

# The Legal Pedagogy of Neoliberalism: The Rise (and Resilience) of a Post-Democratic Constitutional Culture

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## Abstract

This chapter examines the impact of Chile's 1980 Constitution on the formation of a post-democratic legal culture, emphasizing the transformative role of the concept of "economic public order" (EPO). Although not explicitly mentioned in the text of the Constitution, EPO emerged as a powerful formula of constitutional interpretation aimed at safeguarding free markets from democratic politics and demands of redistributive justice. Envisioned as a counterrevolutionary strategy to dismantle Allende's socialist legality and developmental policies, EPO became a cornerstone of both the ascendance and resilience of Chilean neoliberal legality. The chapter examines how this concept has been naturalized within legal culture as a normative framework of interpretation of economic matters, perpetuated through formalist pedagogy at law schools, interpretative practices in the courts, and legal doctrine aligned with economic power and business elites. Using a socio-historical perspective, the investigation highlights the role of law textbooks in shaping constitutional imaginaries and practices that legitimize the foundations of neoliberal constitutionalism. In doing so, the chapter sheds light on the complex interplay between legal culture and the resilience of neoliberalism as a socio-political project.

## 1. Introduction

In April 1981, Friedrich von Hayek was invited to give a lecture at the Centro de Estudios Públicos, a Santiago-based think tank, as a side event during a meeting of the Mont Pèlerin Society hosted in Chile by the Escuela de Negocios de Valparaíso, a business school. Addressing a select group of right-wing entrepreneurs, government officials, legal scholars, and supporters of Augusto Pinochet's dictatorship, he spoke about the cultural evolution of human desires, the civilizational impact of the expansion of the commercial spirit, and the political demise of traditional morality in the West. After giving a critical account of how the idea of social justice and the institutions of mass democracy had eroded the ethical foundations of capitalist civilization (notably, private property and the nuclear family), Hayek concluded with a warning to his distinguished audience:

Until about 100 years ago, we had been reasonably successful in taming the savage by certain basic rules that led him to form an abstract order that he could not understand. Since then, a new savage has emerged that we must tame. We began by taming the savage; we must end, though we have not yet begun, by taming the state. (Hayek 1981: 82)

Hayek's invocation of the figure of "savages" and the need to tame their "rapacious instincts" is not a casual metaphor, but a recurring, racialized trope in neoliberal discourse (Hayek 2013: 482-3; Cornelissen 2020). This rhetoric resonated strongly with the Chilean economic and political elite. After decades of land reform and progressive welfare policies, they felt threatened by the insubordination of the popular masses and their demand for social and political inclusion. Like a colonial ethnologist, Hayek painted a vivid picture of the beast these elites had been battling. The people whom he called savages —the poor, the disenfranchised, and, by extension, the state— were not "the bearers of a new moral", as a socialist would have it, but rather "the non-domesticated or uncivilized who have never learnt the rules of conduct on which the Open Society is based" (Hayek 2013: 304). Hayek's elitist portrayal of people's demand for social justice as akin to "parasitic" grievances makes no secret of a profound fear of the popular masses whose profane democratic aspirations pose a challenge to the sacred order of property (Hayek 2013: 153; see Cornelissen 2017).

When Hayek first visited Chile in 1977, four years before this lecture, he rehearsed some key ideas of his long-held critique of the destructive tendencies of so-called “unlimited democracy” in a meeting with Augusto Pinochet. He shared with Pinochet a chapter of the as-yet unpublished third volume of *Law, Legislation and Liberty* (Chapter 17: A Model Constitution) where he imagines a constitutional order designed to contain the savage energies of representative democracy (Caldwell and Montes 2015). Pinochet had never read a single word of Hayek’s work, but it was in tune with the dictator’s own conviction that limited democracy was the best-suited formula for a country where an excess of democracy had led to a proliferation of incivilities, corroding authority, undermining private property, and, in the end, bringing about democracy’s own demise.

Conceived as an antidote to the “ever-recurring infection” of politics –namely, the pursuit of redistribution–, Hayek’s economic-juridical model outlines “constitutional barriers” to limit the power of democratic society to address questions of substantive justice politically (Hayek 2013: 443-4, 483-4). While championing freedom and the rule of law, the model provides a theoretical foundation and normative justification for the notion that the power of wealth –rather than the power of the demos– is the true driving force behind a genuinely democratic society. Hayek envisions the constitution, and the broader practice of constitutionalism, as a sort of first philosophy of a free market society. Central to this perspective is the idea that the unrestrained demands of distributive justice and the dominance of politics over economic processes have eroded both the language of democracy and the meaning of law. The neoliberal solution, therefore, is to set constitutional boundaries that insulate markets and wealth accumulation from the contingencies and anxieties of democratic life. For “if democracy is to maintain a society of free men, the majority of a political body must certainly not have the power to ‘shape’ society” (Hayek 2013: 473).

When Hayek presented his constitutional vision to Pinochet, a commission of experts — composed primarily of male, anti-Marxist, and Catholic jurists— was in the last stages of a five-year-long process of drafting a new Constitution (1973-1978). While the extent of Hayek’s direct influence on Chile’s 1980 Constitution remains a matter of debate, this historical juncture marks a pivotal moment. It set the stage for the rise of a post-democratic legal imaginary in which economic principles become a pre-political source of both normativity and juridical authority.

Within this framework, the rule of law was reimagined as a symbolic extension of the language of economic value and free-market ideology.

