Towards a theory of neoliberal constitutionalism: Addressing Chile’s first constitution-making laboratory

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Abstract
Before neoliberalism became global, it was an intellectual project that had a particular view of the power of constitutions to limit sovereign states, anchor economic freedoms and protect markets from democratic pressures for greater equality. In Latin America and the developing world, neoliberalism has long been identified with the political economy of the Washington Consensus. However, the comprehensive study of its legal foundations and institutional arrangements is still an area of limited scholarly attention. This article attempts to advance in that direction. By examining the work of Friedrich A. Hayek, Milton Friedman and James M. Buchanan, it explores a theory of neoliberal constitutionalism within Chile, the so-called first neoliberal laboratory. These authors visited the country during the Pinochet dictatorship (1973-90), and were connected with top Chilean authorities as part of their global ambitions to implement their theoretical agendas in real-world scenarios. The article argues that Chile’s constitution-making process between 1973 and 1980 offered an on-site experiment in introducing neoliberal’s radical economic transformation. It addresses how the dictatorship’s natural law-based rule of law principles were compatible with the neoliberal constitutional ideology by supporting a distinctive view of the state’s role and designing the innovative institutional arrangements necessary to guarantee the market’s priority in the structural and rights dimension of the 1980 Constitution. In the wake of Chile’s recent constitutional change agenda, this article not only contributes to the existing debate by reflecting on the ideological origins of the still-persistent constitutional neoliberal features, but also works as a case study for evaluating new global turns towards authoritarian neoliberal politics.

Keywords: authoritarianism; constitutionalism; neoliberalism; rule of law; Chile

1. Introduction
In his article in a recent issue of Global Constitutionalism, Mark Tushnet argues that there are resonances between constitutional law’s globalization and the ideological project of neoliberalism.1 According to Tushnet, these correspondences can be traced to both the

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structural and rights dimension of the constitution, with a robust judicial review process
due to its distrust of popular politics, and a strong property rights regime characterized by
a first-generation rights priority over second- and third-generation protections. However,
Tushnet does not attempt to analyse real case scenarios. As he mentions, his speculation is
in a preliminary state of formulation.

This article is an effort to shed light on Tushnet’s claim, and to explore the possibilities
of a theory of neoliberal constitutionalism considering the Chilean constitution-making
experience between 1973 and 1980. In this regard, this study is both normative and
institutional. It aims to examine and understand the ideology underlying the key complex
legal structures that constitute the Chilean economic and political system. It is also
normative because it supports Global Constitutionalism’s agenda by recognizing how
specific rules and normative principles traditionally related to the development of
modern state constitutions have been progressively extended to the global order. The
article focuses on the initial stage of the advance of neoliberal ideology, and the special
attention paid by the neoliberals to shaping normative rules and principles at the level of
national constitutions as a means of promoting their market-oriented views.

In Latin America and the developing world, neoliberalism has commonly been
understood as a theory of market fundamentalism. It has been identified at length with
the political economy of the Washington Consensus—a specific economic recipe that
includes trade liberalization, deregulation and privatization, and a background of aus-
terity programs, including cuts to public spending. Traditionally, with its capitalist
imperatives, the neoliberal project has been understood as an isolated economic phe-
nomenon. However, as Karl Polanyi declared, markets are embedded in the social
structures of politics, law and culture. In this sense, from the very beginning neoliberals
rejected the presumed belief of a natural order represented by the market. They recog-
nized that a precondition for a well-functioning market society was a particular legal
order and institutional design, in which the state played a distinctive role. An adequate
legal foundation was required for the functioning of a competitive market.

Similarly, Michel Foucault described the 1970s phenomenon of neoliberalism as one of
legal interventionism, linked with Friedrich Hayek’s attempts to apply the rule of law to
the economic order. In this vein, Quinn Slobodian rectifies the classic belief that
neoliberalism is based on one vision of global laissez-faire and self-regulating markets

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with minimal state intervention. He argues that the neoliberal project ‘focused on designing institutions not to liberate markets but to encase them, to inoculate capitalism against the threat of democracy’.\(^8\) Thus, ‘the real focus of neoliberal proposals is not on the market per se but on redesigning states, laws, and other institutions to protect the market’.\(^9\)

In recent years, a growing literature on law and neoliberalism has emerged, focusing on law’s distinctive role in shaping markets and distributing political and economic power.\(^10\) As David Grewal and Jedediah Purdy note, neoliberalism has supported the affirmative use of political power to restructure areas of law and social life according to efficiency-based market fundamentalism, where political intervention is limited to correcting market failures.\(^11\) In their view, neoliberalism is a mode of governance and legitimation that enforces specific distributions and configurations of ‘market discipline’ that support profits and managerial power over democratically determined social guarantees—for instance, labor market ‘liberalization’, erosion of the role of unions in the economy and rollbacks of social provision.\(^12\) What underlies the neoliberal phenomenon is a pessimistic denial that democratic politics and public institutions can successfully shape and discipline economic affairs.\(^13\) This literature has in common—as Honor Brabazon suggests in *Neoliberal Legality*—the attempt to approach neoliberalism as a juridical project, in addition to a political, ideological and economic one.\(^14\)

In Chile and the developing world, the third wave of democratization, beginning in the mid-1970s, coincided with the enactment of new Constitutions.\(^15\) Accordingly, constitutional design was seen as instrumental not only to democratic transitions from an authoritarian regime but also to securing the state retreat in the economy and other radical economic transformations.\(^16\) As Tom Ginsburg notes, during this period there was a turn towards an economic understanding of constitutional structures. Through this approach, economists began to understand the value of constitutions as ‘social devices that structured the creation of rules’, and ‘institutions were defined as the rules of the

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\(^{9}\) Ibid.


\(^{12}\) Ibid 1–3.

\(^{13}\) Ibid. In other work, Grewal would declare that ‘neoliberals would like to see the ultimate withdrawal of politics from production in all areas of the economy, not just those affecting international trade’. See DS Grewal, *Network Power: The Social Dynamics of Globalization* (Yale University Press, New Haven CT, 2008) 247, 250.

\(^{14}\) H Brabazon (ed), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge, New York, 2017) 1–3, 16–19. However, this book does not refer to the role of constitutional law or constitutionalism in the neoliberal phenomenon. Instead, it focuses more specifically on private property, private providers regulation, labour regulations, contract law and the protection of foreign investors, among other topics.


game that structured behavior’. Surprisingly, however, the existing body of literature on the development of constitutional law in the region has not yet appropriately considered the impact of neoliberalism. The connection between the neoliberal politics that governed many Latin American countries and their impact on both the structure of powers and the rights dimension is barely part of the equation.

In this context, Chile has been called the very first neoliberal laboratory because it was the first country where neoliberal economic reforms were implemented in a pure form and in the context of a dictatorship. Chilean neoliberalism was a state-led project of social engineering that transformed the institutional forms of state–society relations. After the 1973 military coup that overthrew the socialist government of Salvador Allende, General Augusto Pinochet and the military junta ruled the country for seventeen years. During this period, a new Constitution was enacted in 1980, and radical neoliberal economic reforms were implemented by technocratic civil servants. The ideological mainstream of these years—compatible with the dictatorship’s authoritarian nature—was a combination of Catholic-conservative values and the Chicago-oriented neoliberal policies, promoted by former Chilean Chicago School of Economics students, later known as the Chicago Boys. With the support of international organizations such as the World Bank and the International Monetary Fund (IMF), the Chilean experience worked as a paradigmatic case study for the future propagation of global neoliberalism. Chile became the backdrop of this story because it was the perfect example of constitutional experimentation.

Despite the country having been mentioned frequently as an example of successful democratic transition and economic progress, Chile leads in regional rankings of income inequality; indeed, in a recent study by the World Inequality Database, it is listed as the most unequal country in Latin America. Inequality has been such a persistent feature of neoliberalization as to be regarded as fundamental to the whole project. Today, the neoliberal features of Chile’s Constitution remain in force. Hence, instead of a clean break with the past dictatorship, the 1980 Constitution has survived for four decades and is still

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21 Ibid.
22 According to this report, in 2019 the top 10 per cent national income share captured 60 per cent of the average national income, and together with Brazil and Mexico, these income inequalities have increased for the past 20 years. See M De Rosa, I Flores and M Morgan, Inequality in Latin America Revisited: Insights from Distributional National Accounts, World Inequality Lab–Issue Brief 2020/09, November 2020, <https://wid.world/wp-content/uploads/2020/11/WorldInequalityLab_IssueBrief_2020_09_RegionalUpdatesLatinAmerica.pdf>.
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a source of profound political division. In many ways, the negotiated democratic transition has left many authoritarian institutional traces, and despite the elimination or reformation of some aspects, the Constitution’s neoliberal features persist.

