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# Privatizing Social Rights: The Law and Political Economy of Chile’s Pension Transformation

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## Abstract

Chile’s pension privatization represents one of the most radical neoliberal experiments in social security reform, reshaping welfare from a collective right into a market-driven, property-based entitlement. This Article examines how the constitutionalization of pension privatization entrenched inequalities, shielding the system from democratic contestation and embedding a logic of over-propertization, where private property rights supersede social rights. Drawing on a Law and Political Economy (LPE) approach, explicitly concerned with the distributional consequences of legal design, this study traces how, during the Pinochet dictatorship (1973–90), Chile’s 1980 Constitution, and Decree Law 3500 institutionalized financialization and individual responsibility, transforming social security into an asset class managed by private pension fund administrators (AFPs). By legally structuring private capitalization accounts as financial assets with attributes such as ownership, transferability, and enforceability, these frameworks granted private actors control over investment management and risk distribution. The analysis highlights challenges to reversing this model, as judicial claims, pension fund withdrawals during COVID-19, and two failed constitution-making processes reveal legal and political constraints on reform. It examines legislative efforts, judicial interpretations, and collective mobilizations—such as the No+AFP campaign—seeking to restore solidarity. It also explores legitimization strategies, including the discourse of “popular capitalism” and the institutional entrenchment of AFPs within Chile’s political economy. By framing pension privatization as a constitutional and legal project rather than mere economic policy, this Article underscores the global consequences of over-propertization and the urgency of reimagining social rights. In doing so, it contributes to a growing body of LPE scholarship that treats constitutions as terrains of economic power, exposing how legal frameworks both encode and contest neoliberal orders.

**Keywords:** Social rights; privatization; social security; pension reform; constitutional law; law and political economy; Chile

## A. Introduction

The right to social security, once a cornerstone of the welfare state grounded in collective solidarity, has undergone a profound transformation in recent decades, driven by neoliberal globalization and its emphasis on market-driven solutions. This shift, epitomized by Chile’s pension privatization, prioritizes individual property rights over social welfare—a phenomenon I describe as “over-propertization,” understood here as the process through which legal systems expand the scope, strength, and constitutional protection of property rights into domains traditionally governed by social rights, thereby displacing solidaristic and redistributive principles with market-based entitlements. By examining Chile’s pension system—a model celebrated by

authors like Friedrich Hayek and Milton Friedman—this Article critiques the erosion of social security’s role in mitigating poverty, unemployment, and old age. Neoliberal governance has transferred economic and social risks from the state to individuals, dismantling safety nets and embedding a moralized discourse of personal responsibility.<sup>1</sup>

Chile’s 1980 pension reform, implemented under the Pinochet regime, marked a turning point in the redefinition of social security as a privatized, market-driven domain. Known globally as the “Chilean model,” it replaced universal entitlements with individualized pension accounts managed by private entities called AFPs (*Administradoras de Fondos de Pensiones*). Initially praised for fiscal discipline and investment growth, the model has faced increasing criticism for exacerbating inequality, marginalizing informal workers, and entrenching gender disparities.<sup>2</sup> The privatization wave fueled by Chile’s example was bolstered by international institutions like the World Bank, which disseminated its principles across Latin America and Eastern Europe.<sup>3</sup> However, these reforms, often accompanied by austerity measures, have prioritized deficit reduction over social equity, undermining the very foundations of collective welfare and public accountability.<sup>4</sup>

This Article adopts a Law and Political Economy (LPE) approach to examine how legal frameworks entrenched neoliberal principles in Chile, transforming social security into a contingent, property-based right. By institutionalizing financialization and individual responsibility, the 1980 Constitution and Decree Law 3500 legitimized economic inequalities and undermined solidarity. The analysis emphasizes how these legal structures constrained democratic avenues for reform, perpetuating the privatized system despite growing demands for change. During the last decades, different legislative developments, judicial decisions, and social movements have reflected efforts to reintroduce solidarity into the system. However, challenges persist, as deeply embedded property rights continue to obstruct structural reform, as evidenced by the impact of the three pension fund withdrawals during COVID-19 on Chile’s two recent failed constitution-making processes.

Chile’s experience offers a powerful case study of how constitutions shape economic systems and power relations, particularly in the Global South, revealing how legal design can embed market logic so deeply that it transforms the very meaning of rights. By institutionalizing

<sup>1</sup>See generally JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2019); MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* (2017) (examining the profound impact of neoliberalism’s retreat from collective responsibility, focusing on how risks are shifted onto individuals and families, and deepening economic and social inequalities. Hacker highlights the “great risk shift,” where collective protections like healthcare, pensions, and job security have been dismantled, leaving individuals to bear these risks alone. Cooper complements this by showing how neoliberalism depends on families as the default safety net, relying on unpaid caregiving and intergenerational support. This privatization of risk, she argues, disproportionately burdens marginalized groups and reinforces conservative family norms).