This chapter explores the implications of this view in shaping Chile's 1980 Constitution and the institutionalization of neoliberalism in legal culture, focusing on how it gave rise to what can be termed "post-democratic constitutionalism". We specifically analyse the transformative role played by the concept of "economic public order" (EPO) as a new formula of constitutional interpretation that consolidated a dominant neoliberal way of addressing constitutional disputes over economic rights and principles. Although the term "economic public order" is not explicitly used in the text of the 1980 Constitution, it continues to exert influence within the legal field as a subterranean normative framework of interpretation aimed at safeguarding free markets from democratic politics.

Our main contention in this chapter is that an examination of crucial transformations in the Chilean legal culture during and after Pinochet's dictatorship is required in order to understand the resilience of this constitutionalization of economic ideas. Our investigation uses a socio-historical perspective to analyse the significance of law textbooks in shaping constitutional imaginaries and practices that legitimize the foundations of neoliberal constitutionalism as an economic public order. By analysing how textbooks disseminate an "authoritative" normative theory of the constitutional interpretation of economic matters among law students and legal practitioners and in court rulings, we aim to shed light on the interplay between legal culture and the resilience of neoliberalism as a socio-political project.

## **2. Post-Democratic Constitutionalism: Reinterpreting Pinochet's Counter-Revolution**

The intricate relationship between constitutionalism and neoliberalism, while historically significant, is often misunderstood (Valenzuela and Cordero 2023). This is particularly evident in the use of juridical institutions in "insulating markets" from democratic governance and demands for social justice (Slobodian 2018) as well as in the role of "legal reasoning" in "disseminating neoliberal rationality as common sense" across constitutional democracies (Brown 2015: 154). Michel Foucault was among the first social theorists to recognize the rise of neoliberalism as a

juridical project that envisions a mode of governance where “the economy creates public law” (Foucault 2008: 84).

Consistent with this view, the ascent of neoliberalism must be observed in relation to the development of legal imaginaries, norm entrepreneurship practices, and constitutional strategies to fortify economic competition and “establish the long-term primacy of markets over politics” (e.g. rules of fiscal discipline, debt ceilings, Central Bank autonomy, limits to the entrepreneurial state, and propietarization of rights) (Streeck 2014). This neoliberal logic is manifested, first, in promotion of the conception of the rule of law as a means for “curbing the excess of democracy for the sake of liberty, individual autonomy and a culture of enterprise” and, second, in a fundamental shift in legal culture aimed at “infusing market institutions with juridical authority” (Bonefeld 2017: 61, 73).

The drafting of Chile’s 1980 Constitution is a case in point of this neoliberal re-articulation of the relations between law, economy, and democracy. This reconfiguration originated as a transnational project in the 1950s but crystallized during the 1970s and gained consolidation over the subsequent two decades. The Chilean case serves as a paradigmatic example of this global shift, demonstrating how neoliberal principles became embedded in constitutional frameworks. The literature acknowledges this, often characterizing the Chilean constitutional experiment as a successful neoliberal laboratory (Alemparte 2022; Couso 2017; Cristi 2021; Heiss 2017). However, the focus has been primarily on the anti-democratic process of institutional transformation and the authoritarian nature of Pinochet’s constitutional design. This perspective, while valuable, overlooks a crucial issue: how can we explain the extraordinary endurance of this troubling constitutional order in Chilean society? This question persists despite numerous reforms over the years that have ostensibly removed its authoritarian traces, the existence of social movements that have contested its institutional and social legacies, and the most recent attempts at constitutional change that, albeit expanding the boundaries of political debate, failed to deliver a new Constitution.

The 1980 Constitution is undoubtedly a counter-revolutionary document. It embodies the aspirations of a hegemonic class to transform Chilean society fundamentally, from a nation of proletarians into one of property owners. Written against the backdrop of the demise of President

Salvador Allende's development policies and the transnational struggle against progressive ideas promoting the economic sovereignty of developing nations (Özsu 2017; Slobodian 2018), this Constitution harnesses the performative power of the law to three interconnected goals: firstly, to exorcise the elite's fear of unruly popular subjects through a *political model* that disempowers their demands for redistribution; secondly, to expand the power of free markets as the engine of an *economic model* of development centred on wealth accumulation; and, thirdly, to legitimize a *normative model* of social life grounded in the language of economic rights, entrepreneurial values, and the sanctity of private property (Cordero 2019). In articulating a distinct landscape of legal meanings, the 1980 Constitution is formative of a post-democratic constitutional culture which is then perpetuated through formalist pedagogy at law schools, interpretative practices in the courts, and legal doctrine at the service of economic power and business elites.

The concept of post-democracy, we argue, offers a more nuanced way of understanding the political logic and cultural force of the constitutional arrangement inherited from the dictatorship. It encapsulates a process wherein politics "slips back into the control of privileged elites in the manner characteristic of predemocratic times, while the institutional forms of democracy remain fully in place" (Crouch 2004: 6). This phenomenon, catalysed by the global expansion of neoliberal capitalism, is characterized by the systematic disempowerment of egalitarian causes, the erosion of public institutions, and the depolitization of the economy (Brown 2015). At its core, post-democracy amounts to "governing without politics", namely, the practice of "doing politics without people" to shield society and markets from the perceived "disorder" and "intensity" of democratic life (Rancière 2014: 80, 1998: 101-102). Such evacuation of politics in the name of democracy bears a strong affinity with the political compulsion of constitutionalism to embody the very spirit of laws.