But times have changed. In October 2019, the largest protests since the end of Pinochet’s dictatorship filled the streets of Chile’s major cities and opened the door for a historical constitutional change. This time, demonstrators were not led by political parties or a specific demand; they were united in a massive political movement by a common rejection of decades of abuses, inequality and damage caused by 45 years of neoliberal policies. A month later, as a way of finding a political settlement, representatives of the major parties across the political spectrum signed an agreement that led to a constitutional reform calling for a national referendum that asked Chileans whether they wanted a new Constitution. On 25 October 2020, the referendum’s approval option won with close to 80 per cent of the general vote. Chileans voted for a fully democratically elected constituent convention to be chosen in May, with its only task being writing a new Constitution during a twelve-month term. The constitution-making process will culminate in a referendum to approve the new Constitution by mid-2022. This is a unique opportunity for the country to pave the way for the foundations of a new democratic constitutional legitimacy.

This article is structured in four parts. Following the introduction, Part II explores a theory of neoliberal constitutionalism through the work of Friedrich Hayek, Milton Friedman and James M Buchanan. These authors visited Chile during the Pinochet years, and were connected with government authorities and technocratic civil servants through the networks of both the Mont Pelerin Society (hereinafter, MPS) and the University of Chicago. The article argues that neoliberals saw constitutions as legal structures created to establish the preconditions of a well-functioning market-based society, including the introduction of often counter-majoritarian institutional arrangements against the challenges represented by both an unlimited government and democratic redistributive pressures. Part III shows how the neoliberal ideological transference of the so-called Chicago Boys influenced the constitution-making process between 1973 and 1980. It demonstrates how the neoliberal constitutional ideology was compatible with the dictatorship’s rule of law principles and supported a distinctive constitutional vision of the state’s functioning and market priority that still prevails in the 1980 Constitution. Part IV turns to the current constitutional change agenda. The aim of the article is to present how the last year’s social mobilizations have been a reaction against the survival of key neoliberal constitutional features.


See e.g. RH Fallon Jr, ‘Legitimacy and the Constitution’ (2005) 118 Harvard Law Review 6, 1795. In Fallon’s words, a constitutional regime possesses sociological legitimacy insofar ‘as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward’.

2. A constitutional theory’s potential

Hayek, Friedman and Buchanan worked as \textit{agents of transmission} of the neoliberal ideology to Chile through the MPS and the University of Chicago networks.\footnote{I take this expression from Foucault, who mentions Hayek and Ludwig von Mises as intermediaries between the German ordoliberals and the Chicago neoliberals. See (n 7) 161.} The MPS was founded and led in the beginning by Hayek (1947–61), with Friedman (1970–72) and Buchanan (1984–86) continuing as presidents. With Hayek’s support, Friedman’s influence grew from the 1960s onwards, and this leadership transference was ‘emblematic of a generational change’.\footnote{J Reinhoudt and S Audier (n 6), 35–36; Burgin (n 28) 154.} The MPS would provide Friedman with an ideal network for spreading neoliberal views.\footnote{Similarly, P Mirowski (n 23) 429.} By the late 1960s, the network included Chileans such as Pedro Ibáñez and Carlos Cáceres, who lobbied to prepare a regional meeting in Chile in 1981. Ibáñez and Cáceres would be members of the dictatorship’s Council of State. Cáceres also played an important role in Pinochet’s government, as Central Bank President (1982) and Minister of Finance (1983–84) and Minister of the Interior (1988–90).

In 1947, the same year that the MPS was founded, Friedman was hired in the Department of Economics at the University of Chicago.\footnote{BE Kaufman, ‘Chicago and the Development of Twentieth-century Labor Economics’ in R Emmett (ed), \textit{The Elgar Companion to the Chicago School of Economics} (Edward Elgar, Cheltenham, 2010) 132.} A year later, in 1948, Buchanan completed his PhD in economics under the supervision of Frank Knight, also an MPS member. In 1950, Hayek arrived in Chicago and would end up spending ten years working at the institution. Between 1956 and 1964, the ideological training of the Chilean Chicago Boys took place here. In these years, Sergio de Castro and Pablo Baraona, among others, studied under Friedman’s leadership and, as will be examined, they later became central authorities of the regime and members of the economic team that advised the Military Junta’s constitution-making process. Hayek had a strong influence on Friedman, who later became the most recognizable leader of the rising Chicago School. Friedman regularly participated in Hayek’s seminars, and Hayek’s major work of his Chicago period, \textit{The Constitution of Liberty}, appeared in 1960. Friedman was among those who first read draft chapters of the manuscript.\footnote{L Ebenstein, \textit{Milton Friedman: A Biography} (Palgrave Macmillan, New York, 2007), 142.} Friedman’s \textit{Capitalism and Freedom} has also been considered a corporate neoliberal version of Hayek’s \textit{Road to Serfdom}.\footnote{See RV Horn and P Mirowski, ‘The Rise of the Chicago School of Economics and the Birth of Neoliberalism’ (n 23) 166–67.}

The three Nobel-laureate authors, using the network of the MPS and the Chicago connection with Chile, visited the country twice during the Pinochet dictatorship. They gave lectures, interviews and advice to government authorities—their personal engagement is a testimony to their intellectual curiosity. Hayek visited in 1977 and 1981. In November 1977, Hayek, invited by MPS fellow Pedro Ibáñez, gave a series of public lectures and attended a special private meeting with Pinochet, to whom he would refer as ‘an honorable general’.\footnote{See generally B Caldwell and L Montes, ‘Friedrich Hayek and His Visits to Chile’ (2015) 28 \textit{The Review of Austrian Economics} 3.} Hayek’s former secretary recalls that Hayek ‘must have meant or hoped to influence’ Pinochet because he had asked her to send the dictator a copy of the last chapter of \textit{Law, Legislation and Liberty}, called ‘A Model Constitution’, along with a
Coincidence or not, the 1980s campaign for the approval of the new Chilean Constitution designed by the military junta adopted the same name as Hayek’s book, *The Constitution of Liberty*. Friedman visited Chile before Hayek in 1975 and returned in 1981. According to Friedman, after meeting Pinochet in 1975, he asked him to write his ‘judgment’ about the country’s situation. In his letter, Friedman recommended a *shock treatment*, reducing the fiscal deficit, promoting a healthy social market economy, cutting public spending and removing ‘as many obstacles as possible that now hinder the private market’. For Friedman, the major error was to envision the government as the solver of all problems and to ‘believe that it is possible to do good with other people’s money’. Pinochet’s response notes that Friedman’s analysis ‘coincided for the most part with the same-year launched National Recovery Plan’. Likewise, Buchanan visited Chile twice, in May 1980 and with Friedman for the MPS regional meeting in 1981 in the coastal city of Viña del Mar. During his first visit, Buchanan proposed *instructions* oriented towards limiting the power of government, arguing in favour of introducing what he would call ‘the fiscal Constitution’, a balanced budget requirement, the full-independence of the Central Bank and the requirement of a two-thirds or five-sixths supermajority in the legislative process for any substantial change or the approval of new expenses. These authors’ visits constituted a personal statement of their global ambitions of implementing their theoretical agendas in real-world scenarios.

The constitutional ideology of these authors—what we have identified as part of a theory of neoliberal constitutionalism—is outlined below, with the aim of tracing their normative and conceptual influence in Chile’s constitution-making process.

**Hayek’s Constitution of Liberty**

Hayek’s legal theory is an attempt to protect through constitutional means the spontaneous order that he identifies with the market economy. In Hayek’s view, the natural competition that represents the market, in comparison to centralized planning, is superior not only because it is more efficient but also because it does not require the coercive or arbitrary intervention of a centralized authority. Hayek’s market defence is related to his knowledge and price theory. For Hayek, the market is an information processor that is more powerful than any human mind because prices in an efficient

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36See CE Cubitt, *A Life of Friedrich August von Hayek* (Authors OnLine Ltd, 2006) 19. I thank Professor Bruce Caldwell for providing me with access to this work.


38Ibid 593.

39Ibid 594.

40Ibid.


42‘Libertad Económica: La base para la libertad política’, *El Mercurio* (7 May 1980), Cl. See also MacLean (n 41) 159.

market contain all relevant information and thus cannot be predicted. Consequently, the market always surpasses the state’s ability to process information, and this constitutes the core of the argument for the necessary failure of socialism. In his view, there is a profoundly undemocratic aspect of centralized planning. However, it is remarkable how he favours planning for competition, as the only way planning and competition can be combined. Therefore, Hayek notes that the endurance of a market-based society requires the protection of a particular constitutional design.

