power of law and highlights its monopoly over legitimate violence[277]. Legal coercion is distinguishable from other forms of coercion owing to law's legitimate authority to forcibly implement and enforce its rules. In practice, the material

[273] Veitch (n 257) 26.
[274] ibid 45-49.
[275] The first two are drawn from Robert Alexy, 'The Nature of Legal Philosophy' (2004) 17 Ratio Juris 156.
[276] Veitch (n 258) 25.
[277] Croce and Goldoni (n 272) 14.

power of a legal order means it is capable of enforcing its normative claims. A well-resourced legal institution will have associated enforcement bodies, such as the police and prosecution services, that aid legislatures and judiciaries in ordering society. In the Nation State legal institutions will be the supreme authority with a monopoly over the legitimate exercise of violence due to an efficient co-ordination between the legal system and enforcement agencies. Compared to transnational or supranational legal institutions who lack the material power to enforce their claims and must rely on the political and legal acceptance of their judgments at the State level for enforcement[278].

Correctness refers to the inherent 'truth' of legal declarations. Law is not merely the embodiment of power, but it makes a claim about what is 'right'. As such, law is not merely an instrument of violence but a declaration of correctness. The claim to correctness is central to Alexy's understanding of what distinguishes a mere norm from a law[279], borrowing from Veitch's analysis:

> The nature of the status of this 'truth' – that it [law] 'must be taken for established truth'- captures precisely the nature of the claim to correctness: that it is a combination of the normative and the factual, according to which the legal norm's implicit claim to correctness stands as correct, and impacts as such on the wider normative and factual world.[280]

Law is implicitly right because its claims are not mere norms but the ultimate arbiter of social normativity. Law's correctness underpins its socially symbolic power which exists where the State's authority is perceived socially as the supreme ordering force. And, law is relied upon to determine and guarantee social expectations not because they will be physically coerced but because its claims are viewed as the right-ordering of social relations.

> [The] state's monopoly on force is not as important in terms of menace and dissuasion as it is in terms of people's perception of something as law. In other words, a pivotal element for a normative ordering to be legal is the general perception of its pre-emptive character.[281]

As Goldoni and Croce emphasise, the social priority of law is key to the distinguishing the supremacy of a legal order from other normative orders.[282] There are a plurality of normative

[278] Přibáň (n 24) 2.
[279] Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Bloomsbury Publishing 1999). in Veitch (n 257) 25.
[280] Veitch (n 257) 25.
[281] Croce and Goldoni (n 272) 14.
[282] See also Sally Engle Merry, 'Legal Pluralism' (1988) 22 Law & Society Review 869, 879.

orders in society but only a national legal system's normative output assumes the status of right conduct sine qua non. The third characteristic flows from the effects of the first two: The capacity of law to make and enforce normative claims about correctness elevates it to a level of social priority or prominence[283]. Legal normativity sits at the top of a hierarchy of social norms, and legal institutions maintain social order by enforcing its declarations of right. These three characteristics underpin an understanding of law's institutional capacity

The supremacy of State law's institutional capacity makes it an essential site of struggle for labour movements whose strategic aims centre around regulatory standards and the social relation between capital and labour. The material and symbolic power of national legal systems means that they have the capacity to determine social relations unlike other normative orders or social practices. The institutional capacity of law can provide direct effects that no other normative order has the material power to deliver, and the symbolic power of national law remains a central arbiter of right conduct. In spite of the challenges to legal mobilisation at the national-level, see Rosenberg, Scheingold and Galanter above, and the existence of legal pluralisms that may be more accommodating of a labour movement's normative claims; the national legal system's role in constituting social relations, enforcing legal decisions, and deciding regulatory standards makes it an essential site of action for effective legal strategy.

A key strategic and tactical decision ought to be whether a legal system has the capacity to provide effective legal remedies. A labour movement whose strategic aim requires direct legal effects, such as the imposition of legal obligations on employers, will need to engage with legal systems that can draw on the material and symbolic power required to satisfy its strategic objectives. For example, in the context of struggles for economic and social rights, Katherine Young encourages movements, and scholarship, to take seriously law's capacity to institutionalise socially transformative regulations and impose certain minimum standards.

> [A]n antistate, antilaw agenda provides no resources with which to counteract the further evisceration of the state. Indeed, the relegation of the aspiration to material security to an "extra-legal" space would do nothing to halt the diminishing access to certain goods and services and would probably accelerate it.[284]

[283] Veitch (n 257) 26.
[284] Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) 245.

Katherine Young captures the important role law plays in guaranteeing rights protections. For Young, State legal systems have the capacity to guarantee economic and social rights and regulate relations between private actors[285]; whereas, alternatives to law lack the necessary resources to challenge current trends toward deregulation or provide direct legal protections. This draws out the link between legal strategy that aims to impose obligations and/or re-constitute social relations and the importance of law's institutional capacity to the achievement of such objectives. Pluralism and autonomy may promise a more receptive normative landscape and engaging with the State may involve certain compromises but, State law's institutional capacity remains necessary for the implementation and enforcement of legal obligations in society. For instance, engaging with State law will mean operating within a structure that upholds existing power relations, not least the subordination of labour to capital; but labour engages State law because wages, pensions, employment and dignified working conditions are at stake. Labour movements will have to make pragmatic decisions that weighs their radical structural critique of liberal constitutionalism's protection of entrenched property title and economic individualism against the importance of legal protections and the potential effect of labour reforms. In sum, an effective legal mobilisation will involve pragmatic engagements with the State because of its institutional capacity to deliver in/direct effects.

Thus far, I have sought to establish the strategic opportunity of State law owing to its institutional capacity. The next step of my argument is that the opportunity of State law is not something that labour movements *choose* to engage with because it is potentially effective. On the contrary, the context of labour's engagement with law is inextricably tied to the institutional capacity of State law. This means that passing over State law as a key site of legal mobilisation 'from-below' risks not only excluding tools of struggle but misunderstanding the reality of labour movements' strategic engagements with law. I will highlight two reasons why labour's engagements with law are emplaced at the national level.

The first reason follows from what we have already established about the role of national law in setting labour standards and adjudicating disputes. Labour is always already situated within the context of a Nation State's jurisdictional competence which limits a labour movement's ability to choose their scale of legality. A dispute about the legality of working conditions is justiciable in the relevant national legal system and, in order to draw on law's material and symbolic power, labour must engage at the national scale. Accordingly, a labour

[285] ibid.

dispute in Manchester will be the responsibility for the English courts, in Guadalajara the Mexican legal system and Thessaloniki the Greek courts. Notwithstanding the potential opportunity to appeal decisions to a supra-State court to compel compliance to certain standards at the national level; the dispute is, first and foremost, the competence of the national legal system.

Moreover, the immediacy of a legal dispute in the national context means that labour may not be free to choose the site of legal action, instead it must deal with the legal parameters (possibilities and limitations) of the jurisdiction in which a conflict occurs. By immediacy of a legal dispute, I mean that a labour movement that challenges legal rules will be brought into conflict with the legal system that is immediately responsible. For example, if a trade union in the United Kingdom organises ad hoc industrial action outside the parameters of the Trade Union Act 2016 an employer will likely initiate legal proceedings against them, and the trade union will have a case to answer in the national courts. Labour movements occur within a given jurisdiction and will have to engage with the legal system that their normative demands confront, either by initiating litigation or being summoned.

Second, labour does not enjoy the same degree of mobility as those social groups that might engage in 'forum-shopping'. Forum shopping refers to the practice of searching for legal systems that are more likely to provide claimants with a favourable judgment[286]. The idea of choosing between jurisdictions has often been discussed in relation to well-resourced actors (such as corporations) seeking to avoid excessive regulation[287]. The ways that labour and capital benefit from the plurality of legal systems is not analogous. Grassroots labour struggles are characterised by a lack of financial resources[288] that are required to take advantage of legal mobilisation in different forums. However, the key distinction refers to the rationale that lies at the heart of 'forum-shopping' and the opportunity that it offers compared to national law. While corporations will 'shop-around' for low-regulatory

[286] The idea of forum-shopping was initially coined in private international law, see Keebet von Benda-Beckmann and Bertram Turner, 'Legal Pluralism, Social Theory, and the State' (2018) 50 The Journal of Legal Pluralism and Unofficial Law 255, 260.
[287] Cf. Keebet von Benda-Beckmann, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village' 19 Journal of Legal Pluralism and Unofficial Law 117. A case study of the overlapping jurisdictions of distinct legal institutions in one location in Malaysia. The study exemplifies a unique setting wherein different legal authorities interact, providing a non-Western account of 'forum-shopping'.
[288] Sandra R Levitsky, 'To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements' in Austin Sarat and Stuart A Scheingold (eds), *Cause lawyers and social movements*, vol 145 (Stanford University Press 2006); Galanter (n 239).

standards and minimal legal obligations, labour movements challenge capital's flagrant avoidance of legal responsibility.

The aim of labour's legal mobilisation will seek to enforce existing regulations or impose higher-standards against capital interests that demand limited legal responsibilities. For labour, the institutional capacity of national law offers an opportunity to fix capital in one place and enforce legal obligations on it. The stake for labour when deciding in which scale of legality to pursue its legal strategy is whether a given legal system has the capacity to enforce either short-term legal protections or re-constitute the relation between capital interests and labour. Labour's legal strategy is tied to the national level precisely because it offers the opportunity for effective engagements that satisfy its objectives.

I make these claims about struggling over the content of law with all the necessary caveats about the limitations of this practice. Certain claims about responsibility cannot be heard and labour will be unable to draw on law's institutional capacity without encountering its deficit of task[289]. In this regard, institutional capacity is emblematic of the opportunity and limitation of legal mobilisation that has run throughout this thesis because its effective ordering of social relations cuts both ways for labour movements. On the one hand, it presents the opportunity for strategic engagements to challenge the present constitution of social relations and increase the legal protections enjoyed by labour. On the other, the institutional capacity of law can either set regulatory standards that offer limited protections or favour certain social groups/interests to the detriment of labour. Indeed, the absence of regulation, Veitch has warned, means the absence of precisely the sort of legal responsibility that will be the object of labour's legal strategy. Law's dis/avowal of legal responsibility means that it has both the capacity:

> [T]o operate as a key mode of organising responsibilities, but simultaneously allow for and legitimise the proliferation of their clandestine counterpart: irresponsibility.[290]

For Veitch, this reveals the ways that law legitimises the production of suffering in society. For our purposes, the tension between legal ir/responsibility represents a strategic battleground for labour between the legality of undignified work practices and the transformation of current legal protections to reflect labour's interests. The importance of

[289] Law's absence enables irresponsibility by facilitating the conditions of human suffering, Veitch (n 257) 85.
[290] ibid 2.

legal responsibility in society means that State law remains a key site of struggle for labour movements.

2.2. Institutional capacity: Exceptions to the rule

There will be circumstances where labour is unable to take action at the State level. If there are no mechanisms of legal redress or the legal system has already rejected its claims, a labour movement will have to take alternative strategic and tactical decisions. In this final part of the tenet, I will introduce nuance to the general rule that effective legal strategy will be reliant on law's institutional capacity by recognising the potential effectiveness of alternative legal systems and the role of political action in achieving strategic objectives.

A national legal system may have superior institutional capacity but, where its rules and remedies offer no realistic mechanism for redress a labour movement will search for the next best option. Labour movements may take the tactical decision to engage with legal orders with limited institutional capacity because it represents a more effective route to legal protections than directly engaging at the national level. The reduced institutional capacity of legal pluralisms mean they cannot have a direct effect on strategic objectives but they can indirectly affect them. Importantly, by highlighting the potentially effective role of pluralisms, I am not dismissing the role of State law but highlighting both the in/direct effects of alternatives and identifying an alternative means of engaging with the State.

For the avoidance of confusion, I do not endorse pluralism along the lines of a societal constitutionalism that identifies pluralism as a means to comprehend the constitutional features of social autonomies, and their capacity to sustain normative distinctness through functional reproduction[291]. This description of the self-constitutionalisation of societal groups has presented a paradigmatic shift in recent constitutional theory[292], but I do not view the fragmentation of legal authority as a phenomenon that benefits labour[293]. In other words,

[291] Gunther Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP Oxford 2012); Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' (n 22); Teubner, *Constitutional Fragments* (n 22).; For analysis of the (dis)connection between societal constitutionalism and social movements, see Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13).

[292] On the constitutional and political effects of societal constitutionalism, see Jiří Přibáň, 'Multiple Sovereignty: On Europe's Self-Constitutionalization and Legal Self-Reference' (2010) 23 Ratio Juris 41, 51–3; Emilios Christodoulidis, 'On the Politics of Societal Constitutionalism' (2013) 20 Indiana Journal of Global Legal Studies 629.

[293] For example, on the 'disorganisation' of centralised authority in modern society and capitalism since the 1970s see Streeck (n 10) 149–160.

I do not suggest that, in response to limited means of redress at the State level, labour movements ought to retreat from the State. On the contrary, I have insisted that labour's prospects of addressing its legal, political and economic conditions are dependent on successfully confronting national legal systems. Far from approaching pluralism as an end in itself, I will highlight how pluralism represents an opportunity to engage with and draw concessions from the State, albeit indirectly.

Although the transnational level lacks enforcement mechanisms it can mobilise a political struggle around certain demands and generate international political pressure. Therefore, while transnational political and legal action may not deliver direct legal protections at the national level, it can indirectly contribute to the strategic aims of social struggles. By drawing on the indirect effects of post-national legal mobilisation, a labour movement can potentially draw on the institutional capacity of national law as legislators, the executive, or relevant authorities succumb to international and domestic political pressure.

For instance, appealing a decision at the national level to a European court may result in a favourable judgment but it is not enforceable at the supra-national level, to satisfy the strategic objectives the judgment needs to be implemented at the national level. In addition, there may be political pressure or symbolic value in targeting transnational legal institutions in spite of their limited institutional capacity. A decision by a supra-national and/or transnational court may not create direct legal obligations in a labour movement's national jurisdiction but, it can generate indirect effects through publicity and international political pressure that encourages national legislators or executives to accommodate labour's demands at the national level.

If we return to the U'wa's struggle we recall that the Colombian Constitution provided a right to include the U'wa in any consultation about actions taken in indigenous territories. This provided a mechanism of redress against proposed oil-drilling but did not satisfy the U'wa's demands to exercise control over the territory. Given the ineffectiveness of the State in relation to the U'wa's normative demands, alternative forms of action such as transnational advocacy have become effective tools. For example, a speaking tour in the United States of America that sought to generate NGO support and, legal action that involved presenting a formal complaint against the Colombian government to the Inter-American Commission of Human Rights[294]. Importantly, this mobilisation of a transnational

[294] Rodríguez-Garavito, and Arenas (n 101) 253–4.

advocacy network is cited as having been pivotal in the decision by Oxy Petroleum in 2001 to abandon its planned drilling on U'wa land[295]. For Rodriguez-Garavito, the sustained cross-border coalition of support for the U'wa over a period of four years had an inevitable impact on their corporate image and such pressure precipitated into a decision that contributed toward the U'wa's objective. Similarly, workers at a Nike factory in Kukdong, Mexico, whose strategic aim was the establishment of an independent trade union and improved working conditions drew on transnational advocacy mechanisms. These included demonstrations at Nike stores in the USA and inviting international sweatshop monitoring organisations to the site[296]. These actions generated sufficient pressure on the factories' management and their clients to provide the Kukdong workers with a new labour contract guaranteeing improved conditions and a wage increase. And, in response to heavy international pressure the Mexican labour authorities agreed to recognise their trade union.

If we recognise the potential role of the transnational level and other plural legal systems capable of generating indirect effects, we must also expand our horizons and recognise the role of non-legal actions that might aid legal strategy. The final caveat to the central claim about institutional capacity's role in effective legal strategy is that: Legal pluralism and political action can be profitably deployed in pursuit of strategic objectives where institutional capacity at the State level cannot be directly engaged. Having already acknowledged the potential role of legal pluralism and transnational political advocacy, I will draw on an insight from the CfB literature that recognises the importance of 'non-institutional' action by social movements.

Gavin Anderson's non-institutional constitutionalism looks to the practices of social movements that transcend the form and nature of institutional constitutionalism[297]. For Anderson, constitutional practices are not reducible to the range of institutional possibilities given by legal and political systems. Instead, Anderson encourages an approach to constitutionalism that moves beyond the formal functions of legal and political systems.

> [T]he absence of social movements from the constitutional literature is not coincidental, but can be attributed to the potential difficulties they pose to some core elements in constitutional thought. In particular, bringing social movements into proximity with constitutional theory calls into question assumptions that

[295] ibid 258.
[296] Rodríguez-Garavito (n 138) 68.
[297] Anderson, 'Societal Constitutionalism, Social Movements, and Constitutionalism from Below' (n 13) 884.

> constitutionalism is inherently institutional, Western in origin, and normatively positive.[298]

This analysis emphasises how social movements may not adhere to institutionally prescribed practices and presents a sociological approach to the relation between social movements, law and politics. Anderson argues that constitutionalism has been dominated by institution-centric analysis that excludes social struggles' practices that cannot be accommodated by existing constitutional functions. In order to recover the informal constitutional practices of social movements, Anderson identifies two insights about the 'non-institutional' ways that social struggles engage with constitutionalism 'from-below'. The first concerns the *form* of constitutionalism and highlights the construction of non-Western legal and political formations[299]. For example, indigenous forms of social organisation that may lack the formal characteristics of Western constitutional but, nonetheless, exercise functions that order and maintain social relations. For our purposes, the second insight is more relevant because it says something about the non-institutional ways that social struggles interact with existing constitutional structures.

The second part of Anderson's non-institutional constitutionalism challenges the *nature* of political power[300]. In the Western constitutional tradition, the nature of political power in constitutionalism is understood to operate via a power relation between constituent power and constituted power. The former is active during foundation and the latter exercises political power on behalf of and according to the prescriptions of the former. Under these institutional arrangements the means of redress by civil society are located in the legal and political system. For Anderson, once we begin to explore the experience of social movements, we can recognise that political power is also exercised outside of the traditional conception of political power. Rather than comprehending the relation between constitutionalism and social movements through the dichotomy of constituent power versus constituted power and its threat of radical structural transformation; a social movement "prioritizes pragmatic, often incremental, strategies of change"[301] and a range of innovative practices that transcend traditional constitutional knowledge. The types of action envisaged by Anderson include alternative political formations but also a broad range of political

[298] ibid.
[299] ibid 902.
[300] ibid 903.
[301] ibid.

actions that will interact with and support legal mobilisation. For example, strikes, protests and whichever actions that might aid a groups' strategic goals.

The 'non-institutional' perspective provided by Anderson invites a reflexive consideration of the nature of power relations and how labour movements might draw on both legal and political tools to achieve their strategic objectives. The key insight from Anderson to an understanding of effective legal mobilisation is that constitutionalism is made up of practices that are not limited to the formal mechanisms of law and politics documented in the constitution. In light of this, we can present a more textured conclusion that, as a general rule, the effective sites of legal mobilisation are those that have the institutional capacity to enforce legal obligations and determine social relations. However, in certain circumstances, when State law's institutional capacity cannot be engaged directly, social struggles will draw upon the capacities of plural legal forms and take political actions in an attempt to satisfy their strategic objectives.

This tenet has argued that the institutional capacity of State law means that it remains the key site of legal mobilisation for labour movements. The material and symbolic power of the State enables it to impose legal obligations and constitute social relations. Missing the point of institutional capacity risks underestimating the role of material and symbolic power in ordering social relations and overstating the capacity of alternative arrangements to enforce a social struggles' strategic aims. By recognising what is at stake when determining the strategic effectiveness of a legal system, we can see the key role of the national level in effective legal mobilisation. Indeed, labour movements engage with national legal systems because its supreme ordering capacity presents an opportunity to enforce legal obligations on capital that would otherwise benefit from the absence of regulation.

Under certain conditions the context of legal strategy may be unable to effectively engage with the mechanisms of redress at the State level. Although legal pluralisms and political action may have limited institutional capacity and will be unable to deliver direct legal effects, tactical engagement with alternative sites of action may provide indirect effects that contribute toward their strategic objectives. In sum, effective legal mobilisation ought to target State law's material and symbolic power; but, where legal opportunities at the State level are closed off the effectiveness of a legal strategy will be dependent on the use of more innovative legal and political practices.

3 Tenet three: Political objectives and legal mobilisation

In this tenet I will set out a nuanced account of the relation between legal engagements and political objectives that insists on the potential effectiveness of legal mobilisation in spite of its unavoidable limitations. To do so, we must return to the tension between opportunity and limitation in legal mobilisation and consider how labour movements manage to engage with law without compromising their political objectives. This tenet argues that effective legal engagements have the potential to contribute to a movement's political objectives and evade the dangers of co-optation. To set out the conditions under which labour movements can hold onto their nomos, we will return to the distinction between tactics and strategy and recognise the productive interaction between legal and political mobilisation.

In order to comprehend the limitations that legal mobilisation might have on a labour movement's long-term aims, we will begin by setting out the supposed dangers of co-optation. This will provide a candid insight into the potential threat that ineffective engagements with law can pose to a political movement. While it is important to accept that legal mobilisation presents challenges to labour movements and may even, in certain circumstances, be an unsuitable form of struggle; we must also critically analyse the assumption that engagements with law will necessarily co-opt a movement's political objectives. I draw on scholarship that questions the understanding that legal mobilisation is politically ineffective and proposes a 'multifaceted'[302] and pragmatic approach to the ways that political struggles engage with law. By introducing counter-evidence that reveals the effective ways that political movements have engaged with law in practice, we will critically evaluate the tension between law's potential effectiveness and the dangers of co-optation.

In the second part of the tenet I will present an understanding of the conditions under which a labour movement can maximise law's potential effectiveness and protect its political objectives. This will involve a return to two insights that we have already considered. First, the indirect effects of legal mobilisation expand our conception of legal mobilisation's potential effectiveness and limits those instances that can be defined as having had a co-optive effect. The insight about indirect effects redraws our perspective on effectiveness by understanding how political objectives are not necessarily exhausted by an unfavourable court judgment. On the contrary, the productive relation between legal mobilisation and social struggles extends beyond direct effects. In other words, we must first better comprehend the distinction between a legal engagement that wins no direct effects and is

[302] Cummings and Eagly (n 249) 517.

co-opted from one that wins no direct effects but whose political objectives are benefitted by indirect effects.

Second, we will distinguish between legal tactics and political strategy so as to place legal mobilisation within the context of a wider political mobilisation. Importantly, the separation of political objectives from legal tactics reveals how a movement's long-term objectives are not exhausted by, or entirely dependent upon, the outcome of legal engagements. To demonstrate how a labour movement might engage with law and hold into its political objectives, I will conclude the tenet by considering the role of organisational support. The organisation of a labour movement by trade unions brings into plain view the distinction between law as tactic and its broader political struggle. I will demonstrate how a labour movement will be better placed to avoid the dangers of co-optation where it has the capacity to mobilise and co-ordinate both its legal and political mobilisation. By distinguishing between legal tactics and political strategy, we can comprehend legal mobilisation as a strategic opportunity that serves labour's objectives and that these objectives are not reducible to the outcome of tactical engagements.

3.1. The danger of co-optation?

The danger of co-optation and the extent to which social struggles can resist it are a central issue for the potential effectiveness of legal mobilisation. The danger that co-optation presents to the effectiveness of legal mobilisation is the potential loss or subversion of a movement's political objectives in the act of engaging with law. In this section I will set out the concerns that fall under the category of co-optation. I will take a broad definition of these concerns and include critical accounts of legal mobilisation that range from a general critique of legal reformism to practical concerns about the limitations of tactical litigation. These criticisms present both a rejection of legal mobilisation as an effective tool for radical political struggle and an internal critique of the practice of legal mobilisation. I have already responded to the first concern by insisting on the continued role of legal mobilisation at the State level, however I will draw on both types of critique as an opportunity to better comprehend the potential pitfalls of legal engagement and shed further light on the threshold between what can and cannot be done in law. The former provides an opportunity to understand the threats that legal mobilisation poses to a movement's political objectives. The latter returns to the threshold that we identified with the concept of law's deficit of task; however, rather than assume that there is a pre-determined limit on what can be done in law,

I seek to hold onto the capacity of effective legal mobilisation and explore the ways that social movements might challenge the perceived normative boundaries of law.

Having documented the concerns about co-optation and legal mobilisation's negative impact on political objectives, we will introduce some critical readings of these supposed limitations. This will show that, while there will be certain limitations on the effectiveness of legal mobilisation, there are also rebuttals to these limitations that hold onto the opportunity in law and reveal a more textured interaction between effective engagements and co-optation. The point of this section is to recognise that effective engagements with law will be those that manage to draw in/direct effects for its political objectives and avoid the danger of co-optation.