Interpreted in this way, Chile's 1980 Constitution is not merely a document that establishes a formal structure of norms and guarantees rights and institutions for good liberal governance, but one that also institutes within the social order a post-democratic conception of law that gives unquestioned supremacy to economic principles in defining the very entities to be regarded and protected as "constitutional" in the political community. Aligned with this neoliberal grammar, the political elites, businesspersons, and legal experts have consistently used constitutional language

as a master code to expunge the impurities of politics and the uncertainties of democratic life from normative debate and juridical interpretation.

In the following analysis, we focus on a concept that encapsulates the distinctive post-democratic logic of the 1980 constitutional order: “economic public order”. This concept warrants close examination for two reasons. Firstly, as Ruiz-Tagle (2016: 59) notes, “Economic public order has become synonymous with almost everything that is considered important in the economic provisions of the Chilean constitution.” Secondly, its pervasive influence raises questions about how it has become naturalized in Chile’s legal culture. Our aim is not to engage in a doctrinal reconstruction, but rather to elucidate how the “economic public order” has evolved into a powerful formula for constitutional interpretation, becoming a cornerstone of both the ascendance and resilience of Chilean neoliberal legality.

### **3. Reimagining Chilean Legal Culture: The Rise of the Idea of an Economic Public Order**

One crucial aspect of the concept of “economic public order” in Chilean constitutional discourse is that, albeit not explicitly mentioned in the text of the Constitution, it remains a pivotal point of invocation, debate, and defence in normative conflicts related to the economy. It has been present in national jurisprudence and scholarly debates on economic law since the 1960s (Aimone 1966, Mac Hale 1968, Santa María 1977) but gained prominence in the discussions of the Constitutional Commission (1973-1978), tasked by the Military Junta with drafting a proposal for a new constitution. Early on in its deliberations, the Commission concluded that the stability of democracy and the exercise of individual freedom were being eroded by the cultural disempowerment of private initiative, the legal weakening of private property, and political intervention in economic activity. The attempt to address these multifaceted issues in one stroke is the underlying motivation for adopting the concept of economic public order. In the words of one of the Commissioners:

Obviously, a Constitution that begins to be drafted after an epoch of Marxism must establish general economic principles... The claim is not that the Constitution consecrates a type of enterprise[,] but the principles that govern the philosophy of a democracy,

insomuch as this political philosophy translates into economic norms that must be part of the Constitution. (Sergio Diez, *Actas Oficiales*, vol I, 36<sup>th</sup> session)

Within this mindset, the notion of “economic public order” emerged as a tool for establishing a network of interdependent norms that, on the one hand, would “shield the economy from political promises and influences that lack all seriousness, and which are responsible for inflation, state chronic debt and poor development of the country” (Enrique Ortúzar, *Actas Oficiales*, vol X, 400<sup>th</sup> session), and, on the other, would “constitutionally consecrate private property as the foundation that sustains the economic and social regime to be implemented, namely, a regime in which *what is natural* is the private property of goods and means of production” (Jaime Guzmán, *Actas Oficiales*, vol VI, 202<sup>nd</sup> session). Thus, the concept of “economic public order” encapsulated both the “aversive” and “aspirational” forces driving the drafting of the 1980 Constitution (Scheppele 2003: 299-300).

The concept of “economic public order” was appropriated by Chilean legal scholars from the French tradition of civil law in the early twentieth century to describe the legal framework for the public regulation of economic activities. In the 1960s and 1970s, however, the concept began to be interpreted in a way that takes ideological distance from state intervention and economic planning (Montt 1978). Coincidentally with the growing influence of German ordoliberal ideas and American orthodox monetarist policies among right-wing intellectuals and entrepreneurs (Valenzuela and Pérez 2024), the Constitutional Commission marks an important point in the process of rediscovery of the concept of “economic public order” as a formula for the creation of a democracy predicated on the centrality of the principle of “economic freedom” and the institutionalization of “free enterprise” as a new fundamental right (Jaederlund 1999). The concept thus condenses a kind of first philosophy of the constitutional order aligned with libertarian economic principles that are taken to be natural in the order of society (Fermandois 2000).

This rediscovery of the concept did not stem solely from pure legal-constitutional expertise. Months before concluding their task, while grappling with the challenge of integrating the concept into the new constitutional framework, the Commissioners sought guidance from the Military



Junta's economic team: Pablo Barahona (Minister of Finance) and Sergio de Castro (Minister of Economy). Although these Chicago School graduates understood the relevance of establishing a legal framework that could sustain the neoliberal transformation of Chilean society over time, neither had any significant knowledge of constitutionalism or public law. Thus, they enlisted the expertise of Roberto Guerrero, a friend, an expert in economic law, and then Attorney-General of the Chilean Central Bank, who suddenly became a leading figure in this discussion.