But protection against what? Hayek feared the threat of a gradual transformation of the spontaneous order of a free society into a totalitarian organized one. This threat, which Hayek would represent with the rule of law’s decay, was related to the advancement of three distinctive movements: legal positivism, social justice and majoritarian democracy. Hayek criticizes legal positivism because it consists exclusively of deliberate commands of human will and thus is a doctrine in direct opposition to those meta-legal principles that underlie the ideal of Hayek’s rule of law. Here, Hayek’s theory is compatible in principle with those of natural law schools, which agreed about the existence of rules that are not of the deliberate making of any lawgiver. According to Hayek, ‘power to legislate presupposes the recognition of some common rules; and such rules which underlie the power to legislate may also limit that power’. Against Kelsen, his former professor at Vienna, he held that constitutions were mistakenly known as the highest kind of law, when it was ‘more appropriate to regard them as a superstructure erected to secure the maintenance of the law, rather than, as the source of all other law’.

Moreover, Hayek identified certain ‘mirage’ concepts such as social justice, social legislation and social rights. These concepts were incompatible with Hayek’s theory because any form of distributive justice requires the centralization of knowledge in a planning authority. Thus, in Hayek’s view, a claim for material equality can only be met by a totalitarian government. In 1976, Hayek criticized the newly adopted International Covenant on Economic, Social and Cultural Rights. According to Hayek, the document ‘fails to define these rights in such a manner that a court could possibly determine what their contents are in particular instance’. Consequently, in Hayek’s view, social and economic rights could not be enforced by law without concurrently destroying the traditional liberal order founded on civil or first-generation rights.

Hayek saw democracy as an instrumental procedure that serves and is functional to other superior values, such as liberty and individual freedom. In Hayek’s view, democracy

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44See (n 23) 435.
46Ibid 90.
48Ibid.
49See (n 43) 91; (n 47) 345.
50See (n 43) 127. See e.g. H Kelsen, Pure Theory of Law (University of California Press, Berkeley, CA, 1967). For Hayek, Kelsen’s theory was used by ‘all those reformers who had found the traditional limitations [of the Rule of Law] an irritating obstacle to their ambitions’. See (n 47) 347.
51See (n 43) 115.
52See (n 45) 340–41. See also (n 43) 248–49.
53Ibid (n 43) 245–47.
54Ibid 263–64.
55Ibid 264.
is essentially a means rather than an end, a utilitarian device for safeguarding internal peace and individual freedom. Hence, in Hayek’s words, democracy’s limits must be determined in the light of the purposes we want it to serve. Thus, there is an inevitable tension between liberalism and democracy because the former accepts majority rule as a method of deciding, but not as an authority for what the decision ought to be. Therefore, for Hayek, unlimited democracy had lost its capacity to protect against arbitrary power and to safeguard personal liberty. Instead, it had become the main cause of the progressive growth of the administrative machine. Since government is free to give itself whatever laws are needed, it becomes the main business of the legislature and legislation subsidiary to do it. This phenomenon represents the end of government under the law, and the beginning of what Hayek calls a ‘bargaining democracy’, where government is bound to serve the special interests of several groups. For Hayek, here is where the social justice myth becomes the most attractive way for politicians to buy majority support, and a ‘magic wand’ for breaking down all barriers to partial measures and inventing a moral justification for the benefits they grant to particular interests.

Finally, Hayek’s model constitution was a theoretical response to prevent the rule of law’s decay and the wrong turn of representative institutions. In this model, which Hayek did not think was ‘for present application’ but rather viewed as providing the guiding principles for future institutional innovation, the primary purpose would be to separate into two distinct chambers legislation from everyday administrative governance, as a way of protecting the rule of law. As Thomas Piketty argues in Capitalism and Ideology, Hayek’s Law, Legislation, and Liberty was an ‘influential neo-proprietarian and semi-dictatorial treatise’. According to Piketty, Hayek’s work expressed ‘the proprietor fear of redistribution of any kind’, and his model constitution was an attempt to ‘drastically limit the power of any future political majority’. In this sense, the only political regime possible in Hayek’s model was one in which the political power was mostly vested in property owners, the only people with the capacity and position to legislate responsibly.

**Friedman’s shock treatment**

Friedman saw in a market-based society the best counter-force against the concentration of power, which in his view was represented by government. He argued that ‘by relying

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56 See (n 45) 110; (n 43), 349. Similarly, JA Schumpeter, Capitalism, Socialism, and Democracy, (3rd edn, Harper Perennial, New York, 2008) 269. Schumpeter suggested a procedural concept of democracy as an institutional arrangement in which individuals would acquire decision-making political power through a competitive electoral process.
57 See (n 47) 172.
58 Ibid 167.
59 See (n 43) 471.
60 Ibid 438.
61 Ibid 435.
63 Ibid 447–57.
65 Ibid 707.
66 Ibid 709. Piketty would support writing into the Constitution ‘a minimal principle of fiscal justice based on nonregressivity (that is, the proportionate burden of the wealth or income tax on the wealthiest segment of the population should not be lower than the proportionate burden on the poorest segment) and requiring the government to publish adequate information on how the tax is apportioned so that citizens can judge whether the principle of nonregressivity has been respected’. Ibid 999–1000.
primarily on voluntary co-operation and private enterprise, in both economic and other activities, we can ensure that the private sector is a check on the powers of the governmental sector and an effective protection of freedom of speech, of religion, and of thought.\textsuperscript{67} Thus, his constitutional views were more pragmatic than theoretical, compared with Hayek, and were oriented towards institutionally designing a government compatible with this market priority as a necessary precondition for the protection of fundamental individual freedoms.

Additionally, Friedman’s belief in market priority was based on the idea that the economic market provides a greater degree of freedom than the political market.\textsuperscript{68} In politics, even in a system of proportional representation, typical issues must be decided on a yes or no basis—meaning that the final outcome generally must be a law applicable to all groups, rather than separate legislative enactments for each party represented. As a result, far from permitting unanimity without conformity, as economic freedom provides, such an approach tends toward ineffectiveness and fragmentation.\textsuperscript{69} For Friedman, the wider the activities covered by the market, the fewer the issues on which explicitly political decisions are required, and thus the fewer the issues on which it is necessary to achieve agreement.\textsuperscript{70}

In a lesser known essay called ‘Neo-liberalism and Its Prospects’, Friedman noted that the error of classical liberals was assigning no role to the state.\textsuperscript{71} In his view, the substitution of laissez-faire economics for a competitive order was the biggest challenge for what he called ‘the neo-liberal project’. Following Hayek, the essential point is that the new powers are all limited in scope and capable of being exercised by general rules applying to all.\textsuperscript{72} Consequently, Friedman claimed that government was essentially both a rule-maker in the context of a forum and an umpire, and thus believed its functions should be restricted to preserving law and order, enforcing private contracts and fostering competitive markets.\textsuperscript{73} Friedman was therefore against the redistributionist dimension of governmental social programs, and favoured an individual-based system for poverty alleviation—in which, for instance, each individual would pay for their own retirement.\textsuperscript{74} He favoured direct cash transfer as a negative income tax, and even Hayek would support his ‘ingenious scheme’ for financing education through individual vouchers, a principle that according to Hayek could be applied in many other fields.\textsuperscript{75} For Friedman, while operating through the market, these programs should not distort the market, nor should they impede its functioning.\textsuperscript{76} This is the basis for government’s role in the promotion of a healthy competitive market.

Accordingly, governmental expansion was a recurring concern in Friedman’s work.\textsuperscript{77} Like Hayek, it represented the advancement of a coercive force that embodied the

\textsuperscript{68}M Friedman, ‘The Fragility of Freedom’, in (1976) \textit{Milton Friedman in South Africa, Cape Town Graduate School of Business of the University of Cape Town}, 3.
\textsuperscript{69}See (n 67) 23.
\textsuperscript{70}Ibid 24.
\textsuperscript{71}M Friedman, ‘Neo-liberalism and Its Prospects’ (1951) \textit{Farmand} 89.
\textsuperscript{72}Ibid 92.
\textsuperscript{73}See (n 67) 2, 15, 25.
\textsuperscript{74}Ibid. 180–3. See also infra (n 182).
\textsuperscript{75}See Hayek (n 43) 387.
\textsuperscript{76}See (n 67) 178.
\textsuperscript{77}M Friedman and RD Friedman, \textit{Free to Choose: A Personal Statement} (Harcourt, New York, 1990) 32.
totalitarian powers threatening a free society. To counter this trend, Friedman recognized
the value of counter-majoritarian devices contained in legal structures and in the
Constitution. Therefore, his proposal—shared by Buchanan—focused on introducing
through a constitutional amendment a balanced-budget rule with the purpose of resolv-
ing the persistent fiscal deficit and the increasing governmental spending.