Traditional criticisms of legal mobilisation at the State level have centred around debates about either reformist or revolutionary forms of action. Reformism refers to the objective of incremental change to existing structures and describes the process of using law to advance a political aim through social reforms. A reform movement operates within the framework of legal and political action made available by the State. In contrast, a radical political movement is one that acts outside the scope of law due to concerns about the limitations legal rules might impose on political action. According to this distinction, legal mobilisation sits squarely within the reformist camp and, for this reason, is subject to criticism by political and legal scholarship that demands radical social transformation. The concerns raised are critical of the potential for radical change through legal reform and, presupposes that any attempts to pursue a transformational political struggle in law would be thwarted, or co-opted, by legal structures. To better comprehend this criticism of legal mobilisation let us move from an abstract summary to a concrete example.

The traditional ideological position has been that radical political aims, of labour for example, that are incompatible with the liberal legal systems will not be able to achieve their political objectives through social reform. Antonio Negri's early scholarship was quite clear that the demands of the worker's struggle could not be satisfied by liberal constitutionalism[303]. Against counter-productive constitutional methods that would account to nothing more than inadequate socio-economic labour reforms[304]; Negri argued for alternative planes of action outside of the liberal constitution[305] that could harness the

[303] Hardt and Negri (n 7) 55.
[304] ibid 301-8.
[305] Negri (n 272) 320., 324.

political potential of the multitude[306] and liberate all, not just workers, from oppressive social conditions under capitalism[307].

At the risk of caricaturing Negri's position, I draw on his proposals as an example of the ideological dismissal of legal reformism as inimitable to a radical political agenda. There is, on Negri's account, an insurmountable disagreement between the demands of worker autonomy, communism and liberal constitutionalism's fidelity to capitalism that will always mitigate against reformist efforts at internal transformation of liberal constitutional structures.[308]. In other words, Negri identifies law's deficit of task and concludes that, as a result, law is not an effective site of struggle. This sets a high-water mark for the limitations of legal mobilisation and what labour movements can and cannot achieve by engaging with law.

Although Negri provides an understanding of the ultimate limitation upon legal mobilisation at the State level, this thesis has insisted on examining the ways that labour movements continue to challenge this limit. Rather than follow Negri toward the supposed opportunities of post-State solutions, we will remain focused on the ways that labour movements engage with State law and unpack the socio-legal concerns about co-optation. While Negri's insights serve an important warning about the normative boundaries of law, the opportunity presented by the State's institutional capacity combined with the practical reality of struggle at the State level means that scholarship must analyse the effective practices that might enable unlikely legal protections for radical political movements. We will return to this distinction between reformist and revolutionary practices and expand on the opportunity to challenge entrenched legal interests in section 3.2 below.

If the reformist critique is concerned largely with the structural limitations upon normative change within legal and political systems, the internal critique of legal mobilisation in socio-legal scholarship highlights the ways that legal systems neutralise, distort or adversely affect the political objectives behind legal mobilisation. In other words, by engaging with legal functions, it is supposed that a movement's "focus on legal reform narrows the causes, deradicalizes the agenda, legitimises ongoing injustice, and diverts energies away from more effective and transformative energies."[309] Orly Lobel has categorised the co-optation

[306] ibid 303-313.
[307] ibid 303-336.
[308] Hardt and Negri (n 7) 308–313.
[309] Lobel (n 249) 939.

criticisms as including concerns about: Resources and energy, framing and fragmentation, lawyering and professionalism, institutional limitations, crowding out and the unsubstantiated legitimation of existing social arrangements[310]. In order to better comprehend the danger of co-optation when engaging with law, I will follow Lobel's identification of these six criticisms and summarise their potential effects on movements' political objectives. This will provide an understanding of both limitations to the potential effectiveness of legal mobilisation and a basis from which we can begin to understand the conditions that might mitigate against law's co-optive effects.

First, litigation is an expensive process that could consume a movement's available resources at the expense of other potentially effective political tactics[311]. The concern here is that the demanding and resource-intensive nature of litigation may detract from the aims of social movements by diverting organisational resources away from the more immediate concerns of its members. And, the returns from litigation may not be worth their high cost, should legal mobilisation fail to deliver direct or indirect effects a movement may have been better placed to deploy non-legal tactics[312]. In addition, the relative inexperience of grassroots struggles will put movements at a disadvantage against parties with vast resources and tacit knowledge of legal proceedings[313]. For example, a criticism of the NAACP's litigation strategy has been that its fixation on pursuing workplace discrimination cases under the Civil Rights Act delivered benefits to only a restricted class of African-Americans, and these victories came at the expense of wider and more immediate concerns about poverty and education that could have been addressed through community investment[314]. By concentrating on a litigious strategy, the NAACP has been accused of becoming alienated from the interests of African-American communities which contributed to reduced movement energy outside the courtroom[315]. Movement energy, as we will see below, is a critical factor in a movement's successful political mobilisation.

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[310] ibid 949–959.
[311] David M Trubek, *The Costs of Ordinary Litigation* (University of Wisconsin-Madison Law School, Disputes Processing Research Program 1983); Herbert M Kritzer and others, 'Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer' (1984) 9 American Bar Foundation Research Journal 559.
[312] Michael W McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Cornell University Press 1986).
[313] Levitsky (n 288).
[314] Risa L Goluboff, '"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights' (2003) 151 University of Pennsylvania Law Review 1977; Lobel (n 249) 949–50.; See also Derek Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice* (Basic Books 2008).
[315] The civil rights movement's close relation to the Civil Rights Act and the labour movement's use of the National Labour Relations Act have been cited as examples of the demobilising effect that law can have on a political struggle. See variously, Karl Klare, 'Law-Making as Praxis' (1979) 1979 Telos 123; McCann, *Rights at Work* (n 231); Cummings (n 230); Lobel (n 249).

Second, legal mobilisation involves framing a political dispute in legal terms[316]. It is argued that framing threatens to distort a movement's political objectives by replacing political demands with legal proposals. As I set out in tenet one, effective engagements with law will involve framing political claims as an argument about a particular right or regulation. For the sake of legal intelligibility, a movement's normative nuances and specific demands may not be represented in legal arguments[317]. On the one hand, the limitation imposed by framing is one that needs to be accepted and seen as a necessary effect of legal engagement. As we have already considered, labour movements that engage with State law will have to work within the paradigm of law's excess of meaning and deficit of task. And, the decision to engage on law's terms means ceding to its structural relationships. For labour, this means attempting to shift the balance of power within the capital-labour relations as opposed to overthrowing that relation altogether.

On the other hand, framing can neutralise more radical political demands by responding to their demands with piecemeal, not structural, reform. And, at worst, framing can fail to represent political demands and lead to ineffective or even counter-productive legal responses. The danger that can result from ineffective framing is it can cause movements to fragment[318] owing to disagreements about the gap between political objectives and the chosen approach to legal argumentation. In the final part of this tenet I will return to the tension between the necessity of framing in legal mobilisation and its co-optive effects to consider how a labour movement might manage the opportunity and danger of framing. The key issue that will be analysed is the extent to which the use of law as a tactic can be deployed effectively for the purpose of a movement's political strategy. Or, to put it otherwise, how can movements hold onto their political objectives given the danger of law's co-optive effects?

Third, lawyers have been understood to contribute to the co-optation of a movement's political objectives[319]. Due to the specialised nature of the legal field a movement must assume 'high-dependency' on their lawyers. The role of lawyers in translating political demands and representing a movement in law introduces the risk that their legal

[316] Lobel (n 249) 950.
[317] William Rubenstein, 'Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns' (1997) 106 Yale Law Journal 1623.
[318] Richard Abel viewed litigation as an individualistic enterprise that prevented the mobilisation of a collective struggle around a common goal, instead litigation was understood as something that individualised members of a movement. See further, Richard L Abel, 'Lawyers and the Power to Change' (1985) 7 Law & Policy 5.
[319] Frances Fox Piven and Richard Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (Knopf Doubleday Publishing Group 2012).

engagements misrepresent their political aims[320]. As with legal framing, the language in which political demands are presented by their lawyers may be unrecognisable to a movement's constituents and could alienate members and have de-mobilising effects[321].

Fourth, the limitations of legal institutions to deliver reforms have also been the subject of critical analyses of tactical litigation. Courts may issue favourable judgments and legislation may promise certain reforms, but this does not guarantee immediate enforcement or substantial reform in practice[322]. The judiciary's lack of an enforcement function means that the effectiveness of tactical litigation is contingent on a synchronicity between all branches of government. For instance, a court may rule that certain working conditions are unlawful and call for new legislative measures, but this does not determine what the content of any new law ought to be. The danger for labour movements is that movement energy and financial resources expended in the judicialization of their conflict may be thwarted by the limitations of the judicial decision. In these instances, labour movements will have to ensure that they are able to transfer movement energy from the legal arena into a sustained political campaign aimed at legislative reform.

Fifth, legal mobilisation has been understood to dominate a movement's strategy once it is chosen as a tactic of struggle. At issue here are two concerns, first that forms of political action will be assumed to be ineffective and that all mobilisation efforts will be concentrated into legal engagements. Law's authoritative role in social ordering means that alternative political forms of action may be viewed as deviant[323] or less effective[324], which might skew a movements resources toward legal mobilisation when political actions may be more effective. Second, the juridification of political conflicts can have a de-mobilising effect on the wider political movement. This is particularly acute where legal processes come to an end and it is assumed that the political conflict has been resolved. For example, the New Deal and its restructuring of collective bargaining rules is cited as having had a demobilising/deradicalising effect on associated labour movements that had encouraged

[320] Clark D Cunningham, 'Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse' (1991) 77 Cornell Law Review 1298; Gerald P López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Westview Press 1992).
[321] Jennifer Gordon, *Suburban Sweatshops* (Harvard University Press 2009) 196.
[322] Rosenberg (n 234) 338.; On judicial systems' inherent limitations when it comes to legal reform, see William P Quigley, 'Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations' (1994) 21 Ohio Northern University Law Review 455, 468.
[323] Michael McCann and Helena Silverstein, 'Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States' in Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press 1998).
[324] Rosenberg (n 234) 341.

more radical forms of political action[325]. For Karl Klare, the New Deal labour law reform (The National Labor Relations Act 1935) represented "a prospect or aspiration for democratic and, to some degree, anti-capitalist social change, as well as a buttress of the institutional system for State administration and containment of class struggle."[326] Klare's evaluation refers to the legislation's shift away from more radical social change as a result of successful lobbying by pro-business interests that mitigated against the aims of the militant labour struggle of the 1930s.[327] The challenge for labour movements engaged in legal mobilisation is to insulate its trajectory from legal decisions, although, as the example details, this may be unavoidable where new legislative provisions directly confront a movement's aims.

Sixth, legal mobilisation that challenges the perceived injustices of a legal system may only serve to reinforce social understandings of law's legitimate authority[328]. As we know, law monopolises material power through coercive means but, symbolic power is the product of a broad societal understanding that law is a legitimate source of authority. The legitimacy of such authority is reproduced where it performs legal functions in a manner that is expected by society. For instance, in Loughlin legitimate government is contingent on its capacity to maintain the political unity of the State which requires the legal and political system to manage social conflicts and satisfy social expectations[329]. Accordingly, the efficient functioning of a legal system is understood to have reproduced its legitimate authority to rule. The danger of co-optation occurs when social struggles engage law with the aim of challenging social injustices and/or entrenched interests and law issues a response that does not satisfy the movement's aims but does reproduce the legal system's legitimate authority to order social relations. The claim by critics of legal mobilisation is that; by engaging with a legal system that creates the conditions of social injustice, social movements often fail to tackle the root cause of these injustices and legitimise the offending legal system in so doing.[330] Therefore, a labour movement may expend vast financial resources and energy in critiquing the legal system only to receive limited tangible legal protections and,

[325] Klare (n 315)., supra note 7.
[326] ibid 131.
[327] ibid 130; G William Domhoff, *The Higher Circles: The Governing Class in America* (Random House 1970).
[328] Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (JHU Press 1992); JM Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 Yale Law Journal 105.
[329] Loughlin, *The Idea of Public Law* (n 21).
[330] Scheingold (n 235).

simultaneously, provide an opportunity for the legal system to 'resolve' a conflict and confirm its social legitimacy as the supreme ordering authority.

3.2. A rebuttal of co-optation's pervasive effect

In response to these concerns about legal mobilisation we must recognise the potentially negative impact on the effectiveness of legal mobilisation. However, we will reflect on whether, and to what extent, issues of co-optation preclude litigation's effectiveness as a political tool. As Lobel puts it: "The contemporary truism about the limits of legal change is thus that law defangs radical demands and should not be the chosen path to transformative politics."[331] Lobel's criticism captures the need to recognise the limits of legal mobilisation without abandoning it as a potentially effective practice for social struggles.

Rather than assume all legal mobilisations will be ineffectual owing to the danger of co-optation, we need a nuanced approach that recognises both its potential maleffects and its capacity to deliver in/direct effects. This thesis has argued that labour movements ought to engage in legal mobilisation because it remains, both in theory and practice, a potentially effective tool in workers' struggles for legal protections. Arguments about co-optation threaten to derail, or at least marginalise, this claim. Therefore, this section argues that legal mobilisation is not inherently de-mobilising and that the limitations detailed above can, in some cases, be turned into positives. In the next section we will consider how labour movements might reduce the potentially co-optive effects of legal mobilisation. Before that, we will introduce some rebuttals to the danger of co-optation and provide a more balanced conception of the relation between legal mobilisation and a movement's political objectives.

> Reform activists sometimes do overestimate the benefits of litigation and underestimate its financial and organisational costs, of course. But my point is that critics often inflate their case with inadequate evidence and faulty logic regarding the inherently crippling effects of reform litigation. There simply is little direct evidence that reform activists are routinely duped by either myopic lawyers or the liberal myth of rights. Quite the contrary, much interview-intensive evidence confirms that many – perhaps most – cause lawyers and other reform activists alike are quite politically sophisticated in their use of legal tactics.[332]

[331] Lobel (n 249) 958. cf. Joel F Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press 1978) 232.
[332] McCann, *Rights at Work* (n 231) 296.

In light of his analysis of the pay equity movement, McCann suggests that supposed limitations may be tempered in practice and even transformed into positives. For our purposes, McCann introduces an important rebuttal to the co-optation critiques that considers not just the potential effectiveness of legal mobilisation, but how the perceived causes of co-optation have in fact been deployed effectively in the context of a struggle. For example, rather than lawyers dominating proceedings and limiting political mobilisations; there is evidence that suggests lawyers have recognised and embraced the role of political mobilisation.

> [O]ne of the central conclusions of my equity movement study has been that the total positive impact of a diversified tactical approach is often far greater than the sum of all the tactics viewed separately. Moreover, if litigation is deployed as just one of several co-ordinated tactics, there is no necessary reason why it must be a divisive, atomising force.[333]

McCann details how contemporary social movements are more likely to be characterised by "tactical diversity" than be dominated by lawyers[334]. And, in response to concerns about the resource-intensity of legal mobilisation, McCann insists that, in certain circumstances "legal tactics can produce as well as consume financial resources."[335] In some high-profile cases awards for court costs have covered all legal fees and cost movements 'little to nothing'. In addition, we can recognise that the financial cost of legal action might be invaluable relative to the positive effect of legal reform on a movement's strategic objectives.

Finally, rather than assuming that legal language necessarily dominates a political movement, legal consciousness studies have revealed how social movements will combine critical approaches to law with a tactical use of it[336]. Indeed, Ewick and Silbey's seminal study of legal consciousness has shown that movement participants will engage 'with, before, or against the law'[337], and far from mere domination social struggles have demonstrated a more complex interaction with legal structures. By assuming that law infiltrates, narrows and determines the scope of political thought, McCann argues that critics have often patronised and underestimated the innovative ways that political movements engage with law[338]. Indeed, McCann's approach to legal mobilisation emphasises the ways

[333] ibid 295.
[334] ibid.
[335] ibid 294.
[336] ibid 304; Merry (n 231).
[337] Ewick and Silbey (n 243).
[338] McCann, *Rights at Work* (n 231) 301.

that social struggles will manage the dangers of co-optation and engage productively with law.

The insight from McCann's rebuttal of co-optation's pervasive effects is that: While legal mobilisation can impose limitations on a movement's political objectives, these effects are just one part of the pragmatic calculations that need to be made when formulating an effective engagement with law. Indeed, concerns that 'State law has co-optive effects on political objectives' need to be balanced against the potential opportunity that such legal engagements present to a labour movement. Legal mobilisation at the State level is a potentially effective practice for social struggles and the presence of limitations does not contradict this claim. On the contrary, it provides a position from which to comprehend those actions that can benefit a strategic objective and those that threaten to neutralise or de-stabilise a movement.

We can take this insight further and recognise that pragmatic decision-making about potential opportunities and limitations on political objectives is not unique to actions taken at State level. In fact, whichever type of action and/or site of action in which it is taken will demand pragmatic calculations about potential effectiveness. This applies to legal mobilisation at the State level or within a local, non-Western legal system, and to forms of political mobilisation. This is an important insight for our purposes because it frees legal mobilisation at the State level from the terminal criticism that its co-optive effects necessarily limit its usefulness as a tool of political struggle. Rather than assume that the State level is an inferior site of action because alternative institutional forms are capable of realising political objectives free-from negative externalities; a more realistic conception of political struggle recognises that each site of struggle will present similar challenges. Thus, the challenge is for social struggles to effectively engage with available legal tools and make pragmatic calculations that weigh opportunities and limitation together with strategic objectives. To substantiate this claim, let us consider three brief insights from Orly Lobel's critical analysis of legal pluralism as a means to confront the dangers of co-optation at the State level.

First, civil society organisations and legal pluralisms have been identified as alternative sites of organising to traditional State-based legal systems[339]. In theory, civil society groups are identified as a means to directly address social concerns without having to engage with legal

[339] Lobel (n 249) 959–70.

systems that mediate, and potentially distort, their political ambition. However, Lobel cautions that in practice such engagements with civil society can be co-opted by more conservative agendas. For example, the civil society movement's central premise of 'decentring' social programmes by limiting the role of the State in social transformation aligns with a conservative agenda that prefers privatisation programmes and implementation of non-State supervisory bodies. Rather than acting as a defence against deregulation and neoliberal globalisation that thrives on the absence of legal obligations, civil society organising can unwittingly endorse a structural framework with few checks and balances.

Second, Lobel argues that, by vacating the space of law and assuming an extra-legal position, activists assume a false position in which they no longer exert pressure on legal structures but remain subject to them. Activists must assume a more complex relationship that recognises the opportunities and limitations involved with legal mobilisation. Indeed, abandoning the State means losing a legitimate authority with the capacity to enforce legal obligations. As I have argued in tenet two above, the institutional capacity of the State is especially important for labour because it imposes regulatory standards and coerces employers to abide by its obligations. Third, pluralism and/or localism can lead to a fragmentation of a political movement. The move to extra-legal forms of organisation and pluralism leads to a fragmentation of energies that prevents any cooperation or the collective strength needed to deliver wide-ranging social transformation.

We have drawn on insights that legal mobilisation at the State level is not uniquely afflicted by the danger of co-optation and McCann's rebuttal of the co-optation critique as a means to insert a doubt into the received understanding that legal mobilisation has a negative impact upon political objectives. Accordingly, it is not possible to write-off legal mobilisation as a tool of social struggle because its positive contribution to social struggles will be a matter of contextual contingency. As McCann has stated, a movement's "specific situational dynamics"[340] will determine the effectiveness of engagements with law. This re-affirms the need for a pragmatic approach to the tension between legal mobilisation's effectiveness and the dangers of co-optation. In order to better comprehend such pragmatic calculations, the remainder of this tenet will develop our nuanced approach to legal mobilisation's effectiveness and provide an understanding of the conditions in which the danger of co-optation might be avoided.

[340] McCann, *Rights at Work* (n 231) 296.

3.3. Tactics, strategy and in/direct effects: Limiting the danger of co-optation

In this section I will present an understanding of the ways that engagements with law can enable a movement's political objectives whilst limiting the potential danger of co-optation. To comprehend how movements manage this tension I will return to two guiding insights: The in/direct effects of legal mobilisation and the distinction between tactics and strategy. The first stage of my argument encourages a broader perspective on the relation between legal mobilisation and strategic objectives. If we return to the insight about in/direct effects from tenet one, we can begin to redraw our understanding of the tension between effective engagements and co-optation of political objectives. This will recognise the extended benefits of effective legal mobilisation to a movement's aims and insists on the potential effectiveness of legal tactics over-time. The second insight centres on the distinction between legal tactics and political strategy. I will argue that, the key to limiting the co-optive effects of law lies in the capacity of a movement to distinguish between its legal and political mobilisation. The danger of co-optation appears when political objectives become over-reliant on legal tactics and political demands are subordinated to law's determinations. In order to exemplify the relation between tactics and strategy, I will draw on the important role of organisational support that enables movements to manage the tension between the potential effectiveness of tactical engagements with law and the danger of co-optation.

We have already considered the types of limitations that are contained within the general danger of co-optation; the concern here is how to determine when an engagement with law does or does not contribute to a movement's political objectives. The danger of co-optation will appear more likely when we take a narrow approach to effectiveness. For instance, if a movement's political objectives are only understood as receiving a benefit when legal mobilisation delivers direct effects, all other outcomes can be registered as an example of law mitigating against – or co-opting – a movement's political intentions.

I have argued above that a more realistic approach to the effectiveness of legal mobilisation is one that recognises indirect effects. If we return to these insights, we can see that even engagements with law that do not deliver direct effects can provide important externalities for a movement's political objectives. This shifts the balance between law's potential effectiveness and the danger of co-optation by reducing the instances in which engagements with law will have a de-mobilising effect on a social struggle. The insight from indirect effects encourages a textured account of legal mobilisation's effectiveness by taking a comprehensive approach to the relation between law and social movements.

In response to the charge of co-optation, McCann builds on his insights about in/direct effects and suggests that we must consider the long-term effects of legal mobilisation on a political struggle and suggests distinguishing between legal reform that 'contained' a political movement and legal engagements that have 'expansionary' capacity[341]. Accordingly, a 'contained' legal reform is one that achieves short-term results but does not result in widespread social transformation. An expansionist movement is one that builds on short-term gains and develops into a larger counterhegemonic struggle. In other words, McCann emphasises how a political struggle that achieves legal reform should not necessarily be understood to have had its political intent contained; legal reforms or mobilisation can provide the platform for a continued struggle for social transformation. By looking at whether a legal reform contained a political movement or facilitated the expansion of a political struggle provides a more textured account of the relation between a political movement and legal reform.

> Large-scale social movements rarely begin with grand architectonic designs and radical social agendas, as structuralists often suggest. Rather, counterhegemonic movements most often evolve incrementally through a series of more limited local struggles over quite concrete, often trivial ends….Small-scale acts of quiet resistance or simple demands for reform thus are not simply a coopted alternative to transformative politics.[342]

Rather than evaluating legal mobilisation according to its ability to achieve grand social transformations, McCann insists on a position that recognises the importance of incremental developments. A legal engagement that does not deliver legal protections or constitute a reform is not necessarily an example of a political use of law that has been co-opted. In fact, according to McCann, a failed attempt at legal reform can serve to generate political support and mobilise resources before launching an effective long-term struggle. A sociologically informed approach to the relation between legal mobilisation and social struggles recognises the importance of incremental steps, and how small-scale actions can serve more fundamental long-term ends.

Returning to the critique at the start of this tenet that drew sharp distinctions between reformist and revolutionary struggles, we can begin to recognise the interaction between the two practices and objectives. There will be a fluid interaction between strategy and tactics. At certain times, tactical engagements may not appear to deliver a radical critique of the

[341] ibid 307-9.
[342] ibid 307.

legal order but might deliver important legal protections that contribute to a social struggle's longer-term objectives. On the other, constitutional values will enable workers to present arguments that challenge the current content of law in pursuit of their strategic aims. We can draw on David Harvey's succinct summary of the practical relation between tactical actions and strategical goals:

> [T]he difference between a reformist and a revolutionary is not necessarily that you do radical things all the time, but it is that at a given moment, you may all do the same thing, i.e. demand living wage, but you do it with a different objective, and that is a long-term transition.[343]

The insight here is that so-called reformist practices may be used as part of a wider struggle for a 'revolutionary' political transformation that cannot be currently accommodated within law's deficit of task. The potential effectiveness of using legal tactics for political ends is the central preoccupation of this thesis and the importance of the interaction between tactics and strategy will be subject of the remainder of this tenet. I will build on the role of tactics and strategy to provide a conception of the ways that movements can limit the co-optive effects of litigation and hold onto their political objectives during legal engagements.

The aim of this discussion is to situate tactical engagements with law within the context of political struggle as a response to claims that law necessarily co-opts a movement's political objectives. Effective legal mobilisation will be composed of two elements: There is tactical use of legal tools and a wider political strategy with normative demands. If we were to narrow our view of legal engagement to the use of law as a tool, we might easily conclude that a political movement's effectiveness and ultimate trajectory is entirely reducible to legal processes.