Together, they crafted a memorandum outlining the issues and clauses required for the new Constitution to promote a free-market economy. According to Guerrero's own account (interview, 2018), this memorandum essentially translated the neoliberal economic vision of Barahona and de Castro into juridical form. After the document was presented to the Constitutional Commission, Guerrero was entrusted with drafting crucial articles that would serve as doctrinal pillars of the legal architecture of the "economic public order". These articles included provisions for the expansion of economic freedom (production, commerce, and labour), the protection of private property rights, and the regulation of expropriation. They were also designed to ensure equality before the law, prevent arbitrary economic discrimination, emphasize the subsidiary role of the state and the defence of private initiative, impose limitations on public spending and taxes, and guarantee the independence of monetary policy from political interference (autonomy of the Central Bank).<sup>1</sup>

In this conceptual design, it is important to recognize the important, yet often overlooked, role played by the Escuela de Negocios de Valparaíso. This business school in the port of Valparaíso was founded in the 1950s by Pedro Ibáñez, a renowned Chilean conservative politician, agro-exporting businessman, and member of the Mont Pèlerin Society, and was later led by Carlos Cáceres, a Harvard economics graduate whom Pinochet appointed to a number of key positions, including membership of the State Council, President of the Central Bank, and Finance Minister. The business school proved pivotal in disseminating ordoliberal ideas through training programs for a new generation of entrepreneurs. It was also active in promoting the work of renowned neoliberals among business leaders, legal scholars, politicians, and government officials and, for

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<sup>1</sup> In October 1978, Guerrero presented a more developed version of the memorandum during the IX Jornadas de Derecho Público at the Pontificia Universidad Católica de Chile, a conference held to discuss the draft proposal for the new constitution. He later published this talk as an article entitled "La constitución económica" in the *Revista Chilena de Derecho*. See Guerrero (1979).

example, hosted meetings with Ludwig Erhard (1969), Friedrich Hayek (1977 and 1981), and James Buchanan (1981). Through these activities, it emerged as a hotspot for neoliberal norm entrepreneurship and pedagogy (Valenzuela and Cordero 2023), becoming an influential advocate of the elevation of free enterprise to a core constitutional principle.

From this position of influence, the school's faculty became actively engaged in advising the Constitutional Commission on incorporating the concept of "economic public order" into the new framework. Their approach was twofold: first, they proposed it as a system of principles that "must be considered in the integral conception of the text" with a normative force "that must flow from the context of constitutional interpretation", rather than from a body of explicit definitions (Cáceres 1977: 2). Second, they conceptualized it as a constitutional meta-code that "dispenses with universal suffrage" as a formula for legitimizing decision-making on economic policy, thereby limiting "the whim of the masses over scientific and technical decisions about the economic order" (Durán 1977).

The notion of "economic public order" was therefore not conceived as a purely technical or neutral concept, but rather as a highly political one. It served as a tool for the ideological neutralization of state action and collective-democratic demands for equality and redistribution, as much as a normative mechanism for the liberation of individual economic action and competition as the basis of public life. In this way, "economic public order" delineates a legal imaginary that gives precedence to free enterprise as a grammar that shapes the constitutional order and legal meanings. It functions concretely as a boundary concept, demarcating the line that separates what is constitutional from what is not, and as a juridical fiction, providing an interpretative framework that actors may use to protect the free enterprise ideal and the institutions of economic freedom.

Conceived as part of the constitutional counter-offensive against the progressive structural reforms of the 1960s and 1970s in Chile (e.g. nationalization of natural resources, agrarian reform, creation of an area of social property), the concept of "economic public order" also came to perform the role of a constitutional narrative that promises if not a cure, then at least an effective treatment for the alleged pathologies of Chile's legal culture, namely, the instrumentalization of

the law at the service of “egalitarian mysticism”. In the words of José Luis Cea, author of the first and most influential textbook on the 1980 Constitution:

What we demand is that the Fundamental Code explicitly and unequivocally embody the characteristic principles of the social and economic model that is sought to be enshrined... If this is not done, the solidity of the social and economic components will, in a short time, be threatened by the expedient of loopholes or extra-constitutional practices... The lessons of history indicate that in [establishing the economic public order], it is possible to reduce defrauding of its principles. The alternative is to leave the formulation of the system at such an abstract and general level that, under the pretext of respecting it in letter, it opens the way to inflict a deep wound in its spirit. (Cea 1988: 16-17)

Following this lead, we explore how the concept of “economic public order” consolidated a dominant position as a hermeneutic and normative grid central to the justifications and institutionalization of the neoliberal project in Chilean legal culture. We do so by looking at the key role of constitutional law textbooks.

#### **4. Embedding Neoliberalism into Constitutional Culture: The Role of Law Textbooks**

Textbooks are key *epistemic devices* in the formation and transformation of legal cultures. They constitute a particular kind of legal writing that serves as a vehicle for the circulation of statements, ideas, concepts, and theories that establish parameters for the formalization, differentiation, and reproduction of the law and legal meaning. They mobilize modes of reasoning and knowledge that shape understandings of what law is and how it works. Textbooks thus contribute to the work of boundary-making of the legal world by producing *codified readings* of norms which, in turn, provide fundamental principles of ordering, modes of description, authorized interpretations, and doctrinal justifications that actors use and mobilize as tools to make sense of and struggle over the legal form of things (Fernández and Dubber 2012). As material devices embedded in discursive practices, textbooks also assume a crucial role in the *pedagogical process* of learning to think, act, and see like a lawyer (Mertz 2007) and, more broadly, in the social formation of a “legal

consciousness”, that is, conceptions of the law and normative repertoires embedded in everyday practices and objects of legal contention (Silvey 2005). It is, therefore, unsurprising that the development of textbooks usually accompanies projects to reform legal education as well as broader institutional transformations (such as constitutional change, nation-building, modernization) that trigger political, epistemic, and cultural shifts.