Buchanan’s constitutional revolution

Buchanan’s constitutional economics was an effort to challenge the traditional constitu-
tional politics that ‘fails to convey the relevance and applicability of economics, as a
disciplinary base, in the examination and evaluation of the foundational rules of social
order.’ In The Calculus of Consent, coauthored with Gordon Tullock who would join
Buchanan in a visit to Chile, he proposes that constitutional design and daily decision-
making can be understood as a precise individual calculation of interests. Buchanan notes
that certain particular governmental rules would allow members of the group to use the
structure of the state to obtain differential advantage, and that this should be the main
motivation for rational individuals to place constitutional restrictions on the use of the
political process. A central part of the book thus focuses on the analysis of simple majority
voting and the influence of special interest groups. The authors, applying the model of game
theory, argue that simple majority voting tends to result in an over-investment in the public
sector. They call this phenomenon the redistributive element of majority decisions. They
note that the expansion of the public sector has taken the predictable form of an increased
investment in special-interest organizations aimed at securing differential gains or advan-
tages through the political process. In this view, majority decision-making, or any less-
than-unanimity rule, tends to produce some gain-sharing among the individual members
of the group. In consequence, the authors support a near-unanimity voting rule at the level
of constitutional design to best serve individuals interests. Additionally, they point out that
when vote-trading or logrolling processes emerge, the public resource-wasting aspect of
majority voting tends to be significantly reduced.

Buchanan called for a constitutional revolution, arguing that the only solution to the
legal and institutional crisis was a radical change in the constitutional structure, redefin-
ing individual rights and limiting governmental growth. According to Buchanan, the
system of checks and balances had rarely been interpreted to have as one of its objectives limiting government’s growth tendency.⁸⁷ In his critique of the separation of powers doctrine, Buchanan distinguished between what he termed the productive and the protective state. The former was associated with the legislative branch, whose task was to produce public goods and law in general, while the ‘protective umpire state’ was represented by the executive and judicial branches.⁸⁸ For Buchanan, the mode of operation of these branches was decidedly different because the enforcement or application of rules involved a truth judgement analogous or similar to scientific inquiry, whereas legislation was first and foremost a matter of interests and collective choices.⁹⁰ In this approach, Buchanan warned about ‘the dangers of the executive and judicial encroachment of the genuinely legislative function of lawmaking.’⁹¹ Inspired by Adam Smith, he stated that the triumph of laissez-faire had been achieved because intellectual and political leaders came to accept a new principle for social order: a regime described by well-defined individual rights and by freedom and enforcement of voluntary contracts.⁹² This regime worked without a centralized decision-maker, and without government intervention beyond that of the strictly protective state.⁹³ Therefore, Buchanan’s proposal called for a consensual redefinition of individual rights. In this, judges would cease legislating, legislators would cease using the political mechanism to make uncompensated transfers of rights among individuals and groups, and citizens would stop seeking private profits from the government.⁹⁴

Furthermore, Buchanan insisted that the idea of benevolent rulers had to be rejected to carry out any realistic analysis of politics, and thus his ‘innovative move’ was to assume that politicians and bureaucrats behaved according to the model of homo economicus.⁹⁵ This implied analyzing politicians as individuals with an ‘overriding interest in securing their reelection, first and foremost, through logrolling with other political actors and responding to rent-seeking demands from organizations or movements representing constituencies considered of vital importance to these efforts’.⁹⁶ Consequently, governmental policies are subject to incoherent designs, short-term interests, inflation and public debt accumulation.⁹⁷ For limiting governmental growth, Buchanan—like Friedman—would propose the establishment of a balanced-budget constraint on government as a means of ‘rescuing’ the economy and the constitutional order from democratic excess, in addition to qualified majorities.⁹⁸

As the next part of this article will show, the influence of these three authors in Chile cannot be traced directly to the drafting of some law or even the 1980 Constitution. However, their ideological influence can be found in the decisions of Chile’s top governmental authorities and constitutional designers.⁹⁹ As Alfred Stepan argues, Chile’s

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⁸⁷Ibid 15, 166–69.
⁸⁹Ibid 57.
⁹⁰Ibid
⁹¹Ibid.
⁹²See (n 86) 170.
⁹³Ibid 171.
⁹⁴See (n 88) 150.
⁹⁵Ibid.
⁹⁶Ibid.
⁹⁸P Vergara, Auge y Caída del Neoliberalismo en Chile (FLACSO, Santiago, 1985) 4.
structural neoliberal reforms emerged **reflecting** these authors’ ideas. In other words, their intellectual contributions were not put into practice in pure form, by following a narrow script. A theory of neoliberal constitutionalism needs to be examined in the particular context of its implementation, and the intrinsic value of exploring the constitutional foundations of neoliberalism needs to consider the natural gap between theory and practice. This article attempts to explore the former as a first step, providing the context of the Chilean neoliberal experience in order to better understand the neoliberal constitutional project as a whole.

3. An on-site constitutional experiment

The introduction of neoliberal ideology to Chile can be traced to 1955 with a program-agreement between the University of Chicago and the Pontificia Universidad Católica de Chile (hereinafter, PUC). Sponsored by the US government, the goal was to start an experiment by inserting the most conservative economic ideas regarding the free market and neoclassical economics. Implicitly, the idea was to directly combat the increasingly popular socialist ideology in Chile and Latin America. At the time, Chile represented a strategic centre because the United Nations Economic Commission’s headquarters for Latin America and the Caribbean had been in Santiago since 1948 and it had become a strong bastion of development theories. The program offered Chicago an on-site country for experimentation and an opportunity to challenge the rise of Keynesian-oriented policies in the region. From 1956 to 1964, under the leadership of Chicago economics professor Arnold Harberger, who would act as a ‘godfather’ to the Chilean Chicago Boys, the program trained 26 Chilean students and was expanded to other Latin American countries.

At least for the moment, this ideological transference to Chile was just being used in academic circles without political implementation. A series of events changed the conditions in favour of a new political alliance between the Chicago Boys and the Gremialistas, an emerging Catholic-conservative movement based at PUC. This political alliance had a decisive influence in the future dictatorship. In 1965, the Chicago graduate Sergio de Castro was elected dean and gained control of PUC’s economic faculty. He later became the most important economic authority of Pinochet’s regime between 1975 and 1982. As Minister of Economy and Finance, he led the first stage of the dictatorship’s neoliberal economic reforms. As we will review further, de Castro participated in the constitution-making process, overseeing central economic constitutional provisions. Furthermore, a student revolt in 1967 sealed the alliance between the neoliberals and the Gremialistas, founded by Jaime Guzmán, who later became one of the main authors of the 1980 Constitution and Pinochet’s leading legal adviser. The Gremialistas

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101 See Valdés (n 100) 118.


103 Valdés (n 100) 127.

movement was based on the belief of protecting the autonomy of intermediate organizations of society and against its instrumentalization by ‘collectivist’ ideologies. With the Gremialistas gaining control of the PUC’s student federation in 1969, the Chicago Boys–Gremialistas alliance, mixing Catholic corporatism with neoliberal market fundamentalism, became the ideological mainstream for the conservative forces for the following decades.106

Salvador Allende’s 1970 presidential victory consolidated neoliberal and Gremialistas political ambitions, and prepared the way for the ideological assault. In mid-1971, a group known as The Monday Club, which brought together important businessmen, economists and intellectuals, including de Castro and Guzmán, began meeting to analyze and discuss the state of Chile’s economy.107 In 1972, Guzmán argued that what was precisely needed to become a developed nation would be the constitution of a truly competitive capitalist regime, fundamentally regulated by the market.108 These concepts came from Friedman, ‘filtered’ through his connection with the Chicago Boys.109 Thus, motivated by connections with the navy in late 1972, this group’s mission changed towards preparing a new governmental program.110 The document, known as The Brick (‘El ladrillo’) and authored by de Castro among other Chicago Boys, was ready by May 1973, and played a distinctive role in the future dictatorship’s neoliberal agenda.111 Arnold Harberger would declare, ‘I do not think it an exaggeration to say that the studies and debates leading up to El Ladrillo played for the subsequent revolution in Chilean economic policy a role not unlike that of the Federalist Papers in shaping the constitutional framework of the United States’.112 The Brick claimed that political and social pressures had contributed to the progressive expansion of public spending in the provision of social welfare, regretting the paternalist tendency of the political system and the lack of organisms, known as intermediate bodies, that could replace some of these functions assumed by the state.113 The document rejects the idea that ‘the state is the agent of the common good’ and the widespread belief that the enactment of laws solves every problem.114 This had consequences in the hierarchical and technocratic structure of the state imposed by the dictatorship, which managed the state with the logic of a private company.115