As we know, a politics of legality is viewed by Santos as a key element in an effective engagement of law by a political struggle as it ensures that any legal action is concurrently debated and mobilised in the political sphere[344]. For Santos, this ensures that an issue is not

[343] 'A Conversation with David Harvey' (2006) 5 Logos: A Journal of Modern Society and Culture in Knox (n 28) 219.

[344] Santos, *Toward a New Legal Common Sense* (n 35) 469.; The politics of rights is both the idea that rights can be used in politics to make a claim and form a group, but also that rights claims are political because the scope of a right or its interpretation can be changed or reapplied. The politics of rights was a term used by Scheingold (1974; 1986) to describe how the elevated status of legal rights claims benefitted political mobilisation. Political struggles were organised or 'constituted' around a rights claim and could claim support from social groups or from State institutions.; On a politics of law as a counter-hegemonic strategy see also, Hunt (n 253).

contained within legalistic categories that limit the scope of analysis[345]. By politicising the subject of litigation, the present boundaries of legality are no longer subject to solely juridical analysis but become part of a wider political discussion. My argument about the importance of political strategy draws on politicisation as a practice that holds onto the normative aims of a social struggle. A labour movement ought not to engage with law exclusively but ensure that such engagements are paired with and contribute to their political struggle. The question that remains is: How do labour movements organise their tactical engagements with law so that their efforts contribute to their political strategy? In what follows I will expand upon the assumption that co-optation can be avoided by drawing on a dedicated account of the ways that social struggles politicise the terms of legal engagement.

Honor Brabazon has distinguished between movements that use 'law for politics' and 'law as politics' to comprehend the different ways that social movements engage with law[346]. The principle aim of this distinction, for Brabazon, is to provide a more rigorous account of law's role in political strategy.

> When law is used *for* politics, law is used as a tool or vehicle for a (subversive) political pursuit. When law is used *as* politics, the use of law itself is a (subversive) political pursuit as well. Law is still being used as a tool *for* a political pursuit, but this substantive political pursuit (such as a favourable court decision) is subordinate to the procedural political pursuit of using the law in a subversive way to achieve it. More specifically, in instances of law for politics, law is used unquestioningly in order to legitimise and institutionalise the political goal being sought. In contrast, in instances of law as politics, law is used not to *enjoy* but to *exploit* the legitimising and institutionalising characteristics of law….As such, the use of law as politics might appeal to movements that contain elements which would prefer more radical change than would be possible using law for politics, but which are unable to do so at that time.[347]

Law as politics highlights the distinction between a movement's political and legal mobilisation. And, in these circumstances, the mobilisation of legal tools does not subordinate a social struggle to the outcome of engagements with law because, where there is a wider political mobilisation a movement is not exhausted by the outcome of legal engagements. For our purposes, Brabazon's concept of 'law as politics' neatly captures the relation between legal tactics and political strategy and provides a more textured account of

[345] On the MST's and the politicisation of legal struggle see, Houtzager (n 142) 219.
[346] Honor Brabazon, 'Occupying Legality: The Subversive Use of Law in Latin American Occupation Movements: Occupying Legality' (2017) 36 Bulletin of Latin American Research 21, 26.
[347] ibid 27.

legal mobilisation's strategic opportunity than one preoccupied with the dangers of co-optation. In order to better comprehend how labour movements can engage with law effectively and hold onto their political objectives, we will work through Brabazon's distinction between law as politics and law for politics.

Law for politics describes legal engagements that do not carry a wider political objective, such as the subversion of the legal system's legitimacy or the wider reform of constitutional provisions. For Brabazon, the absence of a wider political agenda means that the aims and effectiveness of law for politics is contingent upon the outcome of law's determination of its claims. In other words, an engagement with law that is not linked to a wider political mobilisation should be understood as a purely strategic use of law. In the terms set out in chapter two, the absence of a long-term political objective means that any such use of law is not tactical but strategic. For example, we can understand a group of workers whose sole aim is to challenge their dismissal and be reinstated at work as having a legal strategy whose effectiveness is tied to the achievement of a legal decision that satisfies its stated objectives. If we suppose that these workers have no wider political objectives outside of these objectives, the danger of co-optation will be realised where their claims are rejected on the grounds that their dismissal was legal. The group's engagement with law would be categorised as law as politics if their legal challenge was part of a wider political challenge to the current regulations about unfair dismissal from work. Therefore, law for politics is aligned with internal legal strategy that lacks a wider political critique and law as politics draws out the relation between tactical engagements and their contribution to a political strategy.

The 'law as politics' approach is built on three principles: Law is one aspect of political struggle; Law is always already political; and the social legitimacy of law is at stake in the politics of legality. According to Brabazon, it is within these principles that we can identify the separation between law as a tactical opportunity and its wider political aims that are not co-opted by legal functions. Let us summarise these principles to better comprehend how legal mobilisation can be deployed to the benefit of political objectives.

The first principle is a belief that legal change is not sufficient[348]. Legal engagements are seen as "an opportunity to move towards a resolution" of certain issues but a political movement will aim toward more radical systemic changes that legal mobilisation alone

[348] ibid 7.

cannot deliver. As such, when law is used as a tool by a radical political movement it does so, from the start, with a theoretical understanding of law's limitations in relation to social transformation. From Brabazon's perspective, these limitations do not make legal mobilisation ineffectual but are simply markers of what can and cannot be done in law. Following Brabazon's insights, legal tactics will seek to contribute to a political objective but may be incapable of delivering its ultimate goals. Therefore, a movement need not be understood as having been co-opted just because it relies on legal decisions that do not attain more radical political reforms; on the contrary, such engagements with law may contribute to a longer-term political aim.

Second, Brabazon argues that radical political movements approach law as an already politicised forum[349]. Any decision about the content of law is understood as a political process because it determines the (il)legality of certain social, political and economic actions and orders social relations. Therefore, a social movement will engage with law to the extent that it serves its own normative account of what law ought to be, and where legal mobilisation serves no such purpose it may choose to engage other tactics. In other words, legal mobilisation is always a part of the wider political struggle, and law will not be engaged where it does not serve these objectives.

Third, the social legitimacy of law will be targeted by movements whose engagements with law seek to expose its injustices and contradictions. By questioning both the content of laws and presenting alternative interpretations of existing rules, Brabazon argues that political movements can invite a reflexive consideration of the vested interests that underlie the legal system and its rules[350]. In practice, attempts to disrupt law's present normative order may be rejected by judges but, the act of revealing such biases in law is capable of generating public support for a struggle[351]. For our purposes, we can see that the indirect effect of publicising a political struggle's objectives will ensure that tactical engagements with law serve a political strategy. Law may not present any means of direct redress where the political objectives present a challenge to law's entrenched interests and/or question law's legitimacy, however, there are ways to engage with law effectively in pursuit of such ends.

Brabazon's law as politics brings together our previous analysis from Santos' conception of grassroots legal mobilisation to in/direct effects and the productive interaction between

[349] ibid 30.
[350] ibid 31.
[351] ibid 32.

tactics and strategy. The abiding insight from the concept of law as politics is that law will be engaged by political movements with a wider critique of law's current content for the purpose of advancing its political objectives. This is important for our conception that labour movements can engage effectively with law because we can identify the separation between their use of law as a tactic and its intended contribution to labour's wider political objectives. As Brabazon has put it: "Law is used as a strategic opportunity and not as a determinant of strategy."[352] In order to expand upon this conception of effective tactical engagements and how they are deployed for strategic purposes, I will set out the role of organisational structures in ensuring that a movement is capable of managing the relation between legal and political mobilisation. In other words, I will provide an understanding of the conditions under which a movement can engage effectively with law and minimise the danger that law will co-opt its political objectives.

Before we move on, it is important to acknowledge that the means that a movement might employ to hold onto its political objectives will be numerous and the product of innovative practices that I cannot begin to pre-determine. Brabazon provides a final insight here about the types of political practice that will protect strategic objectives against law's attempts to dismiss or distort political demands. Brabazon notes how the MST (Bolivia) and ERT (Argentina) movements have engaged in a 'radical legal praxis' that has protected their political aims. The MST and ERT have taken actions that are illegal (the occupation of private property) and engaged law to legalise their use of property and protect their long-term aims. This introduces the idea that a labour movement can hold out against law's co-optive effects by deploying forms of political action that may involve illegal practices. I will not analyse this phenomenon further as the role of such 'radical legal praxis' will be subject to further discussion in the next chapter.

3.3.1. Labour movements and Trade Unions: Organising the relation between legal tactics and political struggle

This final subsection will demonstrate how the organisational role played by trade unions is key to the productive relation between political strategy and legal tactics. A trade union is a key factor in building a successful labour movement[353]. A trade union will both mobilise

[352] ibid 30.

[353] Komlosy (n 204) 65; Elise Danielle Thorburn, 'Workers' Assemblies: New Formations in the Organization of Labor and the Struggle against Capitalism' in Dario Azzellini (ed), *An Alternative Labour History: Worker Control and Workplace Democracy* (Zed Books Ltd 2015).; Michael Denning, 'Wageless Life' (2010) 66 New Left Review 79.

political strength and provide the structures required for an effective use of legal and pollical tactics. It is beyond our current task to wade into the vast and disparate literatures on trade unionism, labour struggles, and political organising[354]. For our present purposes, we will introduce labour's organisation to our discussion and make the modest claim that, a determining factor in the construction of an effective labour movement will revolve around a movement's organisational capacity to manage the relation between legal tactics and political strategy. The aim of organisational structures, I will argue, is to ensure that there is an adequate political mobilisation and that a movement does not become defined solely by its engagements with law.

I will refer to 'trade unions' as representative of an organisational structure that is capable of mobilising both legal and political practices. Of course, in certain circumstances, this function may not be performed by a trade union. Instead, an alternative institutional structure or the movement itself will be responsible for synchronising their legal and political mobilisation. Nonetheless, I will refer to 'trade unions' in what follows as emblematic of a labour movement's need for robust organisational structures that effectively mobilise tactics that serve strategic objectives.

Political mobilisation will involve the formation of a movement's identity around normative demands and recruiting workers to build political strength[355]. The solidarity of members is a key part of a union's organisational efforts and ensures that legal mobilisation is always taken on behalf of and is backed by a political movement. The point of solidarity here is it provides collective strength owing to the commitment by workers to the achievement of their collective demands. Importantly, such political mobilisation can buttress legal mobilisation. For instance, a labour movement's ability to apply political leverage, and not rely solely on the result of legal decisions, is contingent on there being a mobilised collective that is willing to take political action. As such, the organisation of a labour movement is a prerequisite for any political strategy and provides important tools in the form of political action, such as industrial action or other forms of protest. In the absence of an organised political struggle, the outcome of any engagement with law would be reducible to law's determinations and

[354] For critical reflection on the effectiveness of organising strategies see Kate Bronfenbrenner and others, *Organizing to Win: New Research on Union Strategies* (Cornell University Press 1998).; On the steep decline in Union membership and influence in Streeck (n 10) 46–54.
[355] The raising of workers' consciousness about injustices, rights demands, and their struggle are key to mobilisation, McCann, *Rights at Work* (n 231) 119.

such a movement would have failed to heed the advice about law as politics and, as a result, would be open to the threat of co-optation.

The mobilisation of workers in support of a particular cause has been cited as an important factor in co-ordinating effective engagements with law. As Bronfenbrenner et al have noted, the decade post-1945 saw high rates of worker unionisation and a growth in legislative regulation as trade unions exercised political leverage. However, in the following decades periods of low/decreased unionisation in the United States have been accompanied by deregulation, a reduction in progressive labour law reforms and weakened trade unions incapable of arresting the slide[356]. This process of unionisation is the product of political mobilisation that is key to labour movements.

For instance, the organisational strength of trade unions enables a movement to benefit from a range of tactical resources such as lobbying for legislative protections, leveraging in employer negotiations, publicising of a particular demand or injustice, and building a successful industrial action campaign that generates public support. These political actions may include public campaigns to generate political support for proposed legislative reforms, but it can also be focused on workplace organising[357] that seeks to build a labour movement's membership base and develop movement consciousness.

For our purposes, the key issue is that a trade union is capable of co-ordinating resources and knowledge into an effective use of legal tactics that provide in/direct effects to a labour movement's political objectives. My argument has been that a labour movement is not reducible to its engagement with law, so long as its engagements with law are tactical and deployed as part of a wider political strategy. A precondition of this claim is that a movement is not lead solely by labour lawyers but has an organisational structure that mobilises the necessary resources, exercises competent political expertise (bargaining, leveraging and strategizing) and maintains the support of its members. Under these conditions a labour movement will be best placed to manage the tension between effective legal mobilisation and the danger of co-optation. Although the precise conditions of effective legal mobilisation will vary in different contexts, the overriding factor is that a labour movement is built upon strong political foundations and engages law in pursuit of political objectives.

[356] Bronfenbrenner and others (n 354) 6–7.
[357] On the rise of 'law and organising' techniques and their effect on 'workplace organising', see Cummings and Eagly (n 249) 470–3.

For labour movements from-below it may be that specific trade unions are required, those that are able to better represent their specific demands. Traditional trade unions may be insufficiently responsive and/or unwilling to represent the political demands of different groups of workers. There are vast issues relating to the effectiveness of trade unions, especially in response to more recent changes in work and employer/employee relations[358]. Not all trade unions will provide a suitable organisational structure to support grassroots labour movements. For instance, if a labour movement demands radical reform to the employer-employee relationship an established trade union may be unwilling to provide organisational support due to the damage such an affiliation would cause to their working relationship with employers. And, even in more modest scenarios trade unions may be ill-equipped to mobilise and represent workers whose working practices diverge from more traditional forms of work. For example, the organisational needs of workers in the so-called 'gig economy' are not analogous to those of factory workers that have a culture of unionisation. As such, the type of labour organisation representing and organising a movement may vary from traditional trade unions to disparate forms of association that manage a labour movement[359]. The key issue is that an organisation exercises a range of functions from mobilising a collective of workers, developing workers' political consciousness, and co-ordinating legal tactics with political objectives.

The central claim of the third tenet is that engagements with law can contribute to a labour movement's political aims, and not simply threaten to co-opt their political demands. While there are certain insuperable limitations that prevent more radical political demands from receiving direct effects; the innovative interplay between tactics, strategy and in/direct effects reveal how such radical political movements may still engage effectively with law. For instance, while law may be unwilling to recognise legal claims that threaten to infringe private property rights, the publicization of a labour movement's demands may generate political support for their specific case or even mobilise wider societal movements against such perceived injustices. Therefore, I have encouraged a pragmatic approach to the danger of co-optation that recognises the potential limitations of legal mobilisation, but also comprehends that social struggles will weigh any potential threats against the potential effectiveness of legal engagement. Rather than concede that law necessarily has a negative effect on political aims, I have encouraged a textured approach that recognises the conditions

[358] Komlosy (n 204); Thomas Haipeter, '"Unbound" Employers' Associations and Derogations: Erosion and Renewal of Collective Bargaining in the German Metalworking Industry' (2011) 42 Industrial Relations Journal 174.
[359] See for example the share group system in Malaysia in Scott (n 201) 256–61.

under which labour movements will limit the dangers of co-optation and benefit from the potential effectiveness of legal mobilisation.

4 Conclusion

These tenets have sought to provide a detailed conception of the potential effectiveness of engagements with law at the State level. We began by highlighting the various innovative ways that labour movements will engage with law and encouraged a textured account of legal mobilisation's effectiveness. Michael McCann's conception of the direct and indirect effects that legal engagements can provide to social struggles has provided a detailed account of the opportunity that State law continues to present to labour movements. I developed our conception of the ways that labour movements will engage law by analysing the role of framing in the articulation of effective legal arguments. The central concern was the extent to which movements can draw on law's in/direct effects for the purpose of realising their political demands. On the one hand, labour movements that seek direct legal protections or structural reforms will need to frame their political claims in a legally cognisable form. This means that effective engagements with law rely on a competent re-presentation of political demands into a legal claim that can be accommodated within law's normative boundaries. On the other hand, labour movements may actively refuse to frame their claims in law in order to politicise the current state of legal regulations and mobilise a wider movement for social transformation.

In tenet two we addressed the reason why State legal systems are an effective site of struggle for labour movements. Notwithstanding the recent proliferation of innumerable legal pluralisms, the State's monopoly over coercive mechanisms and claims to correctness mean that it is able to both issue normative claims and enforce them. I proposed that the general rule for the effective context of legal mobilisation will be that movements ought to engage legal systems with sufficient institutional capacity. Indeed, labour movements' effective engagements with law will have to be attuned to the institutional capabilities of different legal systems, they must not engage with a legal system and expect certain remedies that it is institutionally incapable of delivering. For labour, a group that seeks to impose legal responsibility on employers and capital owners within a given jurisdiction, only the institutional capacity of State law can enforce its legal demands. However, there may be tactical reasons for engaging with legal systems that are capable of issuing normative claims but lack an enforcement capacity. A nuanced conception of the effective context of legal

mobilisation will recognise both institutional capacity and the potentially effective role of legal pluralism and/or political action.

The final tenet confronted concerns about the maleffects of legal mobilisation on social struggles' political objectives. I argued for a textured approach that recognised the dangers of co-optation but rejected claims that legal mobilisation would necessarily co-opt a movement's political nomos. In order to comprehend how movements might hold onto their political objectives, I returned to earlier insights about the range of in/direct effects that benefit political objectives and the productive relation between tactics and strategy.

The productive relation between labour's political and legal mobilisation can be grasped when viewed as the tactical mobilisation of legal resources for the benefit of strategic objectives. This provides a conceptual understanding that tactical engagements with law are oriented toward the achievement of strategic objectives. By broadening our perspective on the effectiveness of legal mobilisation to include the role of political mobilisation, we are able to comprehend how labour movement's political strategy remains intact even where legal tactics do not deliver immediate returns. The distinction between tactics and strategy means that legal actions will be deployed when opportunities arise without hedging the long-term future of a political movement to the outcome of those legal engagements.

In order to build on these insights about the potential effectiveness of legal mobilisation, the next chapter will turn to a case study of a labour movement's engagement with law. The aim of the case study is to place our conceptual analysis in a practical context. I will chart the trajectory of a movement and analyse how it encountered opportunities to engage with law and managed potential limitations on both its legal tactics and political strategy. Moreover, the practical context of struggle provides an opportunity to identify the effect on legal mobilisation of variables other than a movement's political objectives. By recognising the role of contextual contingencies and the material demands of labour movements, we can build a more comprehensive understanding of the factors that will shape the effectiveness of legal mobilisation 'from-below'.

Chapter 4. Worker-recuperated factories: An empirical study of labour and legal strategy

> *You're the one who goes to the court and tells the judge the workers have the right to take over a factory they didn't buy. What are the legal arguments you use so they'll allow this?*
>
> *What you do is look for legal rights in some law, some rule, even in nature itself, and try to breathe some life into that right that was left there for dead back in the history of Argentina, or of the world. Put into practice today, that means that the workers have a concrete and functional right to work, which is more important morally and politically than the right to property. And then, from there, you look for legal shortcuts, knowing full well that – I mean, let's not kid ourselves. With talk that's just political and moral, obviously, you're not going to get anywhere, and with a constitutional right that might as well be dead, you're not going to get anywhere, either. So, it's very important to also know the rules of the system. Above all, a lot about commercial law, because the trap is in their own laws, so you look for the loophole to recover the jobs.*
>
> *Diego Kravetz, worker-recuperated factory/enterprise lawyer*[360]

1 Introduction to an Argentinian labour movement and its strategic engagements with law

I have presented a theoretical account of effective legal strategy in chapter three, but I have insisted throughout the thesis that any engagement with law by labour will occur in practice and cannot be properly understood outside the contextual realities of a legal and political struggle. Legal strategy is unlikely to unfold according to ideal scenarios as presented 'in the books'. A labour movements' engagements with law will be determined by pragmatic decision-making in response to a legal system's available remedies, political circumstances, and the material necessities of workers. In order to develop our conception of legal strategy and its potential to deliver legal protections and/or have a wider constitutional effect, I will analyse the trajectory of a labour movement's engagement with law and consider the contextual complexities that shaped their legal and political mobilisation. This will provide a sobering account of the practical factors that will affect a labour movement's legal strategy. In order to comprehend how a legal strategy 'from-below' is mobilised and the factors that determine its effectiveness, we will analyse: The legal rules and remedies that presented a

[360] An interview with Avi Lewis in Esteban Magnani, *The Silent Change: Recovered Businesses in Argentina* (Teseo 2009) 75.

strategic opportunity; how legal arguments were framed in relation to these opportunities for legal protection; and, the impact of non-legal factors.

As we have seen in previous chapters there is an extensive literature analysing social movements and legal mobilisation and multiple case studies considering how social struggles have engaged with law 'from-below'. However, there is limited dedicated analysis in both literatures of labour's use of law to confront their social, political and legal experience of exclusion. The labour movement that will be the focus of our analysis are the worker-recuperated factories (empresas recuperadas por sus trabajadores, hereafter ERTs) in Argentina. This grassroots labour movement was formed by groups of workers that resisted the condition of unemployment and sought to recuperate their workplaces. A factory or enterprise is recuperated[361] by its workers when they: (i) Occupy and take control of the production of goods or the provision of services and, (ii) establish a model of worker self-management and/or form of cooperativism and resume the production or provision or services. The ERT movement continues to be an important labour movement within the country with the number of worker-recuperations having grown exponentially since 2001, from a modest 36 pre-2001, 251 by 2010 and 384 in 2018[362].

The key legal challenge to the ERT movement has been the legality of the workers' control of property. In pursuit of legal protections for their control over property, the ERTs' engagements with law have been directed at both short-term rights to use property and a long-term constitutional aim to re-balance the constitutional right to work vis-à-vis entrenched rights to private property and owners of capital. Given the duration and complexity of the ERTs' engagement with law and the radical nature of their political aims, its experience presents an opportunity to put our conceptual account of effective legal strategy into a practical context and examine the trajectory of a labour movement's

[361] For Ruggeri, recuperation is preferred to 'autogestión' when defining the ERTs because their realisation involved the ex-employees of the capitalist company 'recuperating' their abandoned workplaces and it refers to the workers' actions as an occupation of a previously existing company. While the ERTs are an example of worker self-management, 'recuperation' is preferred to 'autogestión' because it refers directly to the defining feature of the ERT movement. Andrés Ruggeri, *¿Qué Son Las Empresas Recuperadas? Autogestión de La Clase Trabajadora* (Peña Lillo : Ediciones Continente 2014) 18.

[362] Andrés Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En El Gobierno de Mauricio Macri. Estado de Situación a Octubre de 2018.' (Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas 2018) 6 <http://www.recuperadasdoc.com.ar/VI-Informe-Situacion-ERT-2018.pdf> accessed 4 December 2019.; They also boast a high mortality rate of 10.67%, meaning only one in ten ERTs fail after initiating the process of recuperation. As of March 2016, there have been a total of 411 Argentinian ERTs meaning only 44 have failed. In addition, for every ERT that closes another ten will be opened compared to the modest ratio of 1:1 in private capital enterprises. Andrés Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En Los Comienzos Del Gobierno de Mauricio Macri. Estado de Situación a Mayo de 2016.' (Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas 2016) 12 <http://www.recuperadasdoc.com.ar/informe-mayo-2016.pdf> accessed 4 December 2019.

engagement with law. I argue that the present case study captures the practical reality of legal strategy as a process and provides unique empirical insights about the opportunity and limitation of legal mobilisation that expands our conceptual analysis. The following examination of the ERT's strategic engagement with law will reveal how this labour movement used innovative argumentative practices that seized upon existing legal protections, presented new interpretations of what law ought to be, and manipulated the application of existing constitutional rules.

The ERTs have been analysed in sociology, economics and political theory. Recent studies of Argentina's worker recuperated factories have focused upon their struggle to provide an alternative to the general economic programme of neo-liberal globalisation[363]. The workers' rejection of the command model of work and the primacy of private property rights has been interpreted as evidence of a challenge to contemporary capital-labour relations[364] and that an alternative to capitalist dictates at work is possible[365]. Indeed, the survival of these worker-controlled enterprises has been described as an example of the "capacity of Argentine worker cooperatives to maintain alternative norms of producing under capitalist economic constraints."[366] In response, socio-economic analysis has examined how this alternative politico-economic model of work can sustain itself against the political and economic structures of liberal constitutionalism[367].

A neglected account of the ERTs is their engagement with law. The ERTs' use of legal concepts and commitment to their political struggle is a resource from which we can better comprehend the strategic and tactical engagements with law by a labour movement. Honor Brabazon has argued that the ERTs' use of existing law and awareness of law's limitations

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[363] For example, Peter Ranis, *Cooperatives Confront Capitalism: Challenging the Neoliberal Economy* (Zed Books Ltd 2016); Dario Azzellini, *An Alternative Labour History: Worker Control and Workplace Democracy* (Zed Books Ltd 2015).

[364] Peter Ranis, 'Argentine Worker Cooperatives in Civil Society: A Challenge to Capital–Labor Relations' (2010) 13 WorkingUSA 77.