In addition, textbooks work as *narrative machines* that enact modalities of making and staging the history of law, thereby contributing to assembling a normative memory of the legal system. As Robert Cover contends, “The objectification of norms to which one is committed frequently, perhaps always, entails a narrative—a story of how the law, now object, came to be” (Cover 1983: 45). This holds particularly true for constitutional law textbooks, a narrative genre known for its penchant for recounting foundational stories that “offer, make use of, and produce different relationships in and with time” (Constable and Esmeir 2018: 12). Through this temporalization of the legal system, constitutional law textbooks become active participants in struggles to legitimize the juridical boundaries of the polity as much as to ascertain the very nature of legal discourse. This makes it impossible to view them as neutral texts or descriptive endeavours, for “their substance [is] deeply normative, while much of their authority [is] predicated precisely on their appearing not to be” (Fernández and Dubber 2012: 5). This is so because textbooks “create new law inasmuch as they do not simply reproduce something given, but make a choice as to what should count as the law” (Boulanger 2020: 1370).

#### **4.1. Studying Constitutional Law Textbooks, 1925-2017**

Building on these insights, and with the overarching aim of elucidating the pivotal role of the concept of “economic public order” in the neoliberal transformation of Chile’s legal culture, we provide a brief overview of the semantic and discursive universe of constitutional law textbooks published in Chile between 1925 and 2017. Our analysis comprises 82 textbooks and aims to trace continuities and transformations in how key constitutional topics, such as the structure of the state, rights, property, and interpretation, are thematized by them across three distinct periods: 1925-1973, 1974-1999, and 2000-2017. Most importantly, this analysis helps to contextualize the

semantic emergence and consolidation of the concept of “economic public order” over a broader historical perspective. Figure 1 presents the main results.<sup>2</sup>

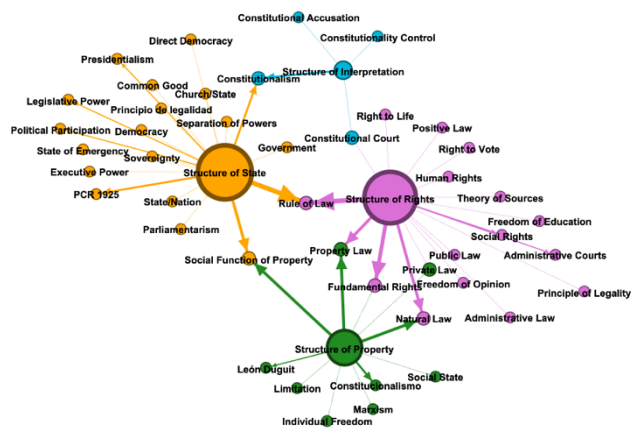
The semantic landscape of textbooks published between the ratification of the 1925 Constitution and the military coup that ousted President Allende in September 1973 (Figure 1a) was predominantly shaped by categories emblematic of classical constitutionalism, with a particular emphasis on delineating the structure of the liberal state. These textbooks allude to the state/church relationship, the separation of powers, parliamentarism, presidentialism, legislative power, and political participation. There are also connections to notions related to debates beyond the liberal framework, such as direct democracy and the common good. A similar phenomenon is observed in relation to debates on property where concepts such as individual freedom, property rights, natural law, and fundamental rights coexist with the progressive introduction of debates on “social law” and the “social function” of property.

In this period, Chile, like other countries in the region, was witnessing the circulation of various legal doctrines that challenged the dominance of classical liberal constitutionalism and opened debate about structural transformations of society and a more active role of the state in the economy. Under the influence of the French jurist Léon Duguit, the doctrine of the social function of property became a point of reference for many progressive constitutional law scholars, but also faced strong criticism due to the alleged ambiguity of its programmatic provisions enshrined in the 1925 Constitution (Valenzuela and Lobos 2022).

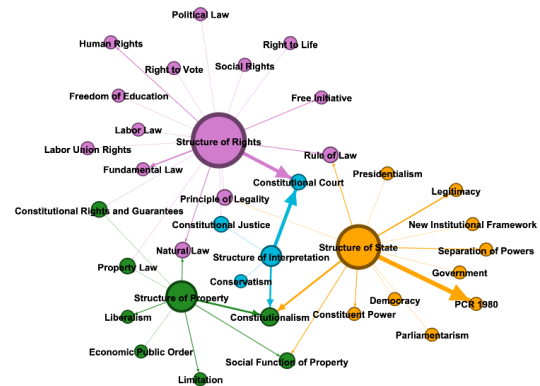
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<sup>2</sup> The objective of this analysis was to examine the evolution of concepts and semantic relationships present in constitutional law textbooks in Chile. We began by identifying an initial corpus of 658 textbooks published between 1925 and 2017 from the databases of the Library of the National Congress and the National Library of Chile, including only those categorized under the labels of “Constitutional Law” and “Chile”. Subsequently, we selected a smaller sample of 82 textbooks, taking into account the authors’ influence in the field and the opinions of constitutional law experts. We catalogued each of the selected textbooks, gathering information on bibliographic data, references, style, and content (concepts, arguments, and doctrinal debates). Based on this, we used ATLAS.ti for initial coding and the reconstruction of semantic relationships. Finally, we visualized our findings through a semantic network approach using Gephi software, selecting spatial arrangement algorithms and customizing visual attributes such as colours, node sizes, and line types to enhance interpretation and analysis. This approach allowed us to obtain a comprehensive and systematic view of the evolution of constitutional law in Chile, facilitating the identification of significant patterns and conceptual changes over time.