In this respect, Chilean neoliberals with their conservative allies had what Jessica White has recently called a conception of the market with a ‘theological lineage’–

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105 K Fischer, ‘The Influence of Neoliberals in Chile Before, During, and After Pinochet’ in Mirowski and Plehwe (n 23) 312.
106 See e.g. A Fontaine Aldunate, Los Economistas y el Presidente Pinochet (Zig-Zag, Santiago, 1988) 30.
107 Fisher (n 105) 317.
109 Ibid 252. See infra Constable and Valenzuela (n 121) 190, 340. In an interview on 22 August 1987, Guzmán said to these authors that his discovery of Hayek had significantly altered his own views since 1974. I thank Professor Arturo Valenzuela for confirming Guzmán’s expressions.
110 See Valdés (n 100) 247–51; Fisher (n 105) 316; Fontaine Aldunate (n 106) 18–19.
113 De Castro (n 111) 48.
114 Ibid 60.
115 Ibid 142. The Brick will follow Friedman’s model of direct transfer or subsidy targeted to the extreme poor population.
supported ‘by their faith in a naturally occurring equilibrium that would be achieved by an “invisible hand” if the market was protected from collective political action and state intervention’.\textsuperscript{116} In this view, neoliberals ‘shared an evolutionary social theory, an attention to the role of morality (and particularly Christianity) in a market order, and a commitment to using law to protect the intermediate institutions of civil society from political interference’.\textsuperscript{117} These intermediate bodies represented for neoliberals the institutions that would later lead the profound process of state privatization, where many governmental functions in areas such as education, health care and social security were outsourced to private entities. In this light, Arnold Harberger, in Whyte’s words, would declare that ‘the market does not create its own virtues, but requires a moral, legal and institutional order to produce submissive subjects’.\textsuperscript{118} Hayek and Friedman later praised the Chilean experience as a form of political ‘miracle’ where these moral, legal and institutional conditions were achieved.\textsuperscript{119}

In the early days of the dictatorship, though, the doctrine of neoliberalism was not taken up with the same enthusiasm as the idea of a new constitution. Although The Brick was circulated the evening after the coup to every military official in the new government, the program was not executed until 1975.\textsuperscript{120} What motivated Pinochet’s turn? Perhaps Friedman’s visit in 1975 reinforced Pinochet’s commitment towards a neoliberal agenda. However, there are other reasons. Some argue that the neoliberal’s pseudo-scientific expertise and nonpartisan approach were crucial;\textsuperscript{121} others claim that Pinochet and his closest advisers distrusted politicians from the right, and thus the economic program gave the junta a degree of autonomy that let it monopolize power.\textsuperscript{122} It would only be in 1975 that de Castro and many other neoliberals would occupy strategic positions and implement their neoliberal recipe under laboratory conditions.\textsuperscript{123}

The dictatorship’s first priority was the enactment of a new Constitution through a genuine constitutional revolution.\textsuperscript{124} The junta assumed the exercise of the constituent, legislative and executive power, and the apparent supremacy of the 1925 Constitution was subordinated to the junta’s state of exception definition.\textsuperscript{125} On 13 September, just two days after the coup, the junta created a special commission that included Guzmán to prepare a draft of a new constitution.\textsuperscript{126} The Commission of Studies of the New Constitution (hereinafter, CENC) met regularly between 1973 and 1978. In 1978, a crucial element inside CENC was the advice of the Chicago-trained economists de Castro

\textsuperscript{117}Ibid 185.
\textsuperscript{118}Ibid 184.
\textsuperscript{119}Ibid 173.
\textsuperscript{120}See Fontaine Aldunate (n 106) 20.
\textsuperscript{121}See P Constable and A Valenzuela, A Nation of Enemies: Chile under Pinochet (WW Norton, New York, 1993) 171.
\textsuperscript{122}Fisher (n 105) 320.
\textsuperscript{123}See (n 121) 190. The support from the World Bank and the Inter-American Development Bank for these policies would be decisive for its success. See also P Silva, In the Name of Reason: Technocrats and Politics in Chile (Pennsylvania State University Press, University Park PA, 2008) 231.
\textsuperscript{124}Kelsen would call constitutional revolution a constitutional change not following the existing constitutional reform procedure. See Kelsen (n 50) 208–09.
\textsuperscript{125}Article 3, Law Decree No. 1, 18 September 1973 and Law Decree No. 128, 16 November 1973. See also Barros (n 104) 84.
\textsuperscript{126}Supreme Decree No. 1.064, 12 November 1973.
and Pablo Baraona, ministers of finance and the economy respectively, and the two most important economic authorities of the time. The ‘economic team’, as it was termed by CENC, argued in favour of particular neoliberal normative views regarding the state’s role in the economy. In October 1978, CENC submitted its draft proposal to Pinochet. The new ‘Constitution of Liberty’ was approved in September 1980 through a national plebiscite, legitimizing Pinochet’s rule and preserving his authoritarian powers until the democratic transition in 1990. Forty years later, despite several constitutional reforms, the neoliberal features of the Constitution remain in force.

Neoliberal constitutionalism was introduced into the constitution-making process through what Guzmán would call the rule of law’s fundamental principles. These principles were translated into specific constitutional provisions and combined neoliberal ideology with the dictatorship’s Catholic conservatism. In Guzmán words, unlike the ‘doctrinally neutral’ 1925 Constitution, the new Constitution would adhere to principles inherent and superior to the state. At the core of the dictatorship’s 1974 Declaration of Principles, written by Guzmán, was the common good principle as the state’s end, which necessarily demanded the respect of the ‘subsidiarity principle’. The latter, generally known through the 1931 encyclical Quadragesimo anno, required that the state could only directly assume those functions that intermediate bodies were not in a position to fulfil, either because they were beyond their possibilities or because they involved a general coordination that, by its nature, corresponded to the state. The right to private property and free initiative in the economic field were central to instituting this principle in the Constitution. Moreover, in a famous 1977 speech also authored by Guzmán, Pinochet called for a new authoritarian, technocratic and protected democracy with a secured legal order, guaranteeing individual rights and an independent judiciary, built with the institutional arrangements required to defend the state from ideologic extremism and also securing stability by reducing the ideological margin with the voice of the expert and the most capable decision-makers. Pinochet personally communicated these principles and features to CENC in a 1978 document called Fundamental Orientations Necessary for the Study of the New Constitution.

Following Hayek, the new Constitution became the superstructure created to secure the maintenance of these meta-legal principles underlying the rule of law. Through this, neoliberal constitutionalism became compatible with natural law’s belief that the law is pre-existent to legislation and is above the political order. It thus denies an unrestricted

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127 See CENC Session No. 388 (06/27/78).
128 Ibid 174–75. This draft was sent to the Council of State for review, and in July 1980 the junta introduced the final changes.
129 CENC Session (hereinafter, Session) No. 243 (08/11/76).
130 See Session No. 37 (05/02/74). See also Session No. 361 (04/27/78).
132 See Declaración de Principios de la Junta de Gobierno de Chile (n 131), Sección II.
133 Ibid.
135 Session No. 353 (04/19/78). Also, Session No. 327 (11/15/77) and 328 (11/16/77).
136 See Hayek (n 47–50).
legislative power to the state. Constitutional drafters at CENC had these rule of law principles in mind while designing state institutions consistent with the dictatorship’s revolutionary project. Taking that into consideration, when interviewed in 1981 by Guzmán in Chile, Hayek summarized the state’s role as twofold: applying the rule of law and providing certain services that the market could not supply, in line with the subsidiarity principle. In what follows, I will focus on how these two state-oriented functions were introduced into the Constitution.

**Applying the rule of law**

In Chile, the rule of law’s application would only be possible through a strong state led by a powerful president. Against an understanding of neoliberalism as weakening government, the neoliberal reforms were implemented only because of the existence of a strong state. In this scheme, Guzmán defined the president as the state’s ‘supreme administrator’ and ‘supreme arbitrator and guard of the Constitution’s compliance, and of the regular functioning of states powers’. This authoritarian presidency was consistent with Hayek’s advocacy of ‘a strong state, in the sense of a state able to resist the demands emanating from society—meaning special-interest groups, and trade unions in particular’. Similarly, Guzmán declared that ‘efforts should be made to banish the pressure exerted by certain groups to achieve extraordinary benefits that do not sympathize with the socio-economic situation of the country’. The highly centralized and technocratic structure of the executive would contribute to challenging pressure from special-interest groups. This essential feature became a symbol of stability and fiscal discipline for the later decades when technocrats in the Ministry of Finance would continue to play the role of mediators between social and political forces.