[365] Dinerstein, *The Politics of Autonomy in Latin America* (n 140).

[366] Ranis (n 364) 77.

[367] See, Mezzadra and Neilson (n 270); David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (Verso Books 2012).; For Dania Thomas, the cooperativism of the recuperation movement intends to buffer the social consequences of the self-regulating credit market. Thomas warns that the credit market demands a form of corporatism that is "inimical" to cooperatives and represents a substantial threat to the ERT movement's capacity to challenge the dictates of the market without a political renegotiation of the market. Thomas' analysis concludes that cooperatives cannot sustain themselves long-term in the current self-regulating credit market. This is sobering analysis that contrasts with academic studies that view the political struggle of ERTs, and their realisation of self-management and cooperativism, can buffer the social and economic effects of markets and protect workers. Dania Thomas, 'Cooperativism in a Credit Crisis: Lessons from the Argentine Worker Takeovers' (2011) 62 Northern Ireland Legal Quarterly 505. Cf. Daniel Ozarow and Richard Croucher, 'Workers' Self-Management, Recovered Companies and the Sociology of Work' (2014) 48 Sociology 989.

is an example of a "radical legal praxis"[368] that reveal the opportunities that strategic engagements with law present for emancipatory resistance against neoliberalism. While providing an enlightening discussion of the interaction between legal and political tactics, Brabazon's conceptual analysis stops short of detailing the specific legal and constitutional rules targeted by the ERTs. The aim of this case study is to consider the types of legal argument presented and the contextual factors that shape their pragmatic legal strategy.

Before moving to our legal analysis, it is necessary to detail the exact nature of the ERT movement and introduce the subject of our analysis. In what follows I will consider the methodological aims of the ERT case study, and the extent to which an Argentinian labour movement provides generalizable conclusions to an inquiry into labour movements and legal strategy 'from-below'. I will contextualize our legal analysis by providing a detailed background to both the ERT movement generally and the specific conflict that shapes the legal strategy of the ERT – Hotel BAUEN Cooperative - that will be the subject of our analysis.

1.1. The ERT movement: Formative conditions

In this section I will establish the contextual factors that were the catalyst for the ERT movement. Before we consider the movement's specific circumstances, I will address two pressing issues: First, the relativity of case study analysis and the generalisability of our conclusions. Second, the extent to which the phenomenon of worker-recuperation is specific to the Argentine or Latin American context.

In relation to the relativity of ERTs' legal strategy I argue that, while the relative social, political and economic conditions in Argentina shaped the emergence and survival of a context-specific labour movement; the important lesson for comprehending the potential of legal strategy 'from below' is not the precise conditions of the ERT movement, but that all labour movements and their legal mobilisation will be shaped by their social, political and legal context. I approach case study analysis and legal strategy from the perspective that all instances of legal engagement 'from-below' will be determined by specific conditions. I have insisted throughout that a realistic socio-legal analysis of legal strategy by grassroots labour struggles must eschew an over-reliance on the explanatory capacity of theoretical and conceptual analysis; instead, we must recognise the pragmatism and contextual

[368] Brabazon (n 346) 24.

contingencies that will determine any movement's strategy. In other words, our conceptual analysis has provided an invaluable framework from which to comprehend effective legal strategy but the precise ways that movements will apply legal tools in practice and the outcome of such engagements cannot be pre-determined. Therefore, the ERT movement provides an opportunity to build upon our conceptions of effective legal argument and the dangers of co-optation by assessing how a labour movement has confronted these opportunities and limitations in the context of localised political, economic and legal factors.

An inevitable methodological limit to our conclusions is that not all labour movements will share the same formative conditions for action. By acknowledging the unavoidable relativity of case study analysis, we also identify the generalisable trend that labour movements' legal strategies will occur in response to its social context. Effective legal strategy is not one-size fits all; its trajectory will be shaped by pragmatic decisions that can only be explained in relation to the context in which they were taken. Therefore, any attempt to evaluate tactical actions in relation to strategic objectives ought to take into consideration the role of contextual factors. Our present task is to comprehend an Argentinian labour movement's legal strategy and this will require an understanding of the contextual factors that caused the ERT's to make pragmatic decisions about their engagements with law. Indeed, we will begin by considering what it was about Argentina around the turn of the millennium that laid the ground for such an extensive labour struggle. In the second part of the case study, we will return to provide a detailed account of the non-legal factors that affected the ERT's legal struggle.

The ERT movement is the product of specific circumstances that occurred in Argentina and Latin America but, it should not be seen as a phenomenon that is unique to the Argentinian or Latin American experience[369]. There is a history of occupations in Latin America but, the 2001 ERTs are not seen as analogous to previous instances. For Ruggeri, the social and political frameworks are markedly different between previous occupations and the current phenomenon[370]. Previous instances were either the result of trade union organised actions that demonstrated the power held by workers in their negotiations with employers about pay and other demands[371] or, they were encouraged and arranged during periods of politically

[369] We can see examples of worker recuperation in Italy, Greece, Chile, and in many other parts of the globe. Their specific emergence are all subject to factors relating to their own circumstances. None are as prolific and extensive as the ERT movement in Argentina. For examples, see Azzellini (n 363).
[370] Ruggeri, *¿Qué Son Las Empresas Recuperadas?* (n 361) 56.
[371] Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 130.

radicalised trade union action[372]. In each case, Ruggeri argues that occupation was the result of a combination of political, social and economic factors unique to a specific period in time[373].

The same conclusion is applied to the post-2001 ERT movement. The ERT movement arose due to the extreme and specific social, political, legal and economic conditions brought about by the financial crisis at the end of the 1990s that reached a crescendo in 2001. As such, occupation and recuperation of enterprises by workers was not premised on previous instances of worker occupation, but the formative experiences of: Precarious and undignified work; economic recession; a rapid decline in household income and living standards; and, widespread political opposition to the idea that there is no alternative to the dictates of neoliberal globalisation. The material necessities of workers left unemployed by the financial crash was a catalytic factor in the establishment of the ERT movement and its engagement with law[374]. In this regard, the ERT movement needs to be understood within the context of a broader mobilisation of civil society in post-2001 Argentina.

The Argentine economy entered recession in 1998, from there the neoliberal policies of the 1990s that had facilitated free market enterprise and hollowed out social protections began to backfire. In the decade leading up to the crisis Argentina had diligently implemented the suggested economic policies of the 'Washington Consensus' and was considered a reliable partner of the IMF and the World Bank.[375] A series of shocks to the economy caused the collapse of the Argentine peso (at that time pegged to the US dollar) and liquidated the assets that had been accumulated on credit during the preceding years of economic boom.

In late 2001 the streets of Argentina were filled by popular demonstrations and united under the common slogan: *¡Que se vayan todxs!* This demand - to 'get rid of them all!' - was directed at those considered responsible for the currency and sovereign debt crisis that precipitated the collapse of the Argentine economy. The government resigned and a caretaker President installed before new elections were organised. The economic collapse

[372] Ruggeri, *¿Qué Son Las Empresas Recuperadas?* (n 361) 56.
[373] ibid 57.
[374] Brabazon (n 346) 24.
[375] Andrés Ruggeri and others (eds), *Crisis y Autogestión En El Siglo XXI: Cooperativas y Empresas Recuperadas En Tiempos de Neoliberalismo* (Peña Lillo : Ediciones Continente 2014) 13.

was viewed as symptomatic of a wider failure of political and legal institutions to meet the social expectations of the people and mobilised a broader anti-institutional movement[376].

This period of social protest lead to a range of innovative social organisations. For example, the 'piqueteros', neighbourhood assemblies, the Unemployed Workers Associations and the ERT movement. The former began as a roadblock protest against mass unemployment. Modelled on the traditional industrial strike, groups of unemployed workers gathered in their neighbourhoods and closed-off streets in protest at the bleak socio-economic conditions and lack of adequate response by the government[377]. The Unemployed Workers Associations (UWAs)[378] and neighbourhood assemblies[379] took similar action but occurred in different geographic locations. These organisations presented demands to government about the need for employment and adequate social policies but, in the main, they took direct action to create employment and attend to the needs of the community. For example, the UWAs set up nurseries, food banks, and organised training programmes for workers[380]. These projects aimed to create a solidarity economy in which the community sought to help itself in overcoming widespread unemployment and the post-crisis austerity policies imposed by the government.

As we can see, the ERT movement did not emerge in a vacuum, worker recuperated factories are a social movement produced by the socio-economic conditions in Argentina in the 1990s/2000s. The neoliberal policies of the past decades provided the formative conditions for a radical re-conception of work. The crisis was the final straw for a workforce that had borne the brunt of a deregulated labour market where employers paid low wages and cancelled the contracts of those that threatened industrial action. In search of dignified and reliable employment the formation of cooperatives allowed workers to take decisions collectively about their future. Rather than a principal concern for profits that encourages efficiency savings and the maximization of productivity; the cooperatives are concerned principally about the protection of employment. In both the short and long term, this is a radical labour movement whose challenge to neoliberal globalisation is not grounded in

[376] Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 113.
[377] ibid 125–6; Sitrin and Azzellini (n 203) 186.
[378] Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 126–8.
[379] Sitrin and Azzellini (n 203) 184–5.
[380] See further, Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 125–30; Ana Cecilia Dinerstein, 'Autonomy in Latin America: Between Resistance and Integration. Echoes from the Piqueteros Experience' (2010) 45 Community Development Journal 356.

ideology but a pragmatic alternative driven by the material necessity of workers.[381] A 2005 study of the ERTs noted this pragmatic concern for work:

> The underlying message of the study was that workers, whatever their ideological predispositions and levels of class consciousness, were essentially resisting unemployment to the best of their capacities.[382]

The ERT phenomenon did not emanate from a revolutionary or anti-capitalist movement for change, rather the 'fear'[383] of being unemployed caused workers to take "purely defensive"[384] actions in response to their circumstances. The legal system has been the principal site of struggle for this labour movement owing to the institutional capacity of law to recognize an ERT's use of property as legal. In the following analysis we will analyse the ways that the ERT movement engaged effectively with law whilst also taking into consideration the role of its specific sociological conditions.

1.2. The Hotel BAUEN Cooperative: An ERT's legal struggle

The ERT that will be the subject of our analysis is 'La Cooperativa Hotel Buenos Aires Una Empresa Nacional' (also known as Cooperativa Hotel B.A.U.E.N., hereafter Hotel BAUEN Cooperative.) The Hotel BAUEN is arguably the best-known workers' cooperative in the Argentine recuperation movement. The Hotel is a twenty-story hotel situated in the centre of Buenos Aires, four blocks from the National Congress. The BAUEN Cooperative has sought to legalise their control of property through innovative engagement with Bankruptcy Law and by seeking an expropriation law for the hotel and all associated assets on behalf of the Cooperative[385]. Our analysis will consider the extent to which the Cooperative's legal arguments engaged effectively with legal provisions, but also the role of non-legal tactics in their control over the property. Before moving to our legal analysis, I will briefly summarise the background to the legal conflict over control of the Hotel.

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[381] Ranis (n 364) 77–8.
[382] ibid 83.
[383] Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 132.
[384] Ruggeri and others (n 375) 15.
[385] The ERT Documentation Centre at the University of Buenos Aires has categorized the states of recuperations as follows: Legally expropriated in favour of the cooperative; Authorised by a judge to continue production under bankruptcy law; Occupation; Rented from landowners; Authorised by a judge to continue production under new bankruptcy law; Other. See, Andrés Ruggeri, 'Informe Del IV Relevamiento de Empresas Recuperadas En La Argentina: Las Empresas Recuperadas En El Período 2010-2013.' (Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas 2014) <https://www.recuperadasdoc.com.ar/Informe_IV_relevamiento_2014.pdf> accessed 4 December 2019.

The hotel was built for the 1978 World Cup finals in Argentina with financial aid from the military junta's National Development Bank (BANADE). The hotel's initial owner, Marcelo Iurcovich, received several loans from governmental and private banks during and after the military regime for the purpose of supporting and developing the Hotel.[386] The loans, including the initial one from the BANADE, were never repaid and the Hotel operated against the backdrop of legal proceedings brought by its creditors.

After a period of firing and (re)hiring its employees the Hotel (officially registered under the company name Bauen SACIC) was sold in 1997 to a Chilean company (Solaris S.A.) but, by February 2001 the Hotel's new owners filed for bankruptcy[387]. At the time of bankruptcy Marcelo Iurcovich had received only a third of the $12 million sale price and he moved to reclaim ownership with a judicial agreement to make a token payment to the Hotel's creditors. The monies were never paid, bankruptcy took effect, and the operations of the Hotel ceased.

The Hotel was first occupied by ex-workers on 21st March 2003. Following the "organizational prodding"[388] of Eduardo Murúa, co-founder of the *Movimiento Nacional de Empresas Recuperadas* (MNER), 32 former employees entered the Hotel and began the recuperation process. The Cooperative re-started the Hotel's operations and by 2006 80% of the 160 rooms had been refurbished and the Cooperative comprised 150 workers[389]. The Hotel is run as a consumer cooperative according to the principles of self-management which means, in the absence of any division between employer/employee or boss/worker, that management decisions are taken collectively by an assembly of the Cooperative's workers[390]. The Cooperative faced initial organizational challenges, the sort common to all ERTs, including the need for salary dispersals, low wages, and democratic assemblies to decide upon the allocation of any surplus capital.

At the time of writing, the Cooperative does not have a legal right to retain control over the hotel however, it remains in control of the Hotel and its legal and political struggle continues. There are other examples of ERTs that have effectively engaged with law and have

[386] Ranis (n 364) 92.
[387] ibid; Andrés Ruggeri, Desiderio Alfonso and Emiliano Balaguer, *Bauen: el hotel de los trabajadores* (Callao Cooperative Cultural 2017) 46.
[388] Ranis (n 364) 92.
[389] Ranis (n 363) 71.
[390] I will not refer to the cooperative workers as 'members' or 'partners', as per the nomenclature of cooperativism that distinguishes itself from wage labour and an employment relation between employer and employee. In this case the workers refer to themselves as workers and I prefer to follow their lead.

permanent legal rights to their enterprises and associated property. For example, the Zanón Ceramic Factory and its FaSinPat cooperative were expropriated and given control over the factory's assets by the Neuquén provincial legislature in 2009. As the "bellwether"[391] of the ERT movement, the Zanón is (for the most part) a tale of legal and political victories. However, as a case study the BAUEN will provide a more detailed account of the political and legal 'struggle' experienced by the ERT movement. Rather than simply receiving the right to control the property, the BAUEN experience offers a more textured insight into both the opportunities and limitations that have determined the effectiveness of its legal strategy. I will, of course, draw comparisons with other ERTs and the movement generally to provide context to the BAUEN's tactical and strategic effectiveness.

The analysis will be divided into two clear sections. First, we will consider the ERTs' use of constitutional provisions and bankruptcy legislation to acquire the permanent and/or temporary legal rights to remain in control of property. In both cases we will begin by assessing the legal authorities that represent a strategic opportunity, followed by analysis of the BAUEN Cooperative's specific tactical engagement with them. Having analysed the Cooperative's engagement with law, we will consider the role of non-legal factors in the BAUEN's legal strategy. I will divide these into three key factors: First, the role of political action in complementing and buttressing the BAUEN's legal strategy. Second, the importance of organisational support in the political mobilisation of the ERT movement, the provision of practical support, and the co-ordination of legal resources. Third, we will assess the changing relation with government and the effect of both political disagreements in legal processes and the impact of government policy on the ERT movement.

[391] Ranis (n 364) 88.

Figure 1.1:
Timeline of legal, political, and economic events relating to the Hotel Bauen (1/2).

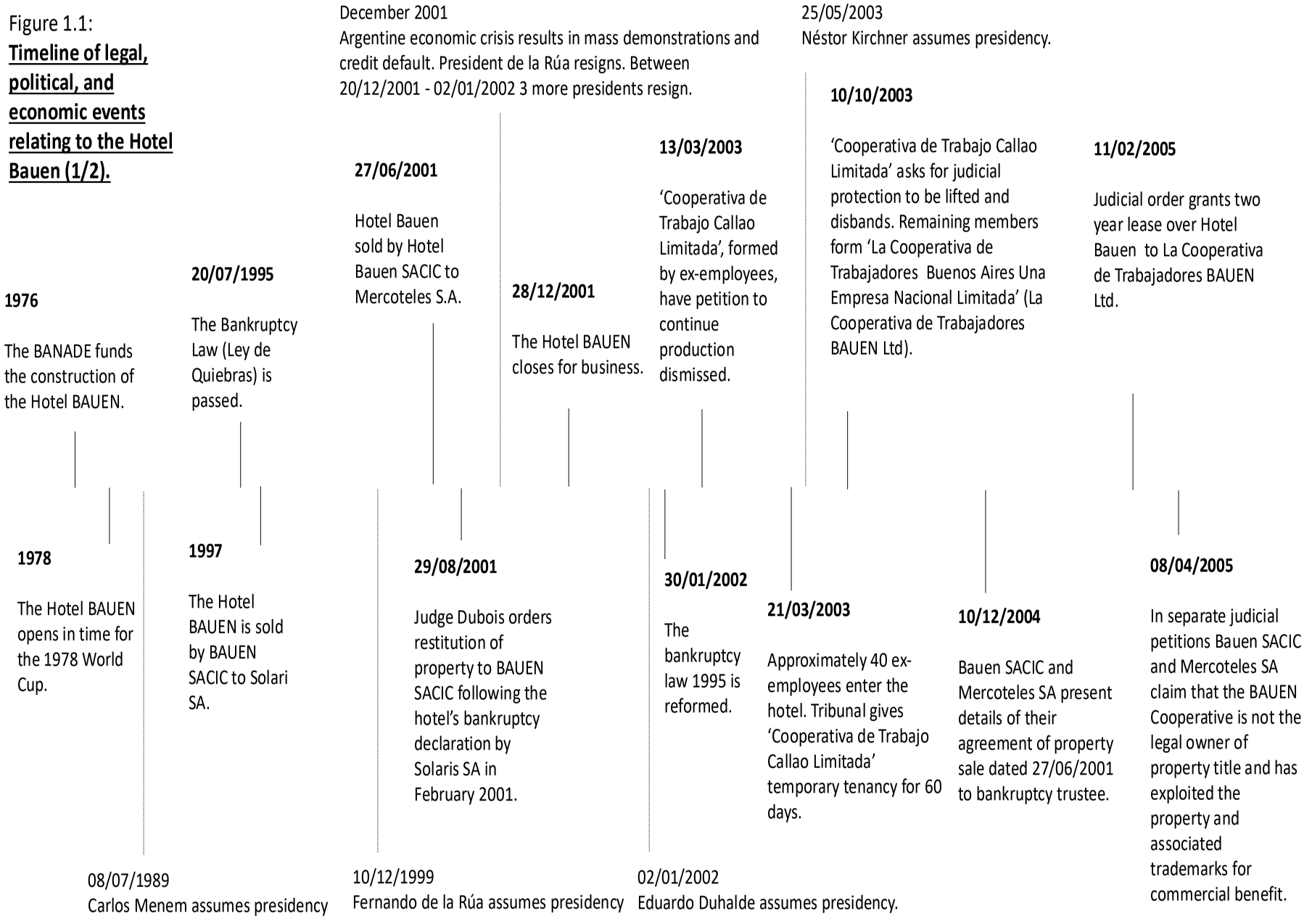
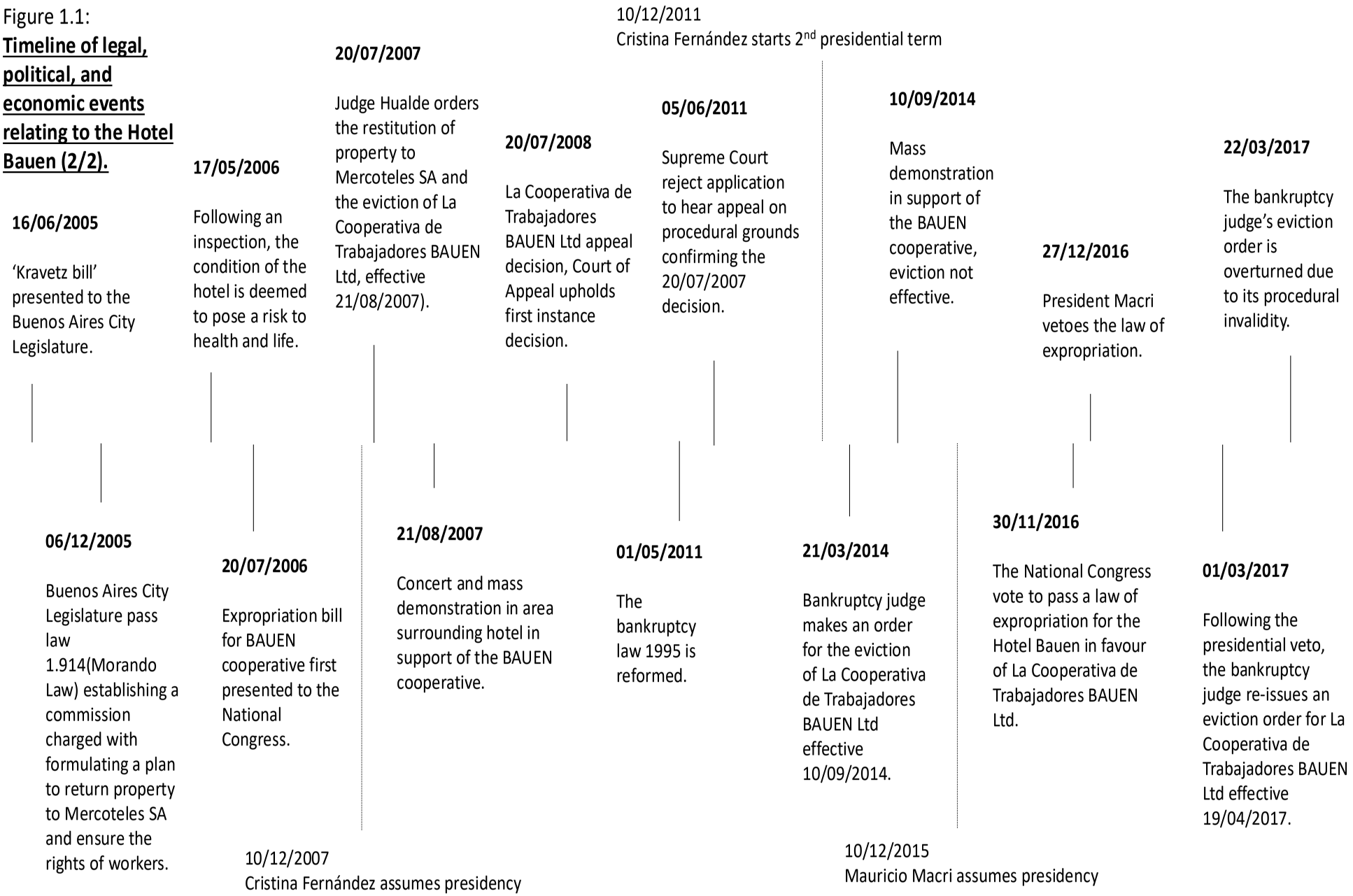


Figure 1.1:
Timeline of legal, political, and economic events relating to the Hotel Bauen (2/2).



2 Legal Instruments: Bankruptcy and Expropriation

Two legal instruments have dominated the ERTs interactions with law. First, the use of a provision of the Bankruptcy Law (La Ley de Quiebras 1995) that has allowed workers to remain in control of property for the express purpose of continuing production. Second, provincial, regional and national legislatures have passed expropriation laws where they have interpreted the worker cooperatives use of property as sufficient to satisfy the test of 'public utility' and trigger an exception to the constitutional right to property. In what follows, I will unpack the strategic opportunity presented by both bankruptcy and expropriation provisions.

2.1. Bankruptcy Law

2.1.1. Introduction to the Bankruptcy Law (Ley de Quiebras 1995)[392]

In the event of bankruptcy, proceedings for the sale of assets are brought by creditors, which makes an ERTs' encounter with the Bankruptcy Law unavoidable. Ordinarily, the Argentine Bankruptcy Law gives primacy to the rights of creditors; whereas workers' claims for unpaid wages, severance pay, and other social benefits owed by their employer are secondary. As a result, bankruptcies favour previous owners, creditors and court appointed trustees (that gain 12% commission at auction) because property rights and the law's protection of contractual agreements (mean that creditors have a contractual right to recover their credit through sale of assets) take priority over claims made by ex-employees.

However, exceptional provisions in the Bankruptcy Law have allowed applications for the temporary continuation of production by third parties. Worker cooperatives have used this opportunity to commence commercial litigation and secure a temporary right to control their factory or enterprise and resume operations. The strategic importance of the legal protection provided by the Bankruptcy Law to an ERT cannot be underestimated for two reasons: First, from a practical perspective, orders for continued production halt the sale of property and assets and prevent the loss of "basic property, machinery, patents, and copyrights from the auctioneers' gavel."[393] Control over property and the protection of assets is essential to the

[392] Ley de Concursos y Quiebras (Bankruptcy Law) 24.522 1995. < http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25379/texact.htm> accessed 04/12/2019
[393] Ranis (n 364) 79.