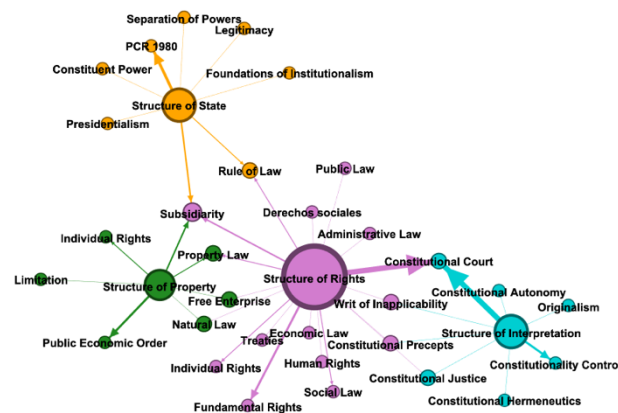
Figure 1. Semantic network of key juridical concepts in constitutional law textbooks, 1925-1973, 1974-1999, and 2000-2017



(a) 1925-1973



(b) 1974-1999



(c) 2000-2017

Source: Prepared by authors using R.

Issues of constitutional interpretation, while present, were rather relegated to the background in textbooks from this period. However, there was growing concern about the development of mechanisms for “constitutional control” of legislative activities. In a textbook published in the late 1960s, Raúl Bertelsen echoed the concerns of other conservative legal scholars about the 1925 Constitution’s perceived weaknesses in containing the extra-

constitutional advancement of socialist legality.<sup>3</sup> He warned of the risks associated with the absence of robust limits on the influence exerted on law-making practices and interpretation by the fluctuations of popular democracy and egalitarian demands. Interestingly, Bertelsen, who later became a member of the Constitutional Commission that drafted the 1980 Constitution, emerged as one of the staunchest opponents of universal suffrage on the grounds that “it is a danger for national security and the economic public order” (Raúl Bertelsen, *Actas Oficiales*, vol X, 335<sup>th</sup> session). This doctrinal attachment to constitutional control emerged before 1973 as a means to address Chilean legal culture’s perceived deformations, yet it crystallized only later into a broader constitutional imaginary aimed at reinforcing a libertarian conception of the socioeconomic order.

The concept of “economic public order” appeared for the first time in textbooks published during Pinochet’s dictatorship and the initial years of the country’s return to democratic rule. As seen in Figure 1b, these textbooks reveal the growing importance given to the description and doctrinal discussion of the constitution’s economic components, particularly the reinforcement of private property and economic freedom as a fundamental right. Textbooks published between 1974 and 1999 also devote significant space to narrating the formation of the new institutional framework and systematizing the key features of the 1980 Constitution. They also anticipate some of the challenges associated with its implementation during the transition to democracy, emphasizing the consecration of the economic constitution, constitutional supremacy, and the role of the Constitutional Court.

While contemporary defenders of the 1980 Constitution dismiss claims of its neoliberal character as a “myth” (Fermandois 2014), the prevailing concepts in the semantic network of textbooks published during this period reveal a notable shift in the understanding of constitutional law. The emergence of the concept of “economic public order” as a pivotal element in constitutional interpretation demonstrates that its neoliberal character does not stem solely from explicit definitions, but rather from the interplay of concepts articulated in constitutional discourse that redefine the course of legal doctrine.

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<sup>3</sup> A comprehensive exposition of this critical perspective is presented in José Luis Cea’s 1977 PhD thesis entitled “Law and Socialism”. See section 4.2 below.

From 2000 onwards, following a decade of democracy and amid mounting criticism of the inherited constitutional order as lacking legitimacy, textbooks begin to refer to doctrinal debates over constitutional reform and new disputes about the interpretative hegemony of the 1980 Constitution. The uncritical adoption of “originalism” in jurisprudence and legal pedagogy as the de facto method of constitutional interpretation was brought into question, notably by a younger generation of constitutional law scholars. Similarly, the notion of “economic public order” came under scrutiny as it entailed a naturalized and ideological reading of the constitution and the structure of fundamental rights. Interestingly, although several textbooks expand on the possibility of developing a progressive doctrine of social rights, the concept of “economic public order” experiences further doctrinal development and a novel defence by legal scholars such as Arturo Ferrandois, a former disciple of Jaime Guzmán (one of the ideologues of the 1980 Constitution). His two-volume textbook *Derecho Constitucional Económico* (2006 and 2010) reconsiders the concept of “economic public order” in a bid to counteract the tendency to denaturalize its “essential” content, thus providing students and judges with doctrinal resources and jurisprudential evidence for a “genuine” libertarian application of its principles in the twenty-first century.

This contemporary defence of “public economic order” not only shows the concept’s resilience as a powerful constitutional grammar central to neoliberal legality, but also its persistence as an object of constitutional contention due to efforts to challenge the naturalization of its principles when, in reality, history shows it has been hermeneutically assembled by “the subjectivity of the most traditional interpreters of the Constitution, [the] true guardians of the ‘constitutional work’ of the dictatorship” (Bassa 2012: 77; see also, Bassa 2017).

#### **4.2. The Legal Pedagogy of Neoliberalism: The Cea Textbook**

Who are these guardians, and why is their work so relevant for the neoliberal shaping of Chile’s legal culture? In this section, we focus on the case of José Luis Cea, arguably one of the legal scholars whose work has had a profound and lasting influence on Chilean legal culture since the end of Pinochet’s dictatorship. It is important to clarify though that our goal is not to attribute the capacity to have such an impact to a single individual. Our focus is rather on understanding the



conceptual and political space that Cea's work occupies in the institutionalization of the concept of "economic public order" and the defence of neoliberalism as a juridical project.