The new Constitution reinforced the president’s law-making domain, providing the authority to add urgency to a particular Bill, exert strong veto powers over draft legislation and, importantly, provide the exclusive legislative initiative on economic, financial and budgetary legislation. The latter covered any Bill related to political or administrative state division, the state’s financial or budgetary administration, including the annual budget law, taxation and, more broadly, any type of operation that might compromise the state’s financial responsibility. In CENC’s view, this power would prevent ‘undue interference from Congress’ and stop parliamentarians from introducing Bills on such matters or

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138 As Foucault notes, neoliberalism was connected with Hayek’s effort to apply the rule of law to the economic order. See (n 7).
140 The state was not weakened; to the contrary, it only retired from some functions, such as public sector companies, to strengthen others, such as macroeconomic policy. See J Martínez and A Díaz, *Chile: The Great Transformation* (The Brookings Institution, Washington DC, 1996) 67–68.
141 See Session No. 320 (10/05/77).
142 See session No. 345 (04/04/78).
144 See Session No. 9 (10/23/73).
145 See Silva (n 123) 232–34.
147 See Session No. 320 (10/05/77).
presenting changes that would affect them.148 In this constitutional vision, Congress would represent pejoratively—a political forum captured by democratic pressures and subject to special interest-oriented legislation.

Here, a key concern of the economic team was providing a procedure to expedite the presidential annual budget Bill, in which Congress would be strongly limited in its review powers.149 To this end, a specific provision would command Congress to approve the budget Bill within 60 days; otherwise, the Bill submitted by the president would automatically be adopted.150 This provision would also grant the government global control of public spending, concentrating the estimation of the annual income and expenses.151 Conversely, Congress would not be able to increase or reduce government income estimations and would only be able to reduce the budget’s law Bill expenses. Moreover, Congress could not approve any new expense without indicating the source of funds and, if this source was insufficient, the president was constitutionally authorized to ‘proportionally’ reduce it after a favorable report endorsed by the government’s audit body of the institution through which the new income was to be collected.152 In CENC’s view, this provision had two goals: to avoid the current practice at the time, where Congress made unrealistic and far too optimistic estimations of funds, and to ‘prevent public spending from increasing indefinitely as a result of Parliament’s intervention’.153 De Castro defended this provision as fundamental to avoid being ‘blackmailed’ by Congress, which ‘due to its political nature’ and its willingness to satisfy the country’s various regions, would tend to fall into a growing redistributive dynamic pushed by organized private interests.154

In addition, the economic team would advocate for the introduction of a special Central Bank chapter in the Constitution. This chapter would guarantee—with the purpose of keeping inflation low—the Central Bank’s full constitutional autonomy in both monetary and exchange rate policy-making. It would also include a specific provision banning the Central Bank from granting credits or loans directly or indirectly to the state or any dependent body.155

Furthermore, CENC highlighted the need to introduce legal certainty through the new constitution by ‘strengthening the legal and institutional order’ and giving ‘stability to the law’.156 This included different counter-majoritarian arrangements, such as the power of the Constitutional Court to exercise ex-ante control of legislation, being able to declare a statute as unconstitutional before its promulgation and the creation of new categories of legislation requiring different supermajorities, such as laws of qualified quorum, organic constitutional laws and those interpreting constitutional provisions.157 Accordingly, CENC defended the necessity of a harder-to-amend constitutional reform procedure.158

148 Art. 67, 1980 CP.
149 See session No. 349 (04/12/78); 353 (04/19/78).
150 Art. 64, 1980 CP.
151 Ibid.
152 Ibid.
153 Session No. 394 (07/04/78).
154 Ibid.
155 Session No. 384 (06/14/78). See Art. 97, 98, 1980 C.P.
156 Session No. 3 (09/26/73).
157 See Art. 63 and 82, 1980 C.P. See session No 344 (04/04/78).
158 Session No. 1 (09/24/73). See generally Art. 116–119, 1980 C.P. See also session No. 374 (05/23/78).
Constitutionalizing market priority

But how is one able to ensure market priority through constitutional means? As a first step, the constitution defined the principle of subsidiarity, declaring that the state would recognize and protect the ‘intermediate bodies’ between the individual and the state, through which society is organized and structured, and guarantee them adequate autonomy to fulfil their specific purposes.159 However, this would not be enough: in Guzmán’s words, subsidiarity also required constitutionally guaranteeing ‘that the state does not enter fields that can be developed by individuals in an efficient and convenient way’.160 With this goal in mind, CENC members and the economic team introduced what they would call public economic order provisions. In their view, these provisions, designed to limit state intervention in the economy, would be one of the major constitutional innovations from a comparative constitutional approach.161 Therefore, besides giving the government strong control over public spending and securing the central bank’s independence, the public economic order provisions would constitutionally limit the state through four mechanisms.

First, it would do so by providing that the state and its agencies could only develop or participate in business activities when authorized by a law of qualified quorum.162 In this case, these activities would be subject to the common legislation applicable to all.163 The underlying purpose was to prevent state intervention through simple administrative regulation.164 Additionally, the constitution included a non-discriminatory principle, stating that the state must give equal treatment to private parties in economic matters. Hence, it was only through a special law that the state could authorize a benefit to a particular sector or activity.165 These limitations were guaranteed through an effective judicial remedy.166

Second, it did so by including provisions constitutionally limiting the state’s debt capacity and, more generally, constraining any operation that could compromise the state’s financial responsibility. State debt represented ‘solving the problem at the cost of compromising future generations’.167 The motive of these provisions was to prevent state companies from expanding their expenses beyond what was necessary, especially since they had easier access to loans than the private sector.168 As a result, a constitutional provision required a special law to authorize the state or any of its organizations to contract loans, which must be required to finance a specific project and indicate the sources of the income from which the debt service would originate.169 Here, de Castro—with the aim of eliminating an incentive to spend through debts and with political or electoral purposes—proposed an additional law with qualified quorum requirements for the approval of loans expiring after the end of the respective presidential term.170

159 Art. 1, 1980 C.P.
160 Session No. 388 (06/27/78).
161 Session No. 400 (07/12/78) and 405 (08/08/78).
162 Art. 19 No. 21, 1980 CP.
163 Ibid.
164 Session No. 388 (06/27/78).
165 Art. 19 No. 22, 1980 CP. See also Art. 19 No. 23, 1980 CP.
166 Art. 20, 1980 CP.
167 Session No. 398 (07/11/78) and Session No. 384 (06/14/78).
168 Session No. 399 (07/12/78).
169 Art. 60 No. 7, 1980 CP.
170 Ibid. See Session No. 398 (07/11/78).
Constitution also required the enactment of a special law for those public initiatives, authorizing generally ‘the execution of any kind of operations that may directly or indirectly compromise the credit or the financial responsibility of the state’.  

Third, it did so by expanding the application of market priority to the property rights dimension of the constitution. Quoting the 1961 encyclical *Mater et Magistra*, Guzmán developed property rights views inseparable from the principles of subsidiarity and the common good. Private property rights were constitutionally reinforced with limits to its social function elements, expropriation regulations that improved the state compensation system for the private party and extensive judicial protection. This new constitutional approach was also extended to other assets, such as mines and water resources. In the case of mines, even though the constitution declared that the state had the ‘absolute’ and ‘exclusive’ domain over all mines, its economic dimension was subject to private property rights through mining concessions. Similarly, although defined by law as a ‘national asset for public use’, individual water rights were constitutionally protected.

Within this normative framework, CENC President Enrique Ortúzar declared at the very first sessions that property rights were ‘the foundation of all public liberties’, and thus ‘an essential basis for freedoms, since economic control is the means of exercising political control’. In CENC’s view, private individual initiative based on a secured private property scheme was ‘the great engine that drives the economic development of a country and guarantees its freedom’, because without it ‘public freedoms are an illusion’. Conversely, state economic activities ‘absorption’ ‘leads to a statist society that ends up denying personal liberty’, leaving citizens’ subsistence ‘delivered to the entire discretion of public authorities, with which the real exercise of all freedoms suffers or disappears’.

Fourth, it did so by applying the subsidiarity rationale in the social and economic rights constitutional domain within a framework of market priority in their fulfilment. These rights were heavily reformed from their previous formulation. They were introduced as future aspirations or mere expectations, but in any case as public duties guaranteed by the state. Guzmán made a clear distinction between what he called ‘classic human rights’ and rights related to ‘social pretension’. In Guzmán’s view, the former, traditionally linked with the negative idea of non-intervention, could be protected by judicial remedies; however, the latter were materially limited and not always possible to fulfil—they were ‘rights to which the community is supposed to tend to make them a reality’. This distinction would be fundamental to the most important judicial remedy introduced in the constitution, the *protection action*, which applied principally to first-generation

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171Art. 60 No. 8 and 9, 1980 C.P. Articles 60 No. 7 and 8 would not apply to the Central Bank.