ERTs because, due to their lack of financial resources, it would have otherwise proved impossible for workers to start the recuperation process from the beginning.

Second, the Bankruptcy Law enabled the recuperation movement's occupation of property and aims of re-starting production to have legal traction and provided the necessary legal protection for their use of the property. It is the opportunity presented by the Bankruptcy Law and its role in the ERT's political strategy that will concern the remainder of this section. Before moving to the BAUEN's engagement with the Bankruptcy Law, I will summarise the articles in the Bankruptcy Law 1995 that have provided the opportunity for ERTs to legally protect normative demands for worker-control and secure employment.

The tactical opportunity begins with Article 21 which legislates for preventative bankruptcy proceedings and allows a judge to suspend the usual practice of asset liquidation and transform the proceeding into an application for preventative bankruptcy. A preventative bankruptcy proceeding is useful to an ERT because they can prevent the sale of assets and make an application for the use of property. Subsection two (Art.21(2)) proscribes any proceedings being brought against assets that have been expropriated, thus insulating expropriated recuperations from the claims of creditors.

Two articles provided workers with a legal right to control the property against the rights of creditors or holders of property title. The Bankruptcy Law enabled bankruptcy judges, acting as trustees, to grant short-term lease agreements to third party applicants. Article 187 stipulates that:

> The trustee may declare that a rental agreement or any other contract applies to the assets, as long as they do not dispose of the property totally or partially and do not exceed the time provided for in article 205.[394]

Short-term leases were usually granted in the first instance which provided a time-frame for an ERT to stabilise its operations before granting a contract for use. Article 195 sets out the conditions under which mortgage creditors cannot make an order for the return of capital, including authorisation for bankruptcy judges to suspend any return of capital for two years.

Any short-term lease is conditional upon a judge being notified about the intentions of the workers to continue production and all evidential conditions being met by the cooperative.

[394] Article 205 sets out the 'Conditions of Sale' and establishes that a lease agreement does not prevent future sale of assets.

Article 190 sets out the general conditions for an application to *resume* production for all types of private enterprise, not just those engaged in the provision of public services[395]. An application must satisfy the following conditions: The resumption of production must not involve the creation of new contractual liabilities except those strictly necessary in the operations of the company and, two thirds of the workforce must be constituted of former employees. And, the following information must be presented to the judge for consideration: The potential benefit to creditors and effect on third parties; an operations plan including budget requirements; current contractual obligations; works required to re-start (recuperate) the enterprise and make production economically viable.

In order to comprehend how the Bankruptcy Law came to provide legal protections to third parties, and as a result ERTs, we will briefly summarise the rationale that underpinned the 1995 Law. At the end of the 1980s Argentina was suffering the effects of hyper-inflation and was heavily indebted to foreign parties[396]. In an attempt to galvanise the economy, Argentina's new democratic governments liberalised market regulations in the hope of stimulating growth. The bankruptcy-related consequences of deregulation were that the conduct of business-owners was excluded from consideration in bankruptcy proceedings, and the 'cram down'[397] technique became a usual escape-route for owners in the event of bankruptcy. The 'cram down' technique is not specific to the Argentine context. It is a mechanism that prevents the failure of large corporations by forcing creditors to accept a debt restructuring plan and prevent creditors' attempts at foreclosure. In the context of 1990s Argentina, the technique became a mechanism that enabled business owners to engage in the circular practices of stripping assets and/or money laundering, failing to repay creditors, declaring bankrupt, and then reaching an agreement to restructure debts and recapitalise the corporations. As the conduct of business-owners was not a disqualifying condition for a preventative bankruptcy application, the Argentinian legal system was defenceless against the caprice of capital owners.

[395] Article 189 sets out the conditions for an immediate *continuation* of production and the conditions that must be met by those providing public services.
[396] Fernando Postilloni, 'Ley de Quiebras y Concursos. Argentina 1995-2011. Recorrido historico de la normativa y papel de las empresas recuperadas por sus trabajadores' [2013] Interescuelas/Departamentos de Historia. Departamento de Historia de la Facultad de Filosofía y Letras. Universidad Nacional de Cuyo, Mendoza. 30.
[397] Postillioni refers to the 'crowndown' technique as opposed to the 'cram down' technique. The explanation and usage of the two techniques appear identical and will be treated as such. I have not recorded Postillioni's usage as a typographical error due to the common usage of 'crowndown' in Argentinian newspapers. For the avoidance of confusion, I will refer only to the 'cram down' technique.

The Bankruptcy Law (1995) sought to introduce a regulative framework that would wrest back control over unregulated business owners and offer some protections to an Argentine economy on the cusp of a financial crisis. The Bankruptcy Law gave debtors the opportunity to apply for a preventative insolvency and avoid bankruptcy (article 21). Importantly, third parties were listed along with business owners as permitted to present orders to continue production. The legislation utilises the cram down technique by giving parties that are committed to maintaining a viable business an opportunity to restructure debts.

While the 1995 Law's inclusion of the third-party clause appears to give workers an opportunity to take legal possession of their workplace; legislators had not intended to provide the legal framework for workers to legalise their occupations of bankrupt companies and launch a nationwide labour movement committed to establishing the conditions of worker control. The 1995 Law was not pro-labour but part of an attempt to kickstart the economy by regulating bankruptcy proceedings and encouraging commercial ventures that contributed to economic growth. The legislation's aims were to encourage, in event of bankruptcy, viable enterprises through the purchase of obligation free assets[398] with the purpose of re-starting production; and to discourage creative financial activities that yield no benefit to the national economy.

The Bankruptcy Law has been reformed to extend the protections for third party applications and those made by ERTs in particular. A 2011 reform to article 203[399] provided an opportunity to those controlling property under article 190 to permanently prevent liquidation and reach an agreement over the purchase of assets. Article 203 established that a worker cooperative can become owner of the assets by offsetting their value against the labour credits owed to the workers by the bankrupt former employer[400]. In the 1995 version of the Law, article 203 insisted that assets were liquidated immediately unless the bankruptcy proceedings had been appealed under article 21. The 2011 reform inserts a special reference to 'worker cooperatives' into article 190 and an obligation upon judges to consider an application for the continuation of production by an ERT before they can proceed with any liquidation of assets.

[398] Successors were not bound by previous labour agreements meaning bankruptcy effectively nullified any labour regulations and rights held by workers.
[399] Article 203bis and 205 were both reformed. See Postilloni (n 396).
[400] The quantification of labour credits, including unpaid salaries and other benefits, is set out in article 48bis, also introduced in the 2011 Act.

I will not consider the effects of these reforms, particularly the 2011 reform owing to the lack of specific literature documenting the effects of these reforms on the ERT struggle. One key reason is that the broader political and economic climate has stalled the progress of the ERT movement. There is far more coverage of the ERTs that arose in the aftermath of the 2001 crisis and, up until the election of Macri, we can see a labour movement mobilising and engaging with law. The 2011 reforms appear toward the end of a more 'positive' period for the ERTs and we cannot account for their specific role in the strategic engagements of ERTs, for this reason I will not provide a more detailed analysis of the reforms.

2.1.2. The Hotel BAUEN and Bankruptcy Law

Having established the provisions in the Bankruptcy Law that provided a tactical opportunity to legally protect the control of property, this section will analyse the BAUEN Cooperative's experience of both effective engagement with bankruptcy provisions and the legislation's limitations. In 2003 the workers occupied the hotel and successfully applied for a 40-day tenancy by the commercial court under an article 21 application for preventative bankruptcy. The workers were recognised as a third party 'in training' and met the conditions for continued production (article 190). The Cooperative established production and successfully renewed their short-term[401] lease for the hotel, by then Cooperativa de Trabajo Callao Limitada was operating under its present-day name 'BAUEN Cooperative'.

On the expiration of their legal tenancy the cooperative's occupation came under renewed judicial attack from both the former owners and supposed holders of legal title to the property and its assets. However, on 11/02/2005 the BAUEN Cooperative was given a further temporary order granting the right to remain for two years under article 195[402]. This was granted by a commercial court judge's injunction in favour of the BAUEN's appeal against a restitution order made by a company, Mercoteles S.A. (hereafter, Mercoteles) that claimed to be holders of legal title to the hotel. The judge ruled in favour of the BAUEN Cooperative having accepted that closure of the Cooperative would have a high social cost with around 160 jobs to be lost, and the evidential requirements to continue production under article 190 were satisfied.

[401] The lease would have been for an initial four-month period under article 186 and subject to renewal and then a two-year lease under article 190.
[402] *Solari SA S/ Quiebra (Indirecta)* [2007] Juzgado Comercial N9 Sec N 18 69699 4; Ruggeri and others (n 375) 157.

At the expiration of the two year lease the case returned to the commercial court[403]. This time the judgment considered whether the property should be returned to the legal title holder[404]; if the BAUEN Cooperative should have its lease period for the property extended; and, what obligations were owed by all parties – Mercoteles, Bauen SACIC (owner during bankruptcy), and the BAUEN Cooperative.

The case was resolved by ordering the restitution of property to the legal title holder Mercoteles under certain conditions. The decision to uphold Mercoteles' claim for restitution of property is based on the following reasoning. The judgment acknowledges that the rightful holder of legal title is Mercoteles by reference to the principle of *res judicata*[405] and the 29/08/2001 judgment that ordered the return of legal title to the original owner Bauen SACIC following the bankruptcy of Solaris SA.

The Cooperative presented a claim to extend their control of the property using provisions set out in the Bankruptcy Law to either extend their lease (article 195) or arrange for the sale of property (article 203) to the BAUEN. The judgment acknowledged that there was a precedent for judicial and legislative protection of ERTs at the expense of legal title holders' right to property[406]. The Court did not agree with the Cooperative's claims that there was a public interest in preserving their employment that trumped the rights of property owners, but it did accept the need to mitigate against the potential effects of restitution. The judge was willing to give certain concessions to the Cooperative and impose obligatory conditions of any restitution of property to Mercoteles. The judgment arrives at this decision and does not extend the BAUEN's legal rights to control the Hotel for two reasons.

First, the judgment distinguished the present case from those that have given priority to worker cooperatives on the grounds that the legal title holder to the Hotel BAUEN was a third party to the bankruptcy.

[403] *Solari S.A. [2007]* (n 402).
[404] The owners of property title Mercoteles increased their legal efforts to remove the Cooperative and to reclaim control of the property, see Ruggeri, Alfonso and Balaguer (n 387) 78.
[405] The principle affirming that a decision has been settled by a competent court. *Solari S.A. [2007]* (n 402) 7.
[406] ibid 9–10.

> It is not an occupation of a bankrupt property by its former employees because due to a transaction of sale that has already been resolved, the property is currently owned by a third party.[407]

The judgment argued that the occupation of property did not occur for the sole purpose of continuing production and recuperating jobs, its aim was to improve the negotiating position of ex-employees with a view to acquiring the failed company[408]. According to the judgment, successful claims to continue production have involved cases where the business subject to bankruptcy is also the holder of legal title. The rationale behind previous decisions that granted legal protections to ERTs has been "to prioritise the social interest in the continuation of an enterprise through a cooperative's conservation of employment, without causing harm to the rights of creditors"[409]. The judge accepts here that other bankruptcy cases have accepted the arguments about the 'social value' in the conservation of business and protection of work. Therefore, for other ERTs the legislative provisions for continuation of production and temporary leases have provided important direct effects. And, the application of these provisions in favour of ERTs has been justified by judges citing the social importance of work; but it does supersede the constitutional right to property of third parties to the bankruptcy.

The question for a judge considering an application by an ERT under the Bankruptcy Law is whether an order for continued production could be made whilst respecting the rights of all parties. In the BAUEN case the occupation and any continuation of it would not have infringed the rights of a now bankrupt property owner and ex-employer (Bauen SACIC) or creditors, but a third party that has legally acquired property title (Mercoteles). The judgment stated that any temporary contract of use granted to the Cooperative would be a clear violation of the constitutional right to property (article 17 Constitution of Argentina)[410], on these facts the judgment ordered restitution of property to Mercoteles.

Second, the judgment accepted that restitution without sufficient protection for jobs would be an unsatisfactory outcome and proceeded to find a suitable agreement between both the Cooperative and Mercoteles. Restitution was ordered on the condition that Mercoteles

[407] "Es que no se trata de la ocupación de un bien de la fallida por sus trabajadores pues en razón de los avatares sufridos por una anterior operación de compraventa posteriormente resuelta, el inmueble es actualmente de titularidad de un tercero…" ibid 10.
[408] ibid.
[409] "a priorizar el interés social de la continuidad de la empresa a través de las cooperativas conservando la fuente laboral, sin perjudicar los derechos de los acredores." ibid.
[410] ibid 17.

agreed to the following obligations[411]: To remunerate the costs of recuperation to the BAUEN Cooperative, hire members of the cooperative that are ex-employees of Solaris SA and maintain their employment for 36 months with a salary that accords to the recommendations of the relevant government authority, to remunerate all members of the Cooperative for work done in the past 12 months according to the appropriate salary rate, and submit to the mediation of all conflicts by the City of Buenos Aires Legislature[412].

> It is possible to conclude that on account of the conflict's outcome [acceptance of conditions by Mercoteles], the rights of workers appear today to be sufficiently protected.[413]

For the bankruptcy judge the above agreement represented a sufficient guarantee for the workers' rights[414]. As secondary creditors, ex-employees' claims for payment of unpaid wages and other work-related benefits would not usually have been met following the reimbursement of primary creditors. Moreover, the imposition of obligations on the holder of property title was seen to accommodate the social interest in employment that had been central to previous cases.

The BAUEN Cooperative appealed the decision to reject its claim to continue production and remain in control of the hotel. Despite an amicus curiae brief from the Secretary for Human Rights, Eduardo Luis Duhalde in support of the Cooperative's use of the property and concerns about the social effects of their eviction[415], the Commercial Court of Appeal rejected the appeal and upheld the first instance decision[416]. The only remaining avenue for redress was an appeal to the Supreme Court, but this was blocked by the Court of Appeal citing an absence of sufficient constitutional grounds. Nonetheless, the Cooperative lodged an extraordinary complaint with the Supreme Court.

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[411] ibid 10–12.

[412] A further issue considered in the judgment was that any previous orders for continuation of production were invalid due to the Cooperative's failure to adhere to the legal standards relating to hygeine. Their contract for 'continued production' was dependent on the Cooperative meeting all necessary legal standards in the delivery of services. For details of the violation in the judgment see further, ibid 16–17. The details of the BAUEN's supposed breach are contested by the Cooperative, see Ruggeri, Alfonso and Balaguer (n 387) 83–85.

[413] "Cabe concluir entonces que en razón de la evolución del conflicto aparecen hoy prima facie suficientemente resguardados los derechos de los trabajadores […]" *Solari S.A. [2007]* (n 402) 12.

[414] ibid 18.

[415] The support for the Cooperative's continued control of property provided by government minister Duhalde did not claim that the right to work ought to permanently supersede the priority of property rights; the Cooperative received support for its temporary lease of property due to the grave social consequences that would result from its eviction. Ruggeri, Alfonso and Balaguer (n 387) 108.

[416] *Solari SA S/ Quiebra 323-4028* (La Cámara Nacional de Apelaciones en lo comercial, Sala C); Ruggeri, Alfonso and Balaguer (n 387) 107.

The appeal presented the following three arguments: First, the Cooperative argued that there had been insufficient judicial examination of the proposed holder of legal title. The Cooperative asked for further investigation into whether the owner of the asset (Mercoteles) was sufficiently different to the company that declared bankrupt (Bauen SACIC). Given that the central pillar of the first instance decision to order restitution and refuse any extension to the Cooperative's lease was that Mercoteles had not been involved in the bankruptcy, the Cooperative's appeal argued that there should have been a more detailed examination of both the transfer of ownership from Bauen SACIC to Mercoteles, and the extent to which these entities are practically separate[417].

Second, the Cooperative challenged the proposed remedy and argued that restitution of the asset would have a disproportionately negative effect on the Cooperative, because it would both transfer the 'good will' built by the Cooperative to the owners and result in the loss of 150 jobs[418]. This argument does refer to the constitutional right to work (article 14 Constitution of Argentina), but it is less an appeal to constitutional rights and more of a claim about the public interest in protecting a source of employment and the effects further mass unemployment would have on both workers, their dependents and public services. In this regard, it is an appeal to the social interest in the protection of employment that previous bankruptcy judgments had recognised and moved to protect the ERT's use of property.

Third, the Cooperative argued that the judge failed to properly consider proposals for the continuation of production[419]. The judicial decision was considered to be arbitrary in so far as it failed to properly consider the Cooperative's proposal before deciding that Mercoteles' right to property trumped all other claims. The Cooperative's argument relies on a procedural claim under the Bankruptcy Law that the judge must take into account any claim for continued production before liquidating or redistributing the asset (article 203 bis).

On the 5th July 2011, the Supreme Court rejected the Cooperative's complaint and upheld the first instance decision.[420] The appeal failed because it lacked sufficient grounds to challenge the first instance decision. For the Supreme Court, the doctrine of arbitrariness

[417] As reported in *Solari SA Y Otro S/Quiebra* [2009] Suprema Corte 898/901.
[418] ibid 2; Ruggeri, Alfonso and Balaguer (n 387) 108–10.
[419] *Solari S.A. [2009]* (n 417) 1–2.
[420] *Solari SA Y Otro S/ Quiebra* [2011] Suprema Corte 993. The extended dictum draws on judgments no.893 and 901 by the Supreme Court cited above.

prevented the Court from re-considering the grievances raised, namely, questions of fact, evidence, and procedural law.

> The doctrine of arbitrariness has an exceptional character and it is not to be used for the purpose of correcting allegedly wrong pronouncements about non-federal issues - in this case, the grievances refer to the examination of matters of fact, evidence and procedural law; in order to proceed the case would require an unequivocal departure from the normative solution or an absolute lack of legal foundation, which disqualifies the judgment appealed as a valid jurisdictional act.[421]

The Court reasoned that the Cooperative's appeal had sought to transform its grievance about the content of a judicial decision into an appeal about procedural error that amounted to an affront to due process, but the Court found no evidence that the judge had committed any such error and that the judgment had been grounded in law. The Court reiterated that its function was to hear extraordinary cases, those that involved either a 'gross logical deficiencies in their reasoning' or a 'total absence of normative foundation'.

Having upheld the decision to decide the case in favour of the title holder's right to property, the Cooperative had no further legal recourse under the Bankruptcy Law or the Constitution and was left waiting for an eviction order to be enforced. Two eviction notices, one for 21st August 2007 and another for 10th September 2014, were issued by the bankruptcy court neither have been enforced. Despite the legal validity of these orders they have not resulted in the eviction of the Cooperative. Enforcement of the eviction orders proved impossible due to mass demonstrations of public solidarity with the Cooperative outside the hotel. We will return to the role of political action in the Cooperative's long-term strategy later. For now, we can see that the Cooperative exhausted all possible legal avenues under the Bankruptcy Law that included a reliance on legislative protections and challenges to judicial reasoning. In the concluding section we will evaluate the BAUEN's tactical engagement with the Bankruptcy Law and its strategic effectiveness.

2.1.3. Conclusion: Evaluating the Bankruptcy Law's effectiveness

Between 2003 and 2007 the Cooperative's applications for short-term control over the property were effective. They met the evidential requirements and the Bankruptcy Law

[421] "La doctrina de la arbitrariedad posee carácter excepcional y no tiene por objeto corregir pronunciamientos presuntamente equivocados en orden a temas no federales -en el caso, los agravios remiten al examen de cuestiones de hecho, prueba y derecho procesal-, pues para su procedencia, se requiere un apartamiento inequívoco de la solución normativa o una absoluta carencia de fundamentación, que descalifique la sentencia apelada como acto jurisdiccional válido." *Solari S.A. [2009]* (n 417) 2.

provided direct legal protections. The framing of the BAUEN's activities within the legislative requirements represents an effective engagement with the Bankruptcy Law's available remedies. However, since 2007 the supremacy of title holders' rights to property have been recognised and prioritised ahead of the rationale of protecting viable businesses, the right to work, or the public interest in securing the continued employment of Cooperative members. In sum, the Bankruptcy Law provided temporary legal protections to the BAUEN Cooperative, but the Cooperative ultimately ran out of mechanisms under the Law or the Constitution to continue to legally control the property. To conclude, I will consider some general problems that have been identified with the Bankruptcy Law as an effective strategic engagement before considering the role of judicial disagreement in shaping the outcome of the BAUEN case. And, what the BAUEN's response says about a selective engagement in tactical opportunities and a refusal of law's co-optive effects.

Despite the opportunity for legal protection, the Bankruptcy Law has also presented challenges to the recuperation movement. A 2014 report into the ERTs identified four limitations of the Bankruptcy Law for the recuperation movement[422]. First, the legislation's evidential requirements that worker cooperatives are made-up of two-thirds of the previous workforce represents a significant practical challenge. Unemployed workers will seek new employment and ex-employees may be unwilling to take a risk and trust in the recuperation process. The threshold set by the legislation is such that a majority of ex-employees may be engaged in the recuperation but they still fall short of protections under the Law.

Second, even though it sets out a dedicated means for the purchase of property by an ERT, the total cost of property makes a purchase agreement by a cooperative, even with the deductions for labour-related debts detailed in article 203, a considerable hurdle to surmount. Third, workers' claims have been stuck in a slow-moving judicial process that can take up to eleven months to present an initial claim under article 21 for preventative bankruptcy and continuation of production. The Bankruptcy Law promises ERTs a potential route toward legal protection and an escape from precarity, but the route is itself precarious with only 20% of all ERTs receiving legal protection using this route[423].

[422] Ruggeri, 'Informe Del IV Relevamiento de Empresas Recuperadas En La Argentina: Las Empresas Recuperadas En El Período 2010-2013.' (n 385).
[423] In 2013 the figures were as follows: 16% had been expropriated, 20% had legal rights to continue under the Bankruptcy Law, 16% were illegal occupations, 16% leased property from former owners, and 32% registered as 'other'. ibid 11.

Fourth, the Bankruptcy Law has had the effect of judicialising the process of ERT legal protection[424]. This has led to national and devolved legislatures avoiding engagement in this volatile political process which leaves decisions with the judiciary, who, as unelected actors, are not responsive to political demands or pressure. An important factor in the effectiveness of the Bankruptcy Law as a tactical opportunity for protecting the ERTs is the role of judicial reasoning in determining the facts and applying the law to them. Florencia Kravetz, a MNER lawyer and one-time lawyer for the BAUEN Cooperative has highlighted the potentially negative role of judicial discretion and a lack of concrete obligations upon judges for factory recuperations to draw upon:

> It doesn't provide deadlines or a solid legal base, so it's not a very good tool. Without these things, certain judges won't take it into account. Still, when you can use it, you do.[425]

Recuperations are subject to judicial influence through their interpretation of facts and application of legal rules. For example, in March 2013 the graphics cooperative 'Mom' (Ex Lanci) were evicted following the rejection of their claims by the bankruptcy judge.[426] The judge questioned the factual evidence that the cooperative was constituted by 2/3 of Lanci workers and issued an eviction order. While the Mom Cooperative resisted eviction, their precarious status had a negative impact upon their capacity to continue production and a second application under the Bankruptcy Law was rejected on the grounds of insufficient evidence of a capacity to establish a viable business (article 190).

We can see that legal strategy is not simply determined by how an ERT formalises its legal arguments but that judicial reasoning will also have a decisive impact on effectiveness. The failure of the Bankruptcy Law to be applied in a manner desired by the ERTs reveals the difference between the strategic goals of the ERT movement and the limits of available legal tools. The Bankruptcy Law does represent a strategic opportunity but an unfavourable judicial interpretation of the Law's applicability and/or the existence of a constitutional right to the property will negatively affect an ERT's legal strategy.

In the BAUEN case, the first three challenges were surmounted but, the issue of judicial interpretation of the normative boundaries of Argentine Law defined the outcome of the

[424] ibid 24.
[425] Magnani (n 360) 111.
[426] Ruggeri, 'Informe Del IV Relevamiento de Empresas Recuperadas En La Argentina: Las Empresas Recuperadas En El Período 2010-2013.' (n 385) 22.

Cooperative's engagement with Bankruptcy Law. There was a disagreement between the Cooperative's legal arguments and the judgment's aim to respect the rights of all parties to the bankruptcy. Having established the existence of a property right by one of the parties, the judge's reasoning proceeded by considering *how* to realise the restitution and mitigate the effects for the Cooperative. The existence of a constitutional right represented the limited application of the Bankruptcy Law by an ERT, or any third-party application to continue production and control property for those purposes. While provisions may be applicable to ERTs in cases where the holder of legal title has declared bankrupt and a suitable agreement can be reached with creditors to continue production; its legislative remedies will be less effective in cases where the an ERT struggles to meet the conditions for continued production, or a party to the bankruptcy proceedings presents a legal claim that takes precedence over third party claims to continue production. In the present case the judicial identification of Mercoteles' constitutional right to property weakened the direct effectiveness of the BAUEN's use of the Bankruptcy Law.