Cea earned his PhD at the University of Wisconsin with the thesis "Law and Socialism in Chile: 1970-1973". In it, he examines "the power of legality" to unleash socioeconomic transformations and, although this work may not stand out for its intellectual depth and originality, it is unequivocally effective in constructing a historical narrative that underscores the pathologies of Chilean legal culture which contributed to the disorderly and chaotic state of the law during Allende's government. Predictably, it aims to show that "the legal road to socialism" was rooted in a deeply flawed understanding of legality and an instrumental, extra-constitutional interpretation of legal precepts that violates the values of the rule of law. In Cea's view, the future role of law and legal knowledge was precisely to restore those broken principles.

Cea had been a professor of constitutional law at the Pontificia Universidad Católica de Chile since 1969 but, under the dictatorship, built an academic and professional career that was deeply intertwined with the creation, institutionalization, and preservation of the 1980 constitutional order. Apart from his teaching and other academic duties, he provided the Constitutional Commission with legal advice, particularly in 1977-1978. Subsequently, in 1989, he was appointed to the commission responsible for negotiating crucial constitutional reforms for the transition to democracy. He later served as a member of the Constitutional Court, initially as a substitute judge (1991-2002), then as a judge (2002-2010), and as its President (2005-2007).

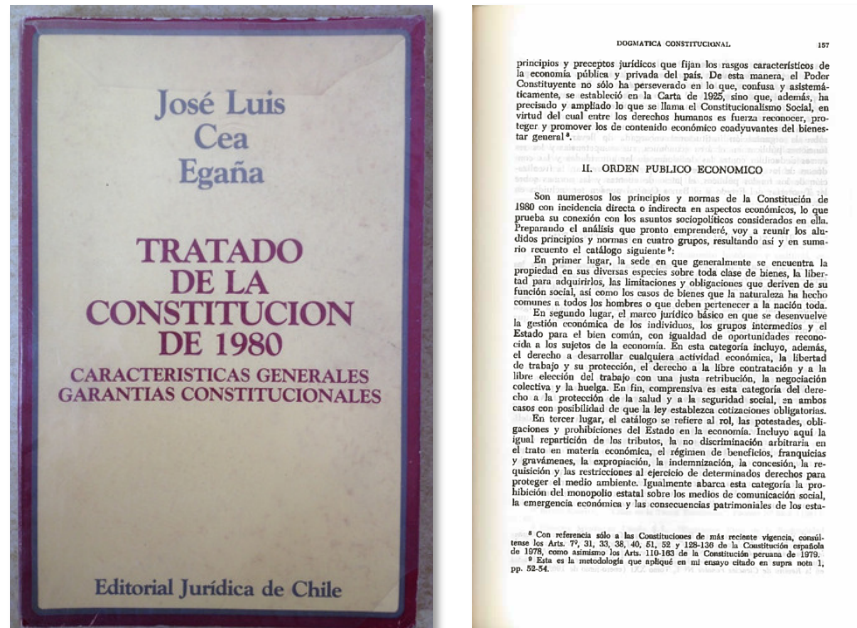
In 1988, Cea authored the first and one of the most influential textbooks on the 1980 Constitution, *Tratado de la Constitución de 1980: Características generales, garantías constitucionales*. It quickly became the default textbook in law schools, playing a pivotal role in reshaping Chilean legal culture and the legal profession in a form consistent with the new constitutional order. As recognized by a renowned constitutional law scholar, "At the end of the 1990s, reading Cea's treatise was the standard in all law schools in Chile" (José F. García, interview 2018).<sup>4</sup> The publication and wide circulation of this textbook cemented Cea's status as the legal scholar who "has had the greatest influence on the analysis of the economic provisions of the

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<sup>4</sup> For a more detail characterization of Cea's professional career, his contribution to Chilean constitutionalism, and influence as a teacher and mentor of new generations of "constitucionalistas", see José Francisco García's study *La Tradición Constitucional de la Pontificia Universidad Católica de Chile* (2020).

Chilean Constitution” and whose interpretations are “followed by the majority doctrine and jurisprudence” (Guerrero 2017: 142), thereby shaping the entire field of constitutional law during the period of transition to democracy and afterwards.

Figure 2. Cover of Cea’s textbook and page from the chapter on “economic public order”



*Tratado de la Constitución* was not an ordinary legal textbook that merely stated the law as it existed. Instead, it uses a form of storytelling, crafting a narrative account of the events that led to the establishment of the 1980 Constitution as a historical, political, and normative achievement. Accordingly, it claims to document the “faithful history of the law”, thereby producing a temporalization and narrativization that projects a sense of durability for the new normative order. Cea himself describes the importance of this doctrinal work in aiming to “consolidate the progress made and make it irreversible. It is not sensible to consider such work finished prematurely” (Cea 1988: 180).

It also asserts that a renewal of constitutionalism was achieved by placing the economic order of society at its forefront. As Cea explains, prior to this textbook, “Nobody cared about the systematization of norms for a free economy” (Cea, interview 2018). Indeed, his textbook contains an innovative codification of the “economic public order”, a concept that is absent from the 1980

Constitution but which, after Cea's systematization, provided doctrinal support for the constitutional entrenchment of neoliberalism.