172See Session No. 161 (10/28/75).

173See (n 167). See also art. 19 No. 24, 1980 CP.

174Ibid.

175See Session No. 1 (09/24/73); Session No. 3 (09/26/73) item number 3, and Session No. 10 (10/25/73).

176See Session No. 1 (09/24/73). Also, see Session No. 10 (10/25/73).

177See Session No. 1. (09/24/73), Session No. 18 (11/22/73).

178The previous 1925 Constitution, after its 1971 reform known as *Estatuto de Garantías Constitucionales*, declared in Art. 10 No. 16 that the state would ‘adopt all measures to facilitate the fulfillment of social, economic, and cultural rights necessary for the free development of the personality and human dignity, for the community’s integral protection, and to promote an equitable redistribution of the national income’.


This right’s conception opened up the country as a potential field for constitutional experimentation, where rights such as health, education and social security would be subject to a profound privatization process. Through this, Friedman’s *Capitalism and Freedom* would inspire Chile’s privatized social security model in 1981, forcing workers to save their future pensions into individual, capitalized accounts administered by private firms. Similarly, Friedman’s system for financing education through vouchers, praised by Hayek as an ‘ingenious’ scheme that could be applied as a principle in many other fields, was replicated in Chile. Additionally, the Constitution undermined workers’ rights, not including any explicit protection and instead guaranteeing the ‘freedom to work’. Through this constitutional provision, the right to collective bargaining was limited, the right to strike was forbidden for workers in the public sector and unions were weakened by guaranteeing workers a ‘voluntary’ enrolment.

Finally, in a closing provision of the Bill of Rights chapter, the Constitution guaranteed that any law or administrative decision regulating the Bill of Rights could not affect the ‘essence’ of those rights, nor limit their free exercise. This precept explicitly aimed to prevent Congress or the president from abusing their powers of implementing these constitutional rights and liberties by distorting their ‘true’ nature, which ended up empowering—even more—the ex-ante control by the Constitutional Court.

4. Contesting the endurance of neoliberal constitutionalism: Social movements and the new constitution

This article has been an effort to explore a theory of neoliberal constitutionalism and understand its implementation in Chile’s constitution-making process. Nevertheless, more than 40 years of neoliberal politics have created different outcomes from those expected by the original constitutional designers. This final and conclusive section reflects how Chile’s neoliberal constitutionalism contributed to the current constitutional crisis and motivated today’s constitutional change agenda. I aim to consider how the neoliberal project’s actual practice has been an imperfect or impure translation of its more theoretical formulation represented in this article with Hayek, Friedman, and Buchanan’s contributions. Indeed, the attempt to address Chile’s neoliberal constitutionalism tells us more concretely about the limits and failure of the neoliberal state-making project as a whole.

The democratic transition beginning in 1990 was designed by the Constitution and the outgoing dictatorship to produce a highly limited and protected democracy. In the

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181 See Session No. 11 (10/30/73) and Session No. 407 (08/09/78).
182 Art. 19 Nos. 9;10;11;18, 1980 C.P. See also Session No. 403 (07/18/78).
183 C Huneeus, *El Régimen de Pinochet* (Editorial Taurus, Madrid, 2016) 407. See also J Piñera, ‘Milton Friedman y sus recomendaciones a Chile’ (2006), <https://www.elcato.org/milton-friedman-y-sus-recomendaciones-chile> This system was first implemented in Chile; later, other countries such as Mexico, Peru, Colombia and Argentina would follow the same path.
184 Hayek (n 43) 387.
185 Art. 19 No. 16, 1980 CP.
186 Ibid. See also Art. 19 No. 19, 1980 CP.
187 Art. 19 No. 26, 1980 CP.
189 See e.g. C Huneeus, *La democracia semisoberana: Chile después de Pinochet* (Taurus, Santiago, 2014).
30 years of democratic governance under the 1980 Constitution, several constitutional reforms were approved. However, the neoliberal constitutional features examined in this article endured, representing not only a source of profound political conflict but a problem of political legitimacy.

Broadly speaking, many of the Constitution’s authoritarian elements were eliminated; however, their neoliberal features remained. For instance, it was only in 2005 that non-elected senators and the undemocratic ‘supervisory’ role of the Armed Forces were eliminated. In 2015, the binominal electoral system that created an over-representation of the right-wing in Congress and excluded the extreme groups of the political spectrum was replaced by a proportional system. Nonetheless, many other authoritarian and counter-majoritarian arrangements remained in force, including the Constitutional Court’s power to exercise ex-ante control of legislation, the requirement of different supermajorities on specific legislation, such as the laws of qualified quorum or the organic constitutional laws, and the hard-to-amend constitutional reform procedure. These institutional features were designed to protect the Constitution’s supremacy and hamper any radical constitutional change agenda. As a consequence, each constitutional reform approved in these past decades has been mediated by these undemocratically designed distortions.

Under this scenario, the negotiated democratic transition was governed by a certain ‘complicity’ with the dictatorship’s revolutionary neoliberal project. The first two decades of the centre-left coalition or Concertación por la Democracia (1990–2010) did not change Chile’s neoliberal constitutionalism, and the recent decade of alternation of powers between the right- and the left-wing coalitions followed the same fate. I will call this phenomenon the endurance of neoliberal constitutionalism.

Neoliberal constitutionalism endured through a powerful and technocratic presidency extremely dependent on a strict macroeconomic management. The president remained as the strong administrator of the state. Still, its power to resist the challenges of special-interest groups would be overcome by the significant influence that big business groups would play in politics in the context of a growing finance capital economy. A different standing would have the interests of a decayed labour movement, whose rights were undermined by the Constitution. In this respect, the highly centralized constitutional budget design aimed at securing fiscal discipline and the autonomous central bank aimed at keeping inflation low provided the perfect scheme for controlling social spending, without incentives to change the privatized structure of social services inherited from the dictatorship.

On the other hand, the Constitutional Court’s ex-ante review power to declare sections of different Bills unconstitutional has overturned various governmental progressive social initiatives. For example, reviewing a budget Bill on education, the court declared ‘an arbitrary discrimination’ to be a policy of free education favouring public over private institutions. In another case related to unions’ rights, the court declared sections of a Bill that sought to strengthen unions unconstitutional, stating that the Bill violated workers’ freedom to voluntarily join the union that was protected in the constitution. Both of these Constitutional Court decisions have invoked the idea of legal certainty and security, as well as the protection of these rights’ essential content as an argument against these more progressive social measures.
The public economic order, constitutionally engineered to keep the subsidiary state limited in the social and economic arena and foster the development of a secured market economy in various spheres of social life, represented this vision of a profound constitutionalism of structural inequality. On this understanding, the constitution acted as a reactive mechanism against any redistributive attempt to change the main characteristics of Chile’s neoliberal constitutionalism.

The reproduction of these inequalities in social and economic rights is another manifestation of the country’s neoliberal constitutionalism. The centre-left primary strategy was to reduce poverty and spread the benefits of accelerated economic growth without changing the income distribution and the privatized provision of social and economic rights, such as education, health care and social security. Back in 1998, the annual United Nations report on Human Development in Chile condemned the ‘inefﬁciency’ of the country’s ‘modernization model’. For this report, the excessive privatization of health-care and pensions under for-proﬁt companies reduced the system into a cost-beneﬁt calculation, measuring the efﬁciency of social services in terms of ﬁnancial efﬁciency, adopting the reductionist point of view of an economic rationale.192 As Andrés Solimano declared, the ‘main delusion’ of these years was believing that effective social progress could be accomplished without really tackling the root causes of high inequality and only by pursuing growth and social policies targeted to the poor while neglecting the middle class as a valid subject of social policy.193 The deep underlying controversy of these market-oriented social policies is that they did not consider the inner logic of social and economic rights in which the collectivist idea of the state’s responsibility for their fulﬁlment was replaced by an individualistic market logic.194 Consequently, these decades of democratic governance were characterized by a continued increase in public social spending, but in the context of a neoliberal scheme of privatized social services.