A final issue with the judgment was its failure to comprehend the aims of an ERT, or the workers' material and political commitment to recuperation. The judgment worked towards a negotiated eviction that both parties would respect. The bankruptcy judge did not consider that the Cooperative may not accept the terms agreed to by Mercoteles. From the judicial perspective, the agreement is suitable because it promises to protect the workers' rights. However, the ERTs' intentions were to realise an alternative model of work that cannot be squared with the return of property to Mercoteles, and any piecemeal offer that 'protects' workers' rights ceded too much ground to the legal protection of private property over work. From the BAUEN's perspective, any deviation from worker control of property, including the employer's lease of property to the workers, would undermine the security of the worker's employment. The BAUEN, and other ERTs, sought to draw on law's institutional capacity to defend its use of property for the ends of worker-control but, where law's solutions threatened to dismantle the political telos and material aims of these worker cooperatives they could no longer engage *with* but *against* the law. This explains why the Cooperative resisted the eviction order as opposed to accepting the terms of the restitution agreement. It also reveals the distinction between the BAUEN's tactical engagement with law and strategic refusal to be co-opted or extinguished by an unfavourable legal decision.

The BAUEN recognised an opportunity for, and benefitted from, the legal protection contained in the Bankruptcy Law. However, the BAUEN's engagement was tactical and

deployed in the service of wider strategic objectives. As such, the Cooperative did not entrust the outcome of their control of property to the provisions of the Bankruptcy Law. They sought to draw on its potential to provide direct legal protections but, the political and material commitment of workers to recuperation has meant that their political strategy was not contingent on the outcome of such tactical engagements with law. At the point that the Bankruptcy Law no longer represented an opportunity but a threat, the Cooperative's tactics withdrew from and turned to resisting against law. The effectiveness of the BAUEN's legal strategy here can be summarised as providing important legal protections from their competent framing of legally recognisable claims, and a selective withdrawal from the tactical use of law to protect its long-term strategy.

In general, the Bankruptcy Law has provided multiple ERTs with short-term legal rights to continue to production. However, it has proved less adept at providing long-term rights protections. The BAUEN's engagement with the Bankruptcy Law ultimately failed because, while its provisions presented an opportunity for legal protection the Cooperative's claims could not supersede the constitutional right to property of other parties to the case. Kravetz captures the opportunity and limit of the Bankruptcy Law in the refrain, "Still, when you can use it, you do." The direct effects of legislative provisions are limited by the scope afforded by their express content and their application within the normative boundaries of the legal system. Nonetheless, in the case of the Bankruptcy Law, its tactical opportunity to provide legal protections was too important to ignore.

2.2. Expropriation laws: An Introduction

A number of ERTs have been granted the legal rights to permanently remain through expropriation legislation passed by provincial, regional and national legislatures[427]. The expropriation laws are an important opportunity for ERTs to attain legal protection and to continue their operations.[428] The expropriation route is viewed as a more secure and favourable opportunity for legal protection than the Bankruptcy Law. An expropriation law is definitive and provides a permanent legal right to remain, meaning ERTs no longer need to rely upon legislative instruments that provide only temporary use agreements. For instance, the Bankruptcy Law explicitly excludes creditors from bringing proceedings for property that has been expropriated or property that is subject to an expropriation bill (article

[427] The last available figures provided in 2014 show that of the 311 ERTs (at that time) 16% had been subject to an expropriation law.
[428] Ranis (n 364) 82–3.

21(1)). Post-expropriation a creditor must apply to the courts about repayment of debts and municipalities or provinces deal directly with creditors as opposed to burdening the worker cooperatives. Moreover, Ruggeri explains that an expropriation law is a preferable legal route for ERTs because the cost of expropriation is subject to a negotiation process which means that a Cooperative's particular circumstances can be taken into account. Whereas, a purchase of property via the Bankruptcy Law involves an arbitrary judicial demand for the immediate repayment of costs. This is based on a strict calculation of the property's value minus monies owed to the Cooperative as ex-employees, the costs involved in recuperation, and any value the Cooperative may have since added to the property and/or business.

The detail of each expropriation order is unique, including the financial obligations owed to primary creditors, and the conditions for a cooperative's contract of use. For example, on 25th November 2004 the municipal council of Buenos Aires passed legislation giving thirteen worker cooperatives the rights to control their enterprise and all associated assets (e.g., machinery, trademarks, and the patents)[429] on the condition that they pay the value of the enterprise at the time of expropriation. The payments were staggered over twenty years and suspended for the first three years following expropriation. In comparison, when the provincial legislature of Neuquén decided to expropriate the Zanón ceramic factory in 2009 on behalf of the FaSinPat cooperative (established in 2002) it was decided that the local government would be responsible for reimbursing the factory's creditors[430]. In what follows I will set out the legal grounds for an expropriation and the necessary steps that an ERT must satisfy in any effective engagement with it.

2.2.1. Expropriation of private property as strategic opportunity: Constitutional and legislative grounds

The legal test for expropriation is grounded in article 17 of the Argentine Constitution:

> Article 17 – Private property is inviolable, and no inhabitant of the Nation can be deprived of it except as defined by law. Expropriation for reasons of public utility must be determined by law with prior indemnity.

[429] Carlos Martínez and others, 'Las Empresas Recuperadas En La Argentina' (Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas 2005) 49–50 <http://www.recuperadasdoc.com.ar/Informes%20relevamientos/Empresas%20Recuperadas%202005.pdf> accessed 4 December 2019. For the full text of Law 1529, http://www2.cedom.gob.ar/es/legislacion/normas/leyes/ley1529.html accessed 04/12/2019.
[430] Ranis (n 364) 89.

This establishes the right to property and the protection holders of legal title enjoy from State interference but, it also inserts an exception to the rule. As a result, article 17 has provided the basis for a strategic engagement with the Constitution and legislative provisions that aims to expropriate occupied property on behalf of an ERT. While the ultimate legal authority for the expropriation of property is rooted in the Constitution, the requirements for any such action is set out in legislation. The process for an authorized expropriation by the National Congress of Argentina is detailed by La Ley de Expropiaciones 21.499, 1977.[431] The test for expropriation set out in article 1 of the statute is:

> Public utility is the legal foundation for expropriation, it includes all cases that the common good is sought, whether it be material or spiritual in nature.[432]

The normative basis for an expropriation is defined by the legislative test of 'public utility'. The determination of something as of public utility and the satisfaction of the legal test requires answering two questions: What actions provide utility? And, who is the beneficiary of those actions? As we shall see, the contested nature of public utility presents an opportunity for the ERTs' to frame their actions in a manner that contributes to the common good.

Article 3 defines those authorised to expropriate property as the Nation State (national executive and legislature of Argentina), the city of Buenos Aires government, and both public enterprises and individuals that are given legal authorisation to expropriate. Article 4

[431] Ley de Expropriaciones (Expropriations) 21.499.<http://servicios.infoleg.gob.ar/infolegInternet/anexos/35000-39999/37292/norma.htm> accessed 04/12/2019. Originally established in 1948 (Ley 13.264) the current Law of Expropriation was derogated by Ley 21.499 in 1977. The Law was established pursuant to the powers conferred by article 5 of the National Reorganisation Statute (*Estatua para la Reorganización Nacional*) as presented by the military junta in 1976. This statute was one of four legal instruments that did not replace but assumed a supra-legal relation to the Argentine Constitution 1853 (For the four legislative instruments, see <http://www.bnm.me.gov.ar/giga1/documentos/EL000162.pdf >(last accessed 04/12/2019). These instruments set out a number of basic objectives that ought to guide the junta's exercise of power. For example, article 5 of the National Reorganisation Statute transferred, with a few exceptions, legislative competencies from the bi-cameral Argentine Congress to the President of Argentina, as well as establishing a new Advisory Legislative Commission. These norms were promulgated by the junta with the express intention of returning the Argentine Republic to 'greatness' and to enable the junta to effectively exercise the constituent power. All four of these legislative instruments were abandoned on 10 December 1983 with the return to democratic rule in Argentina. Although the return of democracy stripped the instruments of their supra-constitutional role; the laws that were passed under its influence remain on the statute book, albeit with their advisory introductory note.

[432] "La utilidad pública que debe servir de fundamento legal a la expropiación, comprende todos los casos en que se procure la satisfacción del bien común, sea éste de naturaleza material o espiritual."

establishes that any class of persons, public and private, may be subject to an expropriation of their property:

> All assets suitable or necessary for the satisfaction of the public good, whatever their legal nature, whether they belong to the public domain or private domain, whether they are things or not, may be the object of expropriation.

The Law of Expropriation also sets out that an indemnity must be paid to the owners by the expropriating authority. According to the general rule, expropriation is only effective once the indemnity has been paid because it is obliged by the expropriation law[433]. However, in certain circumstances art.51(8) allows the expropriating authority to cede the asset without payment.

The test for public utility and the conditions that satisfy it - materially and spiritually - is not predefined by objective standards. Constitutional rights are an important tool in proving the public utility of an expropriation. By framing the expropriation as ensuring the protection of employment, the ERTs' lawyers have drawn heavily on the constitutional protection of work. The right to work is set out in article 14 and 14bis of the Constitution of Argentina[434]:

> Article 14 – All the inhabitants of the Nation enjoy the following rights in accordance with the laws which regulate their use; namely, the right to work, and to engage in any legal industry…
>
> Article 14bis – Work in its different forms shall enjoy the protection of the laws, which shall guarantee the worker dignified and equitable labour conditions; a limited work day; paid rest and vacation time; fair remuneration; an adjustable minimum wage; equal pay for equal work; a share in company earnings with control of production and collaboration in management; protection from arbitrary dismissal; stability for public employees; free and democratic union membership by simple inscription in a special registry.

The rights listed in the Constitution provide a repository of 'goods' that can be utilised in legal arguments that attempt to frame something as providing benefit to the public. The rationale behind using constitutional rights in effective legal argument is that, where something can be recognised as contributing to the common good it is afforded protection

[433] For an example of an expropriation without repayment see Ley 13037 that expropriated 'La Baskonia' Cooperative on the grounds of public utility, <https://normas.gba.gob.ar/documentos/VwvQzu5B.pdf> accessed 04/12/2019.
[434] Constitución de la Nación Argentina 24.430 1994. < http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> accessed 04/12/2019

by the Constitution. Drawing on Cover, we can understand the varying interpretations of the Constitution presented by the ERTs as jurisgenerative, or an exercise in presenting alternative legal meaning. As we shall see, the ERTs' lawyers have drawn on the Constitution's excess of meaning and presented claims about what it ought to recognise as a public utility.

The legal provisions above represent resources in the ERT's strategic attempt to legalise the factory recuperations and recognise their actions as a worthy exception to the inviolable constitutional right to property. The qualification of an action as a public utility is overtly political because it requires an act to be determined as a common good. While the constitution might provide the grounds for interpreting the occupation, recuperation and expropriation of property for workers as legal; the challenge is to present a claim that is both recognisable to law as legal and politically acceptable. The satisfaction of a legal test of 'public utility' imports political arguments into legal reasoning, because the legal test requires legislators to engage in decision-making that has overtly political consequences. Unlike the Bankruptcy Law that set a list of conditions that needed to be satisfied, the determination of an action as a public utility is open to future determinations about its content. Therefore, an expropriation bill for the BAUEN could only be deemed legal where enough legislators accepted the public utility of expropriation. In the next section I will document the BAUEN's strategic attempts to pass an expropriation law and analyse the legal and political challenges that shaped the competing legal arguments that the hotel BAUEN is (not) a public utility and does (not) satisfy the test for expropriation by the government.

2.2.2. The Hotel BAUEN's struggle for expropriation

There have been several legislative attempts to expropriate the BAUEN using innovative arguments about its public utility and the legality of expropriation[435]. The first expropriation

[435] The first legislative step for the BAUEN was a bill introduced in 2005 to the City of Buenos Aires Legislature that sought to establish the public utility of the hotel's recuperation. Ruggeri, Alfonso and Balaguer (n 387) 86.; The BAUEN is the first factory recuperation that sought expropriation in the National Congress. Expropriations had only previously been undertaken by provincial legislatures. This is important in terms of the effects of a decision upon the national legal system and the additional political complexities at the national level. Provincial legislatures can be more receptive to local public opinion owing to both proximity and their shared interest in the community; compared to the National Congress which is composed of members that do not share local pressures but instead bring a diverse range of interests. For example, the decision of the Neuquén legislature to expropriate FaSinPat was heavily influenced by the presence of strong local support for the recuperation and the positive effects of employment in the local area. A decision not to expropriate would have been a politically toxic move by local representatives. See Ranis (n 364) 89. At the local level, the BAUEN faced a less favourable and uncertain legislative reception due to elections that swung the composition of the City of Buenos Aires legislative chamber between majorities for right-wing and left-wing parties. Ruggeri, Alfonso and Balaguer (n 387) 86.

bill presented to the National Congress (20th July 2006)[436] claimed that the Hotel was in fact already owned by the State. The supporting evidence highlighted that the Hotel's former owners owed debts from unpaid taxes to the City of Buenos Aires Government and that the Hotel was built using an unpaid loan given by the now extinct National Development Bank ('BANADE'). The proposal failed to gain traction and was unsuccessfully re-presented on several occasions to members of Congress.[437]

New legislation was initiated by Carlos Heller, a member of the House of Representatives (Camara de Diputados) - one chamber of the bi-cameral Argentine Congress - and President of the congressional party *Partido Solidario.* On 30th November 2016 the bill passed in favour of expropriation in the Senate[438].

The Bill declared the hotel building and all of its fixtures to be of public utility and therefore subject to expropriation by the State of Argentina (article 1)[439]. The expropriated assets were to be transferred to the Cooperative BAUEN on the basis of a gratuitous bailment that is conditional upon the obligations set out in articles 7, 8, and 9: The Cooperative's cultural activities must continue; They should reach agreements with public universities for the provision of career training programmes related to tourism, gastronomy, cooperativism, and event management; And, 30% of the hotel should be made available for social-tourism.

The legislation asserted that the hotel was a public utility because it was a source of employment and it provided a range of other public services. The utility of the Cooperative's activities was grounded not only in the constitutional importance of work and the ERTs' contribution to the Argentine economy, but also having a direct and positive influence upon

[436] Ruggeri, Alfonso and Balaguer (n 387) 94.
[437] ibid 95.
[438] ibid 120–1.; Denise Kasparian and Julia Rebón, 'La Expropiación Del Bauen' *Pagina12* (1481167035) <https://www.pagina12.com.ar/7583-la-expropiacion-del-bauen> accessed 5 December 2019.
[439] All tangible and intangible property, including trademarks and patents, that are related to the touristic, social, and community activities that occur in The Hotel Bauen are of public utility and the subject of the expropriation, with the exception of property acquired free of charge or at a price by the registered Cooperative BAUEN (article 2). The financial costs for the expropriation were to be quantified by the Court of Taxation and the value based on the general condition of the assets as of 20th March 2003, so as not to include any added value already contributed by the recuperation process (article 3). Any fee for expropriation owed to the previous owner ought to take into account any claimable debt that the State owns against the property subject to expropriation and adjusted accordingly (article 4). Article 10 stipulates that the executive must make the necessary funds available so that the process of expropriation can begin and to pay the indemnity as set out by article 4. The details of the expropriation bill are set out in Ruggeri, Alfonso and Balaguer (n 387) 120–1., and in the Presidential veto cited below.

the local community. For the purposes of the legislative test this was understood to provide sufficient evidence of material and spiritual satisfaction of the common good.

The shift away from legislative proposals relying on claims about debts and State-ownership was premised on a more robust expropriation claim that satisfied both prongs of the public utility test. In order to answer both parts of the public utility test affirmatively, the Cooperative defined the utility of its actions and its beneficiaries beyond the narrower remit of the importance of work and the benefit of employment for the Cooperative's members. Given the 'inviolability' of property rights and the Cooperative's previous failures, they were unlikely to evidence a sufficient material and spiritual contribution to the common good by simply pitting the right to work against the right to property. Therefore, they bootstrapped a range of other public services that are listed as constitutional goods to their claim that the BAUEN Cooperative's actions represented a public utility that trumped the private property rights of Mercoteles.

In its legal claims the BAUEN did not argue that the model of worker control and self-management contributed to the public good. The Cooperative had to present its actions in accordance with an exception – expropriation for public utility - to the constitutional right to property. Recuperation and self-management are not legally recognised as defensible values, recuperation and self-management's provision of employment became legally relevant only as part of a wider claim about constitutional rights. In order to satisfy the legal test of public utility the BAUEN represented its actions as contributing to common good through its provision of employment plus its educational, cultural and social contribution to the community. The effectiveness of the BAUEN's legislative proposal was grounded in its framing of the Cooperative's actions in a legally and constitutionally re-cognisable form and by making political claims that could receive broad support from different constituencies.

The BAUEN could have presented their claim by accentuating how public service provision is part of the intrinsic importance and ideological superiority of factory recuperations. Indeed, as part of the recuperated movements' conception of work, its actions do extend beyond providing only those services that are necessary to sustain a given workplace. The recuperations are not simply hotels that provide accommodation to guests or ceramic factories that make tiles, but social enterprises that are inextricably engaged in their local communities. However, to have legal traction the Cooperative needed stay within the boundaries of what is comprehensible to the legal system and politically defensible for elected representatives. Therefore, the Cooperative relied on the Constitution's own

conception of public goods – employment, education and healthcare. Rather than dispensing entirely with the normative foundations of the Argentine legal system it framed its actions legally and satisfied the requirement that an expropriation contributes to the common good, either materially or spiritually. These public goods could be broadly supported by a centre-left majority in the Senate that did not explicitly support the ERTs' more radical conception of work but defended its provision of employment and public services at a time of financial crisis.

Expropriation was not simply the tactical instrumentalisation of law to acquire the legal rights to continue their operations, these actions contained a wider strategic aim to re-balance the constitutional hierarchy of work vis-à-vis property. The key issue for the BAUEN was to frame their actions in a way that satisfied the legal test and in so doing draw on the Constitution's protection of work. This means that the Cooperative's claims about public service provision were not purely instrumental, disingenuous or short-term; their effective claims were premised on the Constitution's promises and contributed to a long-term strategic objective.

While members of the recuperation movement may be offended at the apparent misunderstanding or misinterpretation of their movement. I suggest that this broad interpretation of the BAUEN exemplifies how, if a political movement is to have legal traction and set its strategic aims in motion, political support for recuperation must be translated into claims that satisfy the legal test.

For those opposed to the expropriation, the BAUEN was a private group and any expropriation by the State would mean the use of taxpayer's (public) money for the benefit of a private group. Despite having passed the final legislative hurdle in the Senate the Law of Expropriation for the Hotel BAUEN was vetoed by President Mauricio Macri. The executive order stipulated three objections to the legislature's expropriation order: For Macri, (1) the expropriation would not benefit the community in general, on the contrary it would benefit an exclusive group. (2) The 'obligations' that would arise from the purchase of the Hotel would be burdensome for the State. (3) The expropriation would prejudice the national executive's ability to allocate economic resources for other basic needs of the entire

population, and instead provide a benefit only to those engaged in the activities of the Cooperative.[440]

The executive order makes repeated reference to a disagreement between the legislative and the executive over the contribution of the Cooperative's activities to the "common good". For Macri, the Cooperative and its members are an exclusive group and would be the sole beneficiaries of expropriation. According to the veto: "The expropriation would not benefit the community in general, on the contrary it would be to the benefit of an exclusive group". This exclusive group is defined as those engaged in the Cooperatives' activities. Therefore, the opposition to the legislation is premised upon a dismissal of the claim that the beneficiary of the Cooperative's actions is the public. This stands in contrast to and challenges the legislation's claim that the public services provided by the Cooperative contribute either materially or spiritually to the common good. The veto does not expand on why the public services do not contribute to the public; instead, it concentrates less on the public services argument and focuses on the Cooperative as the beneficiary of expropriation.

The veto challenges the legislature's interpretation and application of the legal threshold of 'public utility' and inserts an additional argument about the financially burdensome nature of the legislature's proposal[441]. At the time of writing, the legislation remains at this stage. According to the Argentine legislative procedure, the veto is not the last word, the bill must pass back to the Senate who have the possibility to overturn the veto.

The central issue here was not the BAUEN's actual contribution to the common good and more about whether there should be an exception to the right to private property grounded in the right to work. The Cooperative framed its actions so that it satisfied the issue of utility and public beneficiaries, but its legislative project ultimately failed due to the President's rejection of its political and financial implications. Unlike the bankruptcy legislation, the satisfaction of the public utility test was not a formality dependent upon the provision of evidence that satisfied the legislative conditions. Instead, it was subject to creative

[440] The veto in full, see <http://www.saij.gob.ar/1302-nacional-veto-total-proyecto-ley-27344-declara-utilidad-publica-sujetos-expropiacion-inmuebles-todas-instalaciones-componen-edificio-hotel-bauen-dn20160001302-2016-12-26/123456789-0abc-203-1000-6102soterced?&o=14&f=Total%7CTipo%20de%20Documento%7CFecha%7CTema/Derecho%20administrativo/dominio%20del%20Estado%7COrganismo%7CAutor%7CEstado%20de%20Vigencia%7CJurisdicci%F3n%5B5%2C1%5D%7CTribunal%5B5%2C1%5D%7CPublicaci%F3n%7CColecci%F3n%20tem%E1tica%5B5%2C1%5D&t=10742> accessed 04/12/2019. See also, <https://www.boletinoficial.gob.ar/#!DetalleNorma/156616/20161227> accessed 04/12/2019

[441] The financial burden had always been a challenge with the BAUEN (BAUEN lawyer Kravetz in Ruggeri, Alfonso and Balaguer (n 387) 86.); The cost of expropriation is high because the hotel building is located in central Buenos Aires City.

interpretation of the legal test and political contestation over the evidence provided. Therefore, the satisfaction of the legal test for public utility by ERTs was and will be contingent upon generating political support for that interpretation of the legal test. This tells us something further about legal strategy that relies not on judicial interpretations but on the agreement of political representatives. In these cases, we must recognise the politicisation of a legal test, which means that the threshold of sufficient evidence to satisfy a legal test is not legally determined but subject to political conflict.

3 Legal strategy and non-legal factors

In this section we will consider the non-legal factors that reveal something about the BAUEN's legal strategy. The opportunities and limitations of legal rules only tell part of the story about the trajectory of the BAUEN's strategic and tactical decisions. For instance, the pragmatic decision to engage with law can be understood better when we acknowledge that the catalyst for the ERTs' mobilisation was workers' material necessities for subsistence to support their families, and not simply because of an ideological commitment to recuperation and worker autonomy. Instead, it is important to recognise how legal strategy is also constituted by a multitude of non-legal factors that serve as catalysts, obstacles, and facilitators of political and legal objectives.

The aim of the case study has been to provide an empirical insight into the effective ways that labour engages with law and to situate our analysis within the practical realities of struggle. In this section we will move away from legal analysis and focus on the effect of non-legal factors on the BAUEN's strategic objectives. Importantly, this will provide an opportunity to consider the ways the BAUEN managed the dangers of co-optation, and the role of political mobilisation in constructing an organisational structure capable of initiating and delivering a legal strategy. To this end, I will consider the following three factors and their effect on the BAUEN and the ERT movement generally: Political action; organisational support; and the changing relation with government.

3.1. Political strategy: Occupation and solidarity

> *Lawyers usually seem, even to the workers, to be the ones who get the goods, but in reality, the success of the lawyers in most cases depends, paradoxically, on the workers' willingness to go beyond what the law prescribes.*[442]

To understand the BAUEN Cooperative and its legal strategy we have to recognise the relationship between political actions taken by workers and legal actions by lawyers. Political tactics have provided support to ERTs that legal actions could not and, importantly, have ensured the survival of the Cooperative and its longer-term political strategy when legal remedies failed to provide protection. In the history of the ERT movement there have been extreme and dramatic examples of political action, including clashes between workers and police outside the Lavalan factory and the Chilavert printing press[443]. In the BAUEN case we will focus upon two political strategies. First, the occupation of property by workers and how it enabled the BAUEN Cooperative to establish its operations and become legally relevant to the Bankruptcy Law. Second, mass demonstrations in support of the Cooperative prevented the enforcement of eviction orders and ensured the survival of the BAUEN Cooperative.