The central thesis underlying this textbook is that the concept of "economic public order" serves as an organic centre, providing the Constitution with normative energy. It is an assemblage of constitutional norms, representing a rather fictional and arbitrary construction aimed at embodying substantive values that should be promoted and protected in the economic organization of society. As we have shown earlier, this is not a neutral concept, but a comprehensive framework of normative cognition for the acknowledgement of individuals' natural rights in economic life as fundamental rights. It entails a meta-theory of the relationship between law and economy, involving the institutionalization and protection of an imagined order of economic freedom and private initiative. Therefore, it functions both as a normative solution to the problem of state intervention in the economy (the entrepreneurial state) and as a construction of an interpretative formula for the constitutional promotion of free private enterprise. In Cea's words, the "economic public order" is:

A context, a system, that has as final rules of order that these rights cannot be violated in their essence... But there is no rule, there is no denomination that says, "the economic public order of Chile is". It flows, it emerges from the integration of provisions, from their concatenated and harmonized examination, and from the practical application of the law. (Cea, interview 2018).

The flowing of this concept as a subterranean framework of constitutional interpretation means that the "economic public order" is a dynamic, not a static, "order of values" that "the jurist must discover" as ideals ingrained in the law. As part of a broader pedagogical endeavour to transform Chile's juridical culture, Cea's textbook furnishes doctrinal ammunition and a repertoire of interpretative tools that legal and political actors can put to work to police the constitutional borders of the neoliberal order. After all, "those norms have been applied for forty years or so and, despite many reforms, they have continued working" (José Luis Cea, interview 2018).

## 5. The Resilience of Post-Democratic Constitutionalism: Closing Remarks

In this chapter, we have analysed how Pinochet's counter-revolutionary constitution reshaped Chile's legal culture around the political doctrine that economic values are generative principles of legality and the ultimate foundation of constitutional rights. We have focused on the transformative role played until this very day by the concept of "economic public order". Envisioned in opposition to the advancement of developmental policies and socialist legality, the concept consolidated a normative formula that sought to set a natural, pre-political frontier for democratic struggles over economic governance and redistributive justice. We have placed particular emphasis on the significance of law textbooks and legal pedagogy not only in consolidating the "economic public order" as an authoritative structure of interpretation, but also in shaping a very resilient post-democratic constitutional culture.

Despite protracted debate among legal scholars over the term's doctrinal application in the courts (Guerrero Becar 2017), political appeals to the concept of "economic public order" have become commonplace among the business and legal elites in conflicts over the economic organization of society. During the recent attempts to draft a new constitution, which lasted three years (2021-2023), as well as during the participatory process for constitutional change attempted by President Michelle Bachelet (2015-2018), a number of actors actively advocated the preservation of the bases of the "economic public order" in the constitution. One of the most vocal defenders of this stance has been the renowned economist Felipe Larraín, Finance Minister (2010-2014; 2018-2019), a professor of economics at the Pontificia Universidad Católica de Chile, and director of CLAPES, a neoliberal economic policy think tank based at this university. Immediately after the plebiscite of October 2020 in which the overwhelming majority of Chileans voted to replace the constitutional order inherited from Pinochet's dictatorship with a new text drafted by a democratically elected Convention, Larraín (2020) warned of the potential risks posed by an extensive catalogue of social rights and outlined the principles that new constitution should uphold (e.g. fiscal responsibility, Central Bank autonomy, free enterprise, no arbitrary economic discrimination). In his view, the existing principles of the "economic public order" established in the 1980 Constitution should be protected, reinforced, and perfected as they had been key in

explaining the country's economic development and capacity to reduce poverty (Larraín 2017; Larraín and Urzúa 2022).

An equally revealing episode occurred on 10 July 2023, when the Confederación de la Producción y del Comercio (CPC), Chile's most prominent business association representing key productive sectors such as mining, retail, agriculture, industry, and banking, lodged a complaint before the Constitutional Court. It challenged legislation passed by the Chilean Congress establishing a new framework for penalizing economic and environmental crimes. Beyond the specificities of this legal dispute and the ensuing political turmoil, it is noteworthy that one of the CPC's main arguments in asking the Court to declare this law unconstitutional was that, "The punitive measures outlined in the provisions of the law do not uphold but rather violate the principles of Economic Public Order" by applying a distinct and more burdensome punitive regime to a specific group (Zaliasnik and Hube 2023: 2). In a fascinating exercise of historical dramatization, the CPC's legal adviser argued that this law represented a revival of the "legal loopholes" employed fifty years ago by Allende's Unidad Popular government to regulate the business activities of "companies and entrepreneurs viewed as agents that endanger collective welfare" because it "smuggles in an abusive use of this new mechanism through legal reform" (Zaliasnik 2023).

Constitutionalism is a social field of semantic, ideological, and material struggles. These episodes not only evoke the historical legal activism of certain economic actors in the struggle to preserve a market structure favourable to their interests and block debate about economic policy on the grounds that proposed reforms would jeopardize economic progress, undermine legal certainty, and infringe constitutional rights (Bassa and Viera 2012, Vallejo and Pardow 2008). In addition, such episodes reveal the ongoing importance of the notion of "economic public order" as a powerful interpretative framework that reproduces neoliberal legality in disputes over the demarcation of rights and the very meaning of what counts as constitutional in society. The concept thus remains a crucial battleground in the ongoing struggle for the political imagination of law and the formation of a legal culture less tied to a neoliberal way of thinking about law and society.

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