At this point, any organized democratic political attempt to dismantle these privatized social policies that developed in the education, health, and social security market was opposed by the lobbying power of the for-proﬁt private interest providers who were eventually affected by the expansion of the state in such areas.195 This was the case with social security, where a highly concentrated market emerged under the control of a reduced number of private companies, which managed the pension funds. In this respect, a super-wealthy group grew, controlling a high national income share in banking, health insurance, pharmaceuticals and pension fund management.196 As a result, a vicious cycle of ﬁnancial interest developed in the social and economic rights domain, including banking’s involvement in education, the private pension fund administrators fostering the development of the capital market, and investing in state-companies’ privatization. This has all been complemented by what Wolfgang Streeck calls the current ‘crisis of public ﬁnances’, identiﬁed with a permanent state of budget deﬁcits and rising levels of governmental debt.197 In Streeck’s words, the rising public debt ‘is being utilized politically to argue for cutbacks in state spending and for the privatization of public services,

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194Ibid 95.
195Ibid.
196Ibid 119, 134.
further constraining redistributive democratic intervention in the capitalist economy’.\footnote{Ibid 72–73.}

In his view, the neoliberal project is based on a continual strategy of replacing a tax-based revenue system with what he calls a ‘public debt state’.\footnote{Ibid.} This situation is worsened by the highly centralized and technocratic structure of Chile’s public finances, concentrated in the Ministry of Finance and other related institutions. Streeck calls the existence of an area of economics that is reserved for decision-making by technical bodies and expert committees, which in the end shows an ‘institutional protection of the market economy from democratic interference’, the ‘neutralization of democracy’.\footnote{Ibid 62. As a consequence, citizens increasingly perceive their governments not as their agents, but as those of other states or of international organizations, immeasurably more insulated from electoral pressure than in the traditional nation-state. See W Streeck, ‘How will Capitalism End?’ (2014) 87 New Left Review 92.}

This leads to an obvious question: When does the idea of a new Constitution become a real possibility? Even though the idea of a constituent convention to write a new Constitution was suggested at the beginning of the 1980s, the dictatorship and the right-wing coalition leading the democratic political opposition opposed any attempt at constitutional replacement.\footnote{Notably, former President Eduardo Frei Montalva would refer to the need for the election of a constituent assembly in 1980. The Alianza Democrática, the predecessor of the Concertación, in 1983 would also try to negotiate with the dictatorship convening a constituent assembly. See MA Garretón, Incomplete Democracy: Political Democratization in Chile and Latin America (University of North Carolina Press, Chapel Hill NC, 2003) 125–31.}

In this context, the first governments of the Concertación focused on removing the most symbolic authoritarian enclaves. In 2005, former President Ricardo Lagos would call the reform constitutional package approved that year the ‘end of the democratic transition’.

Yet Chile’s neoliberal constitutionalism endured. It would only be the next year’s social movements that would push towards a genuine constitutional replacement. Almost two decades after the Jornadas de Protesta Nacional against the Pinochet dictatorship between 1983 and 1986, a new generation debuted on the political stage.\footnote{See G Arriagada, Pinochet: The Politics of Power (Unwin Hyman, Boston MA, 1988) 55–65.} The so-called 2006 student ‘Penguin Revolution’, named in this way because the students’ uniform made them look like penguins, was a reaction to the privatized education system. For the first time, this social movement of high school and university students contested the endurance of Chile’s neoliberal constitutionalism. The movement broke out at the beginning of Michelle Bachelet’s first presidency (2006–10). In 2011, the students came back with more power and with a movement of longer projection, now against the first term of Sebastian Piñera (2010–14), the first democratically elected president from the centre-right alliance in 50 years.

These social movements shared the same constitutional vision. They challenged the privatized sphere of social and economic rights in the country, particularly in the area of education. They opposed banking interests financing education, with the perverse incentives created within the privatized institutions of higher education. These movements called for a new Constitution, envisioned in the idea of a real democratic transition from the dictatorship’s revolutionary project.

To my knowledge, the impact of social movements in the development of constitutional law has been less studied in Chile than elsewhere. Mark Tushnet describes social movements as large numbers of people acting collectively in a relatively under-organized
manner over a reasonably sustained period with the goal of influencing those who have formal authority as top decision-makers. This under-organized element distinguishes social movements from special interest groups. But how do they exercise influence? In Jack Balkin’s view, they influence public opinion in their favour, changing the ‘culture’ with which constitutional law interacts and impacting institutional actors, such as political parties, that absorb these cultural shifts. Thus, social movements can persuade political forces and public opinion towards the idea that a new position is reasonable and correct, in a phenomenon that Balkin calls the ‘bottom-up process’ of constitutional change. In this, instead of leading the process, institutions are reacting and responding to external change. In Chile, social movements have served as a ‘democratizing factor’ and a ‘vehicle of change’ in the country’s recent constitutional developments. With a state power orientation and a critique of the market’s role in privatizing social services, these social movements contested the existing constitutional boundaries. They pushed the political agenda towards a new understanding of social and economic rights.

This last point was decisive. In her second term (2014–18), Bachelet attempted to embody the student movements’ constitutional vision. Through an ambitious plan combining tax and educational reform within a new constitution proposal, her government promised to end the neoliberal constitutional legacy gaining initially surprising popular support. At the same time, a public and academic discourse referring to the development of a genuine constitutional moment, invoking Bruce Ackerman’s famous constitutional change theory, led the constitutional narrative. However, following Ackerman’s burdensome normative phases as a recipe for constitutional change in Chile should be done carefully.

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207 See e.g. F Atria et. al., _El otro modelo: Del orden neoliberal al régimen de lo público_ (Random House Mondadori, Santiago, 2013).

208 See P Ruiz-Tage, _Cinco República y una tradición_ (LOM Ediciones, Santiago, 2016) 258–59. See also Garretón (n 190) 187.

209 Ackerman is thinking in the United States, and has no intention of applying his theory to other national constitutional transformations. Ackerman’s purpose is to argue that there is a different type of constitutional change that does not follow the procedure available in Article V of the US Constitution. This does not discard the didactic value of Ackerman’s dualist distinction between a ‘normal politics’ mode that works under the assumption of granting ‘plenary lawmaking authority to the winners of the last general election’ and a ‘higher lawmaking system’ to understand decisions made with the legitimacy of the people in a genuine constitutional moment. The latter is characterized by the existence of a strong political movement or institutional actor that earns the authority to claim this higher lawmaking power after its transformative constitutional reform proposals are successfully tested and are finally subject to a process of legal codification, during which both the
In the end, Bachelet’s constitution-making project failed for different reasons. Among others, it depended extremely on her figure and was based on her initial popularity that, at the beginning, allowed her to replace the binominal electoral system. In 2015, an initial participatory stage based on public consultations and cabildos—although innovative—was highly improvised. The board of observers appointed for the process did not have sufficient time or capacity to systematize the initial public participation known as the citizen bases. The government largely excluded the political parties in its coalition from the design of the process and was far from obtaining the two-thirds quorum required to modify Chapter XV, the constitutional reform provisions. Once Bachelet’s government’s approval fell, partly because of a corruption case involving her son and widespread cases of private-based illegal funding of political parties on both sides of the spectrum, the whole constitutional agenda lost its political support. Despite these defects, more than 200,000 people participated in the initial stage of the process.\(^\text{210}\) At the same time, though, the social movements remained. In 2016, a movement against the privatized social security system with the name No + AFP emerged with force, and massive demonstrations continued in the coming years. Also in 2018, at the beginning of Piñera’s second term (2018–22), a massive feminist movement developed, capturing the attention of the political agenda.

But these movements were not enough. A larger and more violent social mobilization, beginning on 18 October 2019, would revolutionize the existing basic constitutional principles. A public transport fare increase sparked unrest among thousands of students, who only weeks later would be joined by more than a million people in the streets of Santiago. It was the largest popular mobilization since the return to democracy. Although Piñera came to the presidency without a program for a new Constitution, the social outbreak—or what would later be known as estallido—marked a turning point in his administration and forced his coalition to agree on a mechanism to replace the 1980 Constitution. These were the origins of the Agreement for Social Peace and the new constitution, signed on 15 November by representatives of the most important political parties, which established the guidelines for the current constituent process. Hence the agreement was a negotiated top-down political settlement, a political solution in response to the bottom-up social outbreak, which still represents a more profound problem of legitimacy.

In sum, political parties agreed upon an ‘institutional solution’ to attain ‘peace and social justice’ through a democratic process and sketched the main aspects of a major constitutional reform of the 1980 Constitution approved by the end of that year. Through this reform, a plebiscite was held on 25 October 2020, where the approval option for drafting a new Constitution won with close to 80 per cent of the general vote. In May 2021, the election of a gender-balanced constituent body, including reserved seats for the Indigenous population, was scheduled to take place with the sole objective of writing a new Constitution during a maximum term of one year and approving its norms by a two-thirds majority.

\(^{210}\)See e.g. F Soto Barrientos y Y Welp, Los diálogos ciudadanos: Chile ante el giro deliberativo (LOM ediciones, Santiago, 2017).
This is a unique opportunity to redefine the country’s fundamental constitutional principles. The constituent convention will not only be writing a new Constitution but, more importantly, reimagining a new social contract, one that could replace the old authoritarian and conservative neoliberal order and bring out a new legitimacy that puts at the center of its constitutional vision a real democratic constitutionalism.

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