The recuperation of a company by workers begins with 'the take' or occupation. The initial act of occupation is essential to their aims of worker-control and their legal strategy because it provides the workers with control of the property. Once physically in control of the property a group of workers can start to re-organise the enterprise according to the principle of self-management and establish a viable business capable of providing secure employment. Occupation is a formative act that creates an ERT and mobilises a group of workers into a movement committed to its shared goal of worker-recuperation and will, in turn, demand legal protections. As Magnani puts it:

> Occupying factories, even precariously, at least creates temporary spaces where the workers can cultivate the circumstances to develop political consciousness. While there are no guarantees, this will at least give them a chance for greater combativeness and commitment to deeper goals.[444]

The mobilisation of a worker Cooperative that physically controls property and is committed to the recuperation of their workplace is not just politically formative but has been central to their legal strategy. A cooperative that controls property can present an effective claim to the bankruptcy judge requesting the legal right to remain because it is able to demonstrate

[442] Magnani (n 360) 104.
[443] ibid.
[444] ibid 122.

its capacity to continue production. For example, prior to controlling the property, the Callao Cooperative made an application to continue the Hotel's operations that was rejected due to their inability to satisfy the evidential requirement in article 190 of the Bankruptcy Law that, as a third party they were capable of continuing production[445]. Without control of the property the Cooperative could not prove that they were able to 'continue' production and their legal claim fell short. However, once the Callao Cooperative entered the hotel on 21/03/2003 they were granted a temporary tenancy. The importance of occupation to an ERT means that they must act illegally – occupation of private property – and then seek to make their physical control over the property legal. The political practice of occupation has provided the foundation for ERTs' effective engagements with the Bankruptcy Law.

The second strategy that has played a role in the survival of the BAUEN cooperative is mass demonstrations. These acts of solidarity by civil society have physically prevented the enforcement of eviction orders. These demonstrations and the vast political mobilisation behind the BAUEN's struggle explain how the Cooperative has managed to remain in control of property and continue production in spite of judicial orders for their eviction.

The BAUEN is a focal point of political activism, the Cooperative has welcomed all types of political campaign to use their facilities for meetings and the organisation of popular demonstrations. The support given to other political movements has been reciprocated in the form of public demonstrations of solidarity with the Cooperative. These have been at their most effective during periods of proposed eviction but have included regular demonstrations outside of Court during trials. The demonstrations have been attended by a diverse groups of trade unionists, political party members, representatives of other recuperations, human rights organisations and academics.

For example, on the day of one proposed eviction, 21st August 2007, a concert was organised outside the Hotel, filling the streets surrounding the Hotel with supporters of the Cooperative[446]. The president of the Cooperative, Federico Tonarelli, addressed the demonstration and declared that the workers had no intention of abandoning the Hotel nor their movement for self-management. The demonstration was transformed into an assembly with those present confirming that they would resist any attempt to evict the Cooperative[447]. Given the vast political support for the BAUEN from different social groups, concerns about

[445] Ruggeri, Alfonso and Balaguer (n 387) 55–7.
[446] ibid 104.
[447] ibid 109.

public order, and the practical difficulties presented by a mass demonstration, the eviction was not enforced and the workers remained *in situ*. In response to another eviction order, 10th September 2014, demonstrators again filled the streets and the deadline for eviction expired with the Cooperative remaining in control of the Hotel.

In addition to its concrete role in defending the integrity of the Cooperative, public support for expropriation has be seen as a factor that contributed to legislative support for expropriation. It would be difficult to prove that mass demonstrations were a definitive factor in generating sufficient legislative support for an expropriation; however, we can say that the swell of public support for the BAUEN Cooperative made it a politically sensitive issue. As Magnani summarises:

> No authority wants to pay the political cost of putting more than a hundred workers on the streets. To make it even more complicated, BAUEN workers have always been aware of their delicate position and have been building political networks with all kinds of political actors: unions, political parties, politicians, social movements of unemployed [*sic*], etc. If there were an eviction, besides the complication of sending the police into a 15-floor building full of tourists, there would be huge demonstrations 10 blocks from the Obelisco, the symbolic centre of Argentina. That is an extreme case, but if no definitive solutions are taken, there could be many BAUENs all around the city.[448]

In the BAUEN experience, mass demonstrations were an effective political tool that protected the Cooperative when legal remedies had been exhausted and the Law threatened its integrity. The Cooperative would have been unable to continue its legal and political struggle without the aid of civil society support. Mass demonstrations made law enforcement politically sensitive and practically impossible. These acts of mass solidarity provided a basis to resist law where tactical engagements failed to deliver positive outcomes and demonstrated the vast political support for the ERT movement. And, as a result, these actions managed to defend the political telos and material aims of the ERT movement against the enforcement power of law.

The role of political action in buttressing the BAUEN's legal strategy provides an example of how a labour movement might avoid the limitations of legal mobilisation, or even the dangers of co-optation. We have considered in detail both the opportunity and limitation of legal mobilisation by labour movements in chapters two and three. The principle concern

[448] Magnani (n 360) 159.

that surrounds the danger of co-optation is that a social movement's normative demands may be neutralised, misrepresented, and/or de-mobilised as a result of legal mobilisation. I have argued that, in spite of these risks labour movements should (and do) look for opportunities to draw on State law's institutional capacity, albeit in a manner that co-ordinates such legal tactics with a broader political strategy. The BAUEN's use of mass demonstration and occupation are examples of effective political and legal tactics that have been used at different stages both to encourage and resist legal functions. This selective use of law has enabled the BAUEN to both benefit from the enforcement of law and to resist its ordering capacity depending on its relative effect on their political objectives. In other words, the BAUEN engaged with law where it presented an opportunity for effective engagement and it resisted law where it threatened the Cooperative's existence.

3.2. Organisational support

Trade unions have played a crucial role in the recuperation movement. From the non-recognition of the movement by traditional unions to the formation of ERT-specific organisations. In this section I will highlight how the provision of practical support and legal resources to the ERTs was critical to this labour movement's foundation and its legal mobilisation. In addition, these organisations were critical in mobilising a political movement for recuperation by encouraging workers to see their actions as both a viable economic alternative and as part of a wider political struggle about the nature of work. This will provide insights into the potentially effective relation between the ERT movements' political and legal mobilisation.

The largest Argentine labour federation, *La Confederación General de Trabajo* (CGT), refused to represent workers involved with recuperations. Two factors debarred workers from representation by their union: First, the CGT was concerned about the irreparable damage their support for recuperations would cause to employer relations[449]. Second, workers were no longer categorised as employees because, as members of the self-managed cooperatives they fell outside the employer-employee paradigm. Workers that were union members found themselves precluded from representation and support due to their new status as Cooperative members. For example, according to the La Union Obrera Metalurgica (UOM, The Metal Workers Union) workers engaged in recuperations qualified as employers

[449] Irena Petrovic and Slobodan Cvejić, 'Social and Political Embeddedness of Argentina's Worker-Recuperated Enterprises: A Brief History and Current Trends' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2663290 <https://papers.ssrn.com/abstract=2663290> accessed 5 December 2019.

or cooperative members, not employees or workers. In 2004, the UOM changed its membership criteria so that members of cooperatives (socios) could be recognised as workers for the purposes of trade union membership.[450] The recognition of Cooperative members as workers was not carried out by all trade unions; instead, we are left with a heterogeneous experience of inclusion and rejection by Argentinian trade unions.

To provide the necessary support numerous worker-recuperation related organisations were established. Multiple national, sector-specific and ad hoc worker cooperative federations (or unions) operated in Argentina by 2013[451]. There have been three main organisations: The MNFRT (Movimiento Nacional de Fabricas Recuperadas por sus Trabajadores, National Movement of Factories Recovered by the Workers); The MNER (Movement of Recovered Businesses); and the FACTA (Federación Argentina de Cooperativas de Trabajadores Autogestionados).

The need for alternative organisational structures stemmed from the exclusion of ERT members from traditional trade union structures that were premised upon and structured around the representation of workers as employees and wage labourers; as opposed to supporting the struggle of labour per se. Moreover, traditional trade unions were ill-equipped to support workers engaged in the recuperation and self-management of their workplace. The new organisations have provided practical guidance about restarting production and how to re-structure an enterprise according to the principles of self-management. For our purposes, the organisations have been pivotal in the ERTs' legal struggle through their provision of legal and political resources.

The mobilisation of legal resources by these organisations has enabled the BAUEN to launch legal action and sustain the struggle through the appeals process. The ERTs' legal strategy has been co-ordinated by the legal knowledge of lawyers provided by ERT organisations. In order to engage effectively with both the Bankruptcy Law and the expropriation process, the ERTs have relied on the financial resources of the ERT organisations to provide expert legal practitioners. I have argued in chapter two (see tenet 1) that effective legal strategy is heavily

[450] ibid 21.; For a detailed account of the trade unions that did and did not engage with the recuperation movement, see pp.21-23.
[451] Ruggeri, 'Informe Del IV Relevamiento de Empresas Recuperadas En La Argentina: Las Empresas Recuperadas En El Período 2010-2013.' (n 385) 42–6; Andrés Ruggeri, 'Las Empresas Recuperadas En La Argentina. 2010 : Informe Del Tercer Relevamiento de Empresas Recuperadas Por Los Trabajadores' (Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas 2010) 76–8 <http://www.recuperadasdoc.com.ar/Informes%20relevamientos/informe_Tercer_Relevamiento_2010.pdf> accessed 4 December 2019.

dependent on an extensive understanding of the available opportunities in law, and a capacity to articulate legal claims that are capable of being recognised as belonging to the legal system. The provision of resources by the MNER, MNFRT and FACTA ensured a competent legal mobilisation that enabled the ERTs to benefit from direct legal remedies in the short- and long-term.

Beyond practical and legal support, the mobilisation of a politicised labour movement is a key factor in the establishment of an ERT movement and a coherent legal and political strategy. While the workers were responsible for taking action, the new unions forged an organisational structure under which it was possible to identify an ERT movement as opposed to a collection of ad hoc worker-controlled enterprises. For the MNER and MNFRT in particular, a key part of establishing a robust labour movement involved informing workers about the political nature of their actions, as the MNFRT's founder and president, Luis Caro, explained:

> In Argentina, private property should be recognised, but secondary to work. Perón said it best: we need to put capital at the service of the economy, and the economy at the service of social well-being. We have things backwards here in Argentina. We have social well-being at the service of the economy, and the economy at the service of capital.[452]

The aim of the ERT struggle was not simply to advise about self-management structures but to develop the political consciousness of workers and emphasise the political significance of recovering a factory.[453] Caro, for example, viewed the ERT movement as part of a wider struggle for social liberation with legal tactics geared toward broader constitutional ambitions to re-order the relation between labour and capital.[454] It would have been difficult to sustain an ERT movement committed to such strategic aims without a political consciousness amongst cooperative members that precipitated into the necessary condition of solidarity. And, in periods of difficulty – occupation, negotiation, eviction – the solidaristic bonds of members have been vital. As such, we can distinguish three essential factors that these organisations have provided to the ERTs' strategy: Political mobilisation, legal resources and practical support.

[452] Magnani (n 360) 71.
[453] ibid 72.
[454] ibid 76.

There have, inevitably, been issues surrounding the relationship between the aims of these organisations and those of the ERTs. For instance, a division in the ERT membership of the MNER arose from concerns about the MNER's leadership and informal structures[455]. The MNER had focused its attentions toward lobbying politicians in search of legislative recognition and questions were asked about whether the MNER was representing workers or simply furthering the political ambitions of its leaders. The ERTs expressed doubts about these organisations' capacity to represent the demands of cooperative members and not the wider political aims of the MNER and MNFRT. For the president of FACTA, Federico Tonarelli, an organisation formed in response to the perceived failings of the MNER, the support required by a self-managed worker cooperative cannot be provided by pseudo political parties but organisations dedicated to ERTs' specific organisational needs.[456] The establishment of FACTA was an attempt to provide essential organisational support without undermining the political agency of an ERT or the wider movement. The FACTA has been focused on the creation of concrete support structures whilst remaining committed to legal and political action, including lobbying government about regulations that affect the ERTs as businesses (e.g., special status for taxation of cooperatives) and continued legal strategy for the recognition of ERTs as public utilities.

3.3. The changing relation with government

The government's policy towards factory recuperations has affected the legality of the ERT movement. This case study has already considered the ways that each branch of government has enabled and/or prevented the ERTs' strategic aim to have its actions recognised as legal. So far, this analysis has focused upon the judiciary's interpretation and application of the Bankruptcy Law provisions, the need for a legislative majority to expropriate property, and the executive veto. This section will highlight how the executive branch's changing 'support' for the ERT movement affected its legality (i.e., whether the government enabled the ERTs' use of property to be recognised as legal). We will begin by recognising the executive's relatively receptive years between 2003 and 2015, followed by the increased

[455] Luis Caro (MNFRT) was a mayoral candidate in the city of Avellaneda, and Eduardo Murúa (MNER) stood for the office of deputy for the Province of Buenos Aires and ran for election to the legislature of the City of Buenos Aires. For Caro and Murúa, political office represented an opportunity for the ERT movement to benefit from legislative and executive power. The decision to stand for elections and represent political parties has been met with a mixed response from the workers in the recuperations. We have to remember that the recuperation movement began as a consequence of the wider QSVT movement, built on a rejection and mistrust of traditional institutions, political representatives' intentions, and their capacity to effect meaningful change. Thus, decisions to enter political office are regarded with suspicion and as potentially counter-productive by others in the ERT movement. Ruggeri, Alfonso and Balaguer (n 387) 107.
[456] ibid.

legal and financial precarity of ERTs since the election of President Macri. This analysis will reveal how the shift from a centre-left to right-wing executive has had a significant effect upon the viability of factory recuperations both in their attempts to mobilise an effective legal strategy and capacity to survive the shift in politico-economic policy.

Before 2003 the State had taken relatively little action to tackle the occupation of property by workers. In the post-crisis period, the recuperation movement's only governmental interaction was through article 21 and 190 applications under the Bankruptcy Law.[457] In 2003, the centre-left candidate Néstor Kirchner was elected President and the executive began to take a more active role in the ERT phenomenon. The ERTs received ambiguous support from the Kirchener governments between 2004-15. The most prominent intervention was the provision of subsidies for 'social development' to the ERTs by the Ministry of Work[458]. In addition to subsidies, the executive supported further reform to the Bankruptcy Law to reduce the challenges faced by ERTs seeking the legal rights to control property. The Kirchener governments offered no explicit public support for recuperations[459] but, they did take decisions that enabled the movement legally and financially.

While the executive's financial support for recuperations might be interpreted as merely motivated by their general concerns about kick-starting the Argentine economy; the decision to recognise, through financial assistance and legal reform, a movement that rejects the private property rights of employers cannot be underestimated. The executive's support represents a period during which the ERT movement grew as a political movement and received legal protections. In 2004 there were 169 ERTs, 324 in 2013, 367 in 2016[460] and 384 in 2018[461].

This facilitative relation between the ERTs and executive was not applicable nationwide due to the contradictory approaches taken at different levels of government. There is no one definable response of *the* government, rather, a range of responses by different branches at different levels of government. For example, in spite of the national executive's willingness

[457] Ruggeri, *¿Qué Son Las Empresas Recuperadas?* (n 361).
[458] On the ERTs and State funding see Dinerstein, *The Politics of Autonomy in Latin America* (n 140) 540.
[459] See interview with Andrés Ruggeri, director of Programa Facultad Abierta/Centro de Documentación de Empresas Recuperadas at the University of Buenos Aires: Matt Kennard and Ana Caistor-Arendar, 'Occupy Buenos Aires: The Workers' Movement That Transformed a City, and Inspired the World' *The Guardian* (10 March 2016) <https://www.theguardian.com/cities/2016/mar/10/occupy-buenos-aires-argentina-workers-cooperative-movement> accessed 5 December 2019.
[460] Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En Los Comienzos Del Gobierno de Mauricio Macri. Estado de Situación a Mayo de 2016.' (n 362) 9.
[461] Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En El Gobierno de Mauricio Macri. Estado de Situación a Octubre de 2018.' (n 362) 6.

to support the recuperation movement as a source of employment through business subsidies; the election of Mauricio Macri as head of the City of Buenos Aires Government lead to all ERT-related subsidies being cancelled and a more aggressive stance taken against expropriation bills[462]. Moreover, while various regional legislatures have passed expropriation laws, the national congress is yet to pass an ERT expropriation bill into law. Nonetheless, this was a period of relative, if uneven, support from government with expropriation bills, bankruptcy reform and financial support.

The Macri administration (post-2015) introduced a political, economic and legal climate that has had a detrimental effect on the strategic aims of the ERT movement. Before Macri, the ERTs had received some governmental support but oftentimes remained in a precarious legal, political and economic position[463]. Following Macri's election the political, legal and macroeconomic situation worsened to the extent that it was extremely difficult, even impossible, for worker cooperatives to continue their operations productively and sustainably. From the legal and political perspective, the division between conditional support for the ERTs and outright rejection was exemplified by the BAUEN's expropriation bill. The centre-left majority in Congress, drawn from the same party as the previous Kirchener presidencies, accepted the broad interpretation of the Hotel's activities as a public utility and passed the BAUEN expropriation law only for it to be vetoed by Macri. The changing composition of the Senate in the intervening years has left the politico-legal fate of the BAUEN in legislative stasis. While the bill can still be passed by the Senate, the guardians of the bill need to be sure that sufficient support can be generated again so as to bypass the veto.

Although these politico-legal calculations are important to the effectiveness of the BAUEN's legal strategy; the principal threat to the ERTs during the Macri era has been the introduction of a financial programme that affected the viability of small-businesses generally. The Macri administration oversaw a general increase in running costs for businesses, specifically a significant increase in electricity and gas tariffs, an abrupt decline in consumption, the liberalization of import markets, and a currency devaluation. For example, electricity tariffs rose between 200-700% and gas up to 1300%, between 10 December 2015 and March 2016[464]. The Macri administration's financial policies have not only affected ERTs, all

[462] Ruggeri, Alfonso and Balaguer (n 387) 84.
[463] Thomas (n 367).
[464] A significant factor in these increases was the removal of government subsidies, Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En Los Comienzos Del Gobierno de Mauricio Macri. Estado de Situación a Mayo de 2016.' (n 362) 18.

small-medium enterprises have felt their effect. Figures from 2016 reveal that the unsurprising corollary effect of these policies has been the dismissal of some 150,000 workers from the public and private sector and the closure of 5000 businesses.

For private capital enterprises, such conditions might precipitate redundancies or other 'efficiency' savings in an attempt to ensure a business' survival. In the case of self-managed worker cooperatives, their response to market pressures does not follow the same logic. Decisions are not taken via a hierarchical command structure that views workers as costs, they are taken collectively by workers which means that redundancies have not been an option for ERTs. The cooperatives have absorbed increased costs through the reallocation of financial resources, meaning a collective reduction in salaries or changes in the quantity or quality of production, or provision of services. However, the ability of the ERT movement to survive these financial pressures has taken its toll and negatively affected the movements' capacity to continue its legal and political struggle. For example, the decrease in growth rate can be seen in the decline from 18 new ERTs per year in 2015 to 7 in 2018, and despite an increase in the number of recuperated enterprises the total number of workers employed in an ERT has decreased from nearly 16,000 (2015) to 15,500 (2018)[465]. Indeed, the sale of expropriated property by worker cooperatives is indicative of the precarious nature of the ERTs[466]. Despite having effectively engaged with law and expropriated their properties, the financial conditions have been such that the material necessities of workers were best satisfied through the sale of property.

While we are principally concerned with legal strategy, non-legal factors, such as the prevailing politico-economic conditions, have had a significant effect on the ERTs' engagements with law. Periods where the ERT model was economically viable and the number of ERTs were growing exponentially have coincided with strategic attempts to secure legal protections; however, when the economic conditions make the formation of an ERT more challenging its legal struggle becomes less prevalent. In other words, just as the ERT movement's mobilisation was the result of social, political and financial conditions in 2001, the drastic return of the financial crisis has affected the ERT movement. In short, the ERTs are less likely to be in a position to successfully present legal claims under the

[465] Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En El Gobierno de Mauricio Macri. Estado de Situación a Octubre de 2018.' (n 362) 6.
[466] Ruggeri, 'Las Empresas Recuperadas Por Los Trabajadores En Los Comienzos Del Gobierno de Mauricio Macri. Estado de Situación a Mayo de 2016.' (n 362) 31.

Bankruptcy Law or the expropriation provisions when they do not exist. As with any labour movement, the ERTs' political mobilisation was a precondition of their legal strategy.

4 Conclusion

While the future of the BAUEN Cooperative's legal struggle remains uncertain, its experience has provided an opportunity to assess a labour movement's engagement with law in relation to both its strategic aims and navigation of available legal opportunities. The overwhelming lesson from the ERT/BAUEN experience is, I argue, that the potential of legal strategy to deliver either short- or long-term legal protections is found in pragmatic interaction between law's excess of meaning, the articulation of effective legal claims, and non-legal factors. The BAUEN has not provided a conclusive account of effective legal strategy but has revealed the significant legal, practical and political challenges to any re-interpretation of constitutional rights that may conflict with law's entrenched interests. The BAUEN has allowed us to better comprehend legal strategy within the context of a wider political struggle and to account for the range of factors that will shape its effectiveness. I will conclude by drawing together the insights from the legal and political analysis of the BAUEN Cooperative's struggle.

The BAUEN Cooperative's effective legal strategy has been premised on a competent use of available legal rules. Although the BAUEN and other ERTs have received legal protections, the law does not recognise the normative aims of the recuperation movement. Following our analysis in tenet 1, chapter 3, the ERTs have legalised their actions and won direct effects for their political intentions by articulating legal claims that satisfy constitutional and legislative tests. The effectiveness of the BAUEN Cooperative's legal strategy has been rooted in its ability to win tangible legal protections that enabled it to pursue its normative aims of worker-control and cooperativism. A key part of effective legal arguments is to engage with law on its terms and identify an interpretative opportunity or legal rule that could offer suitable protections. Rather than making political demands that law ought to recognise the ERT movement, the BAUEN framed its political demands (control of property and the importance of work) as legal and/or constitutional claims that could be recognised as belonging to the Argentinian legal system.

The Bankruptcy Law's provisions are an example of the opportunity that legislation may offer to a labour movement seeking to have its actions recognised as legal and worthy of protection. As we have seen, the Bankruptcy Law presented certain conditions and

evidentiary requirements that, where satisfied, could provide the BAUEN with direct legal effects. The engagement with expropriation legislation shows the innovation and pragmatism that is central to legal strategy. In order to meet the legislative test for expropriation, it was argued that the BAUEN represented a public utility because it is a provider of public services *and* because the protection of work is a constitutional right, as opposed to simply insisting on the constitutional importance of the ERT's political objectives. In the BAUEN's case the protection of work was recognised by the legislature as meeting the threshold for a public utility only when combined with other actions that contribute to the common good. This reveals not just the need for innovative legal arguments but also the role of political influence in legal strategy that engages with political representatives/legislators. In these cases, pragmatic calculations will be required to balance strategic objectives, available legal arguments and the likelihood of achieving sufficient legislative support to pass a bill.

The aim of legal engagement has been the control of property, but the effect of protecting an ERT's legal control of property has wider implications for the constitutional importance of labour. What is at stake in the ERT's legal strategy is the relative constitutional role of labour, private property and capital. Effective engagement with available legal rules has provided legal protections for worker-cooperatives or the actions associated with recuperation. The ERTs' strategic use of both constitutional rights and legislation has sought both short-term protections and to achieve longer-term reform of the constitutional protection of work. Their experience has shown that there are opportunities for strategic gains through effective legal action, and that labour can challenge the supremacy of property rights and capital interests (entrenched interests).

Where State law imposes legal obligations on employers or capital interests to the benefit of workers, we can see the importance of national law's institutional capacity to the ERTs' legal strategy. As I argued in tenet 2, it is the State's unique material and symbolic power that make it a key site of struggle for labour movements that seek to re-shape the contemporary conditions of work and social relation between capital and labour. We cannot claim that successful legal strategy transforms the normative structure of the State away from its protection of extant property regimes and capital interests. However, we must recognise the potential effectiveness of legal strategy to deliver key protections that re-balance legal relations or provide much-needed legal regulations. The BAUEN experience illustrated the opportunity of the State's institutional capacity where it won legal rights to control property

and pursue worker-controlled recuperation. To be explicit, it is the State legal system alone that can secure the future of the BAUEN and the wider ERT movement by recognising their actions as belonging to the legal system and bestowing the necessary legal protections.

The BAUEN case has shown a complex interaction between tactical engagements with law, political tactics, and long-term strategic objectives. For instance, the BAUEN sought to both shape the constitutional relation between labour and private property and drew on more short-term legislative provisions with limited constitutional effect. In spite of the difference between constitutional rights and legislative provisions, we can see the potential effect of the latter on the former. First, the tactical use of the Bankruptcy Law has inserted an exception in specific circumstances to the constitutional right to property. Rather than assuming ordinary legislation has no wider constitutional effect, we can see that Bankruptcy Law does limit the supposed inviolability of private property. And, these legal protections have taken effect due to judicial recognition of the social value of work at the expense of creditors and owners of private property. Therefore, in this case, ordinary legislation factually limits certain constitutional rights meaning an ERT's innovative use of its provisions can be understood to have a wider constitutional effect.

At the same time, the BAUEN experience serves as a reminder that the protections provided by legislative provisions are not a proxy for the wider constitutional treatment of certain issues. For example, while the Bankruptcy Law provided an exceptional means for an ERT to control property without holding legal title, its application was limited to specific bankruptcy-related circumstances and did not infringe the constitutional rights of non-bankrupted parties to private property. In other words, there are strategic opportunities within law to claim important legal protections and innovative engagements with legal provisions are an essential part of the ERT's effective legal strategy. Nevertheless, we cannot overstate the constitutional effects of legislative provisions and should recognise that a legal remedy that applies in certain circumstances is not representative of how social relations are structured in the rest of the legal system.

Having said that, and for the purpose of understanding the potential of legal strategy, I caution against dismissing tactical engagements with legislative provisions as having a key role in a broader legal and political strategy. A tactic need not be an end in itself but a means to a strategic objective, which means that we must look beyond the immediate effects of legal mobilisation to comprehend the wider effect on long-term aims. In tenet 3 we identified the importance of this interaction between legal tactics and strategy to advance a

movement's political aims and protect against the potentially co-optive effects of law. Notwithstanding the important distinction in the hierarchy of protections between ordinary legislation and the constitution, a legislative protection may not bestow constitutional rights or amount to a constitutional reform but it can be a necessary step toward it. For example, the tactical engagement with bankruptcy legislation often plays a key role in providing legal protections that allows an ERT to stabilise its operations and pursue more permanent legal status in the form of an expropriation law. An ERT that does not have the legal rights provided by Bankruptcy Law would be less likely, due to the practical and economic pressures of precarity, to establish a Cooperative that qualifies as a public utility.

Furthermore, the indirect effects of legal mobilisation have set in motion a wider political and legal strategy. For example, the bankruptcy legislation provided the conditions for a political movement that proposes an alternative model of work to the neoliberal capitalist norm. One indirect effect has been legislative reforms that extended the rights of worker cooperatives against the rights of creditors and holders of legal title in private property. From a strategic perspective, the ERTs' legal struggle received vast public exposure and support due to its alignment with the QSVT movement and the broader public rejection of irresponsible capitalist interests and the need for alternatives in response to years of financial insecurity and austerity politics. These indirect effects have bolstered the BAUEN's political mobilisation and insulated it against co-optation by resisting eviction orders through mass public demonstrations.

In sum, the BAUEN case highlights the deep tension between the opportunity and limitation of legal mobilisation. The ERT experience of legal strategy reveals both an opportunity to draw on concrete legal protections and the excess of constitutional meaning. The ERTs' re-interpretation of constitutional provisions and the judiciary and legislature's willingness to insert such determinations into law provides an insight into the practical exercise of jurisgenesis. However, the deficit of task has limited strategic opportunities and shaped tactical engagements due to the hierarchy of constitutional rights and entrenched interests. Indeed, the unequal protections afforded to the constitutional right to work compared to the right to property mean that the former relies on 'bootstrapping' additional non-work-related legal claims and can only supersede the latter in exceptional circumstances.

Analysis of legal strategy can focus on legalistic issues but, they are not the only factors that determine its effectiveness. To this end, I have identified three 'non-legal' factors that better

comprehend the trajectory of the BAUEN's legal strategy by placing it in the context of political action, organisational factors and the role of government.

First, political action has buttressed the BAUEN's legal strategy. The initial act of occupation was central to launching an ERT and was a necessary step in meeting the evidential requirements for a short-term lease under the Bankruptcy Law. And, when all legal remedies had been exhausted the only protection against an eviction order was to physically resist its enforcement through mass demonstrations. This returns to and highlights the central claim in tenet 3 about the potentially productive interaction between strategy and tactics and direct and indirect effects as a means to resist the danger of co-optation by law. Political tactics ensured that the ERT's strategic objectives were not co-opted by eviction orders or extinguished by legal decisions that rejected the BAUEN's legal claims. Importantly, the BAUEN has deployed legal and political tactics in search of strategic objectives without being entirely dependent upon the outcome of these tactical engagements. The BAUEN Cooperative's continued control over the Hotel is testament to the capacity to separate the effectiveness of legal tactics from the effectiveness of a political strategy in the long-term.

Second, organisational structures dedicated to the ERT movement have provided the practical support and resources required for an effective political and legal mobilisation. The co-ordination between the ERTs' lawyers and the movement's political aims has been key to its effective engagement with law and tactical use of political action. Third, the reception of the aims and context of a political movement by government has affected the scope for legal and political protection. Analysis of ERT movement has to be assessed against the changing political context because of the significant effect that a government's normative receptiveness to labour has had upon the successful application of legal and political strategies by ERTs.

Conclusion

The pressing concern that underlies and motivates this research has been the legal, political and economic challenges facing contemporary labour. Under contemporary conditions labour faces widespread changes to working practices according to market dictates[467], a hollowing-out of hard fought labour regulations[468], a decline in the political power of organised labour movements[469], and a social landscape that is increasingly ordered according to the ideological imperatives of 'total-market thinking'[470]. In light of these challenges the question posed and explored by this thesis has been about the strategic opportunities for labour to insist on the enforcement of legal protections and intervene in the determination of what law ought to be. This highlights the importance of law as a tool of social struggle and calls for a strategic approach to the relation between social conflicts and law.

The central contribution of this thesis to an understanding of the ways that labour can realise its political objectives has been through a conception of effective legal engagements. The potential effectiveness of legal engagements, I have argued, is premised on a strategic approach to law that identifies both its opportunities and limitations as a tool of social struggle. This means that effective engagements with law are determined by their capacity to influence law's determination of legal regulations and social relations, and to avoid law's limitations with respect to political demands that confront its normative commitments. In order to draw out the ways that labour can negotiate this tension, this thesis has sought a sobering and pragmatic conception of the tenets of effective legal engagement. I have presented a nuanced analysis of (i) the articulation of coherent and innovative legal arguments, (ii) law's institutional capacity and (iii) how the tactical use of law can be oriented toward the achievement of strategic aims. And, importantly, I have built on this conceptual account with empirical analysis that recognises the contextual contingencies of struggle and the important role of non-legal factors in effective legal mobilisation.

These insights provide a conception of labour's capacity to act as a democratic subject through strategic engagements with the legal system. In spite of the challenges that labour faces, we can identify how, under certain conditions, labour can impose legal obligations on capital and insert new protections into law that shift the emphasis of regulatory frameworks

[467] Komlosy (n 204); Dukes (n 11).
[468] Streeck (n 2).
[469] Streeck (n 10); Bronfenbrenner and others (n 354).
[470] Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' (n 93).

from capital interests to a commitment to labour protections. By reclaiming law as a tool of social transformation we bring forward the opportunity for transformatory social reform and, at the same time, confront the undoubted challenges that labour faces in registering a truly emancipatory legal demand. While this does not emancipate labour from the pressures and challenges of capitalist conditions, it does provide an opportunity to present its political demands and win much-needed legal protections. Indeed, the fact that labour's plight is not intangible or a merely scholastic problem can often be missed in theoretical work. On the contrary, it is connected to everyday working conditions, health, safety, dignity and the material needs of workers. In this sense, the strategic opportunity of legal action may be limited to what can be done within the normative boundaries of law, but it offers an important avenue for political and legal redress. More radical forms of political action may seek to expand the scope of such action, but in the meantime, the potential effectiveness of legal mobilisation needn't be discarded as a useful tool.

This focus on the practices of social struggles has expanded upon an account of agency within constitutionalism. The presence of social struggles in constitutional practices is not a new phenomenon but the CfB method has enabled the role of social forces in societal reproduction to be recognised as a constitutionally-relevant practice. This methodological approach to social struggles refreshes constitutional discourse by re-introducing the importance of the political in constitutional practices. By moving away from a formal account of constitutionalism we have been able to document labour's democratic impulse and identify the mechanisms through which political demands can agitate and confront the processes of constitutional ordering.

In the remainder of this conclusion, I will summarise the four stages of my central argument about the potential effectiveness of labour's engagements with law. The initial challenge to any comprehension of social conflicts in a constitutional key is the identification of a methodological approach capable of recognising the significance and aims of social conflict on its own terms. For instance, top-down constitutional analysis has failed to grasp the role of social struggles owing to a methodological perspective that overemphasises governing processes, and excludes the capacity or agency of social conflict. By privileging the role of government in managing social conflicts as either demands or threats, top-down constitutional theories provide a formal conception of government functions which struggles to engage with the role of social autonomies in societal reproduction.

I have argued that in order to contend with the agency in social struggles and the constitutional-relevance of their actions, we must shift our analytic lens and consider the ways that labour movements engage with constitutional processes from-below. Boaventura de Sousa Santos and Gavin Anderson's call for a constitutionalism-from-below provided a methodological frame that highlighted the necessary role of social struggles in the achievement of social reform. Moreover, this approach calls for new constitutional knowledges that are capable of documenting the legal and political experiences of excluded social autonomies. From this methodological perspective, this thesis has sought to build on CfB's research agenda by considering how labour movements challenge the content and application of State law through strategic practices 'from-below'.

Having set up the methodological importance of CfB, I analysed its substantive treatment of the relation between social struggles and law and applied these insights to our present concern for strategic legal action at the State level. I set out four main insights that lay the groundwork for our conception of effective legal strategy 'from-below'. The first simply identifies the relevance of CfB scholarship for our present aims by identifying its concern for law as a tool of struggle. While it does not provide a comprehensive account of the effective conditions of legal mobilisation, the potential of State law is brought within the frame of CfB's analysis and provides certain key insights about the opportunity law presents to social struggles. Second, law is understood not simply as a means to achieve new legislative protections and rights but also a mechanism that can be used to amplify and realise political objectives. We identified the repeated reference in CfB scholarship to the importance of legal mobilisation as an opportunity to politicise the content of law and rights. This interaction between legal and political mobilisation has been an essential element of our conception of effective legal strategy.

Third, CfB highlights the plurality of contemporary legal systems and encourages social movements to engage in those sites that offer suitable opportunities. Underneath this concern for pluralism is a broader proposition that legal meaning is not monopolised by the present determinations of State law. This struggle over meaning is the subject of the fourth, and most important, lesson from CfB to an understanding of legal mobilisation. The key contribution of CfB is its identification of the tension that runs through the heart of law and, in turn, our current investigation – the relation between law's excess of meaning and its inherent limitation or deficit of task.

The relation between the excess of meaning and deficit of task is representative of the tension between the opportunity and limitation of legal mobilisation. On the one hand, we can recognise how law's meaning can be re-interpreted so as to recognise and deliver emancipatory demands. In the Cover-ian sense, labour movements can engage with law for the purpose of presenting legal arguments that are sensitive to the political and material demands of workers. Constitutions are replete with interpretative opportunities, their promises about the values of dignity and equality as well as a range of rights protections provide a potential arsenal of legal claims to be deployed by social struggles. This represents the opportunity for what can be done in law. Labour movements can draw on values, principles, rights and legislative provisions in their attempts to realise certain strategic ends.

On the other hand, law's deficit of task reveals the limitation and key challenge for legal strategy. The normative commitments of liberal legal systems to economic individualism, the inviolability of private property rights and the interests of capitalist accumulation introduce the reasons why certain legal claims cannot be heard in law. This underpins a strategic approach to law that recognises the normative orientation of liberal legal systems, and the fact that there will be limitations on what social struggles can and cannot argue for within law's normative boundaries. As such, labour movements will be unable to present normative demands about work that contradict a legal system's entrenched interests.

In order to build on CfB's insights, I presented an internal critique that highlighted three issues that needed to be addressed if we were to provide an answer to our research questions. First, it was necessary to bring in a strategic and tactical approach to engagements with State law. The distinction between strategy and tactics provides a means to comprehend the ways that labour movements manage the opportunity and limitation of legal mobilisation. Tactics refer to short-term engagements with law and strategy to longer-term political objectives. As we shall summarise below, this provided an opportunity to better account for the reasons why movements might draw on seemingly short-term legal provisions in spite of their longer-term objectives, and, importantly, why the fate of a political struggle is not necessarily tied to the outcome of a court judgment.

Second, we identified the lack of a dedicated empirical analysis of labour in the CfB scholarship. This is coupled with the third concern that highlights the general exclusion of labour from CfB's conceptual analysis of the conditions of social transformation. This absence of labour in an area of scholarship that is concerned for dispossessed and under-represented social groups can be explained by Santos' specific approach to social exclusion

and a historical wariness of the organised labour movement. Santos has focused on a normative approach to social exclusion that focuses on those populations of the globe that have no access to legal rights and are without recourse to political representation. While such an approach is undoubtably necessary, I have argued that it ought not to be the only type of concern in CfB studies. For instance, there are a range of social struggles that cannot be categorised as suffering from extreme social exclusion but whose experience of struggle are vital to an understanding of legal and political mobilisation 'from-below'. Furthermore, labour ought to be an essential subject of CfB's analysis because its engagement and endeavour in the reproduction of the social world cannot be underestimated, nor can the historic role of labour in struggles for social transformation be ignored.

In order to build on CfB and comprehend the effectiveness of legal mobilisation 'from-below', I have presented three tenets of effective legal engagements. The first tenet confronts the issue of what constitutes an 'effective' engagement with law. Michael McCann's conception of legal mobilisation identifies both its direct effects through legal protections and its capacity to contribute indirectly to a movement' political objectives. This provides us with a broader understanding of the opportunity presented by tactical litigation. For instance, where a legal case does not impose legal obligations onto an employer it cannot provide direct effects to a group of employees. However, litigation may have an indirect effect on a movement's objectives through the publicisation of its proposed injustice, which can build public support and contribute to a wider political mobilisation.

The first tenet draws on the insight of in/direct effect and explores the challenge of presenting effective legal arguments. The main argument is that movements that require direct effects must frame their political demands in a form that is recognisable to law. The articulation of an effective argument relies on identifying the normative boundaries of law and presenting a claim whose content law can recognise as belonging to the legal system. As we have seen, the jurisgenerative capacity of social movements presents an opportunity for movements to present alternative interpretations of what law ought to be; however, this practice can only be directly effective where legal claims are capable of being recognised and inserted into any re-determination of law. In other words, at the moment of adjudication, or determination of law by a judge, a labour movement's claims must be recognised as worthy of legal protection.

The potential effectiveness of indirect effects expands our conception of legal argumentation by recognising that movements may decide, for strategic reasons, to present its political

claims in law. Indeed, the opportunity to politicise the content of legal rules by confronting law's present normative boundaries with a movement's political demands may better serve a movement's long-term objectives.

A neglected, or unfashionable, factor in analysis of the potential for social transformation 'from-below' has been the continued role of the Nation State. In the second tenet, I have argued that, by assuming a critical approach to national law as irredeemably aligned to bourgeois interests, socio-legal scholarship risks passing over potentially profitable tools of struggle. Grassroots political struggles, such as labour, are characterised by a lack of financial resources, political and legal power, and are driven by the need to impose obligations on employers, landlords, corporate actors and/or politicians. In this sense, law can become a weapon of the weak or dispossessed because it provides an opportunity to enforce legal obligations and expand the scope of law to tackle conditions of oppression and exploitation. I have unpacked the importance of the State as an effective site of legal engagement by documenting its institutional capacity to not only issue normative claims (symbolic power) but also enforce (material power) its judgments. Given the State's monopoly on coercive power and symbolic power that flows from social legitimacy, it remains a potential site of social transformation sine qua non. For labour, an important element of effective engagements with law that cannot be underestimated is the institutional capacity of the legal system. The fact that labour is uniquely subject to the decisions and actions of capital, labour cannot afford not to engage with a legal system capable of forcing capital to abide by certain minimum standards. Indeed, the battleground for the labour is the content of those standards.

If institutional capacity is a general tenet of effective legal mobilisation, we can bring back CfB's identification of the importance of legal pluralism and evaluate its potential effectiveness and limitations. The latter will, inevitably, revolve around pluralisms' lack of enforcement functions. It is precisely the State's capacity to determine social relations and apportion legal responsibility that means it remains a key site of action for labour. However, in light of scepticism about the State's capacity for radical social transformation and the potential limitations that law's deficit of task may impose on certain strategic objectives; one cannot simply instruct all labour movements to engage at the State level. Under certain conditions engagements with plural legal systems may be tactically more effective. For instance, plural legal systems may offer limited direct effects for labour but, they may provide much-needed publicity and/or politicise the content of a legal conflict. As such, the

general rule will be that direct effectiveness is tied law's institutional capacity, but, from the strategic perspective we can much recognise the potential of pluralism.

Importantly, I do not embrace pluralism for the purpose of protecting the autonomy of a movement's normative claims. On the contrary, this strategic approach to pluralism identifies an opportunity to target, albeit indirectly, the content of regulation at the State level. In other words, pluralism provides an opportunity to indirectly effect labour's struggle in a manner that politicises the content of law and, potentially, leads to reform of national legal standards.

A key criticism of legal mobilisation has centred around law's co-optive effects on the nomos of social struggles. For instance, when viewed from the top-down, the aims of political struggles in legal processes appear to be ordered according to law's normative determinations. In this way, a social struggles' political claims are understood to be domesticated by law's governing processes. However, a key aim of this thesis and the preoccupation of tenet three has been to show an alternative perspective of this ordering process. Returning to the insights of in/direct effects and the distinction between strategy and tactics, I have argued that labour movements can engage with law whilst holding onto their strategic aims. This means that, rather than viewing law as having a necessarily taming effect on social struggles, we can better comprehend the productive tension between strategic objectives and legal mobilisation.

A central claim of tenet three is that a movement's political demands are less likely to be exhausted by a legal decision where their legal engagements are tactical and part of a broader political mobilisation. The argument here is that, the danger of co-optation needs to be understood against the backdrop of both a movement's tactical engagements with law and their in/direct effect on strategic objectives. The first distinction highlights the higher risk of co-optation for a labour movement that lacks a broader political aim and whose objectives are reducible to the enforcement of a legislative provision. In other words, if a movement's strategic objectives do not extend beyond the determination of existing legal rules, its political struggle is entirely dependent on legal and not political processes. This draws a link between a movement's strategic objectives that cannot be contained by law and such a movement's wider political mobilisation. A key condition for insulating against the limitations of legal mobilisation has been the existence of a strong political mobilisation which may include organisational structures that are able to mobilise civil society support and apply political pressure through strikes or demonstrations. Moreover, the presence of

both a political and legal mobilisation highlights the co-ordination between both tactical engagements with law and a movement's strategic political aims. The first distinction draws on strategic reasoning and identifies the fact that an effective labour movement is one that cannot be reduced to its purely legal actions.

The second distinction re-introduces texture to our evaluation of the effect of legal mobilisation. Ostensibly, a labour movement that simply enforces a legislative provision or even fails in an attempt to impose legal obligations may be viewed as 'co-opted' by law for any of the following reasons: The movement framed its claims in legal argument and not its more radical political claims, law successfully ordered its claims and, as a result excluded its political demands from law. However, the insight about indirect effects reveals that litigation, even where it fails to deliver direct legal protections, may still serve an important purpose to a labour movement's strategic objectives in the form of indirect effects. In this regard, focusing on legal processes misses a broader set of political practices and effects.

The ERT movement in Argentina, and the BAUEN Cooperative's experience in particular, provides an opportunity to examine the practical experience and trajectory of a labour movement's engagement with law. The radical nature of the BAUEN's legal claims about work and the duration of their struggle contributes a unique insight into the ways that legal and non-legal factors determine the effectiveness of legal mobilisation. Our analysis of the ERT movement's strategy considered: The legal rules that presented a tactical opportunity to deliver important protections for the movement's broader political objectives; the ways that the BAUEN seized upon these opportunities and framed their claims (in)effectively; and the impact of non-legal factors such as political action, organisational support, and the effect of government on the outcome of legal strategy. To conclude, I will summarise what these three lessons from the ERT movement tell us about effective legal engagements by labour movements.

The first insight from the BAUEN experience has been that a tactical use of legal interpretation and coherent articulation of legal arguments is an essential part of an effective legal mobilisation. The BAUEN identified an opportunity in the Bankruptcy Law and made a successful claim that provided short-term direct protections. In addition, an expropriation law was passed by a majority in the legislature due, in part, to the jurisgenerative interpretation of both existing legislative tests, constitutional values and their application to the facts of the BAUEN's case. The BAUEN managed, in both cases, to present claims that were recognised as belonging to the legal system and therefore deserving of legal protection.

Therefore, the tactical effectiveness of legal argumentation was premised on the identification of legislative provisions or rights claims that could be re-identified by law as legal claims. This aspect of labour's strategic use of law will rely on lawyers capable of constructing legally effective arguments that are also sensitive to a movement's political objectives.

In addition to these engagements with law, we identified how non-legal political factors and contextual contingencies determined both the success and failure of the BAUEN's legal strategy. Three key factors were identified: First, the political acts of occupation and demonstration, the changing relation between the Presidency of Argentina and the ERT movement, and the role of organisational support. Political action enabled the productive interaction with the Bankruptcy Law by providing the material conditions to satisfy the evidential requirements of the legislative test for a preventative bankruptcy order and a third-party right to continue production. And, mass demonstrations buttressed this tactical use of law where its opportunities for the ERT movement reverted to limitations in the form of eviction orders.

The government both facilitated the ERT movement's development through favourable legal reforms and government programmes, and threatened to extinguish the movement altogether through legislative vetoes and damaging economic policies. In the ERTs' case, the political orientation of the national executive mattered. A radical labour movement faces inherent difficulty in gaining traction in liberal legal systems but, the potential effectiveness of legal mobilisation for political reasons was made significantly more viable in the ERTs' case where the Presidency, which was by no means explicitly supportive of the ERT movement, provided the economic, legal and political conditions to foment and pursue its strategic objectives. And, when the Presidency shifted to the right the tools of government were exercised against the ERT movement.

This highlights the significance of institutional capacity in determining the (in)effectiveness of the BAUEN's legal struggle. Only national law had the capacity to secure the Cooperative's legal right to remain in control of property which ensured that bankruptcy proceedings and the attempts to secure an expropriation law were vital sites of action. While the BAUEN has resisted law's material power through demonstrations and challenged law's claim to correctness (symbolic power) through the politicisation of their legal struggle, the long-term aim of the BAUEN is to have their claims recognised as legal and, as such, draw on law's institutional capacity. In other words, despite the challenges that State law

presented to the BAUEN, its strategic objectives are reliant on defeating the former employers' rights claims and winning legal protections that are enforceable against parties that reject their normative claims about public utility.

The final issue connects with tenet three and recognises how organisational structures provided invaluable practical support in the initial formation of worker-cooperatives, co-ordinated legal tactics, political actions and strategic objectives, as well as enabling effective legal mobilisation through the provision of legal expertise and financial resources. We have highlighted the importance of a coordinated legal and political mobilisation. The existence of a strong political mobilisation ensures that a legal strategy is not reducible to the outcome of an engagement with law, be it litigation or legislation. The BAUEN case highlights the importance of a labour movement having both distinct political objectives, an organised support network and an organisational structure. A movement's political demands represent its strategic objectives and ensure that, where tactical engagements with law fail to provide protections the BAUEN's political aims remain intact. Indeed, it is these political demands that have mobilised civil society support and enabled acts of solidarity in defence of the BAUEN Cooperative's control over property. Finally, the BAUEN's use of political action to buttress failed attempts to secure legal protections illustrates the importance of a coordinated use of both legal and political tactics in pursuit of strategic objectives.

Bringing these factors together we can see that, as far as generalisable conclusions are possible, the interaction between the jurisgenerative opportunity presented by law, coherent articulation of legal claims, law's deficit of task, political action and contextual contingencies will determine the effectiveness of legal engagements. To some extent this is an unsatisfactory conclusion, it provides no definitive account of an effective tactical and strategic use of law and leaves our understanding premised on the tension between law's opportunity and limitation being played out in each specific circumstance. However, I have argued that this inability to predetermine a blueprint of effectiveness is an unavoidable reality of political and legal mobilisation. In each locale, the use of law as a tool of struggle will be subject to available legal rules, constitutional values, and relative political-economic conditions. As we have seen in Argentina and the Wards Cove case, a social struggle may effectively attend to all of the factors at its disposal and receive no in/direct effects owing to contingent factors beyond its control.

To this extent, this thesis has contributed to an understanding of the ways that labour movements will construct effective legal strategies. However, what we cannot say is how a

movement will necessarily present an effective argument or, indeed, that there will not be effective engagements outside of the tenets presented in this thesis. Given our methodological commitment to new constitutional knowledges we must accept that pragmatic decision-making, contextual factors, and innovative engagements with law will mean that the scope of constitutional strategy will be always open. It has been our aim to rationalise and categorise our present understandings and contribute to a conception of strategic engagements with law 'from-below'.

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