<sup>2</sup>See CARMELO MESA-LAGO, *REASSEMBLING SOCIAL SECURITY: A SURVEY OF PENSION AND HEALTH CARE REFORMS IN LATIN AMERICA* 64–67 (2008); see also CHIARA CORDELLI, *THE PRIVATIZED STATE* 1–19 (2020) (explaining the ethical and political implications of privatization in modern democracies).

<sup>3</sup>See MITCHELL ORENSTEIN, *PRIVATIZING PENSIONS: THE TRANSNATIONAL CAMPAIGN FOR SOCIAL SECURITY REFORM* 71–76 (2008); see generally also Mark Hyde & Silvia Borzutzky, *Chile’s “Neoliberal” Retirement System? Concentration, Competition, and Economic Predation in “Private” Pensions*, 7 *POVERTY & PUB. POL’Y* 123, 123–57 (2015). In the 1990s, over 30 countries—mainly in Latin America and Eastern Europe—replicated Chile’s pension privatization model, citing fiscal sustainability and individual responsibility. However, over time, shared flaws emerged. See KATJA HUJO & MARIANA RULLI, UNITED NATIONS RSCH. INST. FOR SOC. DEV., *THE POLITICAL ECONOMY OF PENSION RE-REFORM IN CHILE AND ARGENTINA: TOWARD MORE INCLUSIVE PROTECTION* 1–44 (2014), <https://cdn.unrisd.org/assets/library/papers/pdf-files/hujo-and-rulli.pdf> (explaining that such flaws included low coverage, high costs, and unequal benefits; several countries, including Argentina in 2008, Bolivia, and Hungary, later reversed or reformed these systems, revealing the Chilean model’s contested legacy and its limits as a path to equitable pension provision).

<sup>4</sup>See generally, e.g., RAÚL L. MADRID, *RETIRING THE STATE: THE POLITICS OF PENSION PRIVATIZATION IN LATIN AMERICA AND BEYOND* (2003) (arguing that pension privatization in Latin America was driven primarily by macroeconomic objectives—particularly the need to increase domestic savings and curb long-term public spending—rather than by a commitment to social policy reform); see also Mark Blyth, *The Austerity Delusion: Why a Bad Idea Won Over the West*, 92 *FOREIGN AFFS* 41, 41–56 (2013); see also CLARA E. MATTEI, *THE CAPITAL ORDER: HOW ECONOMISTS INVENTED AUSTERITY AND PAVED THE WAY TO FASCISM* (2022).

neoliberal principles, the Chilean model turned social guarantees into commodified assets, prioritizing property rights over redistribution, social cohesion, and collective security. This process of over-propertization reframed solidarity as self-reliance and collective welfare as individual risk, highlighting the broader risks associated with privatized welfare systems. Far from being neutral frameworks, constitutions can thus serve as vehicles for market entrenchment, raising urgent questions about the sustainability, equity, and democratic viability of rights transformed under such a model. In this way, Chile offers not just a national example but a paradigmatic case of how law, in its dual capacity as a constraint and a creative force, can remake the meaning of social rights.

## B. A Law and Political Economy Approach

Social security, once envisioned as a collective safeguard against life's uncertainties—such as illness, maternity, workplace accidents, and old age—has undergone a profound transformation. Over the past few decades, governments around the world have shifted the burden of risk from public institutions to individuals and families, amplifying economic insecurity and destabilizing the foundations of social solidarity.<sup>5</sup> This shift is not merely a byproduct of economic evolution but reflects deliberate macroeconomic policies that prioritize growth and inflation control over equitable distribution, cloaking these priorities in the language of technocratic neutrality.<sup>6</sup> At the same time, the invocation of recurrent public finance “crises”—fueled by narratives surrounding budget deficits and mounting public debt—has been weaponized to justify austerity measures and the privatization of essential services. These strategies are often framed as inevitable solutions but, in reality, serve to limit redistributive policies and entrench inequalities, undermining the democratic process itself.<sup>7</sup> This interplay between economic policy and governance reveals how ostensibly apolitical decisions shape the distribution of risk and wealth in ways that reinforce systemic disparities. As the boundaries of social security continue to erode under the weight of neoliberal orthodoxy, the broader implications for democratic governance and economic justice become unavoidable. The transformation of social risk from a public responsibility to a private burden calls into question the legitimacy of political systems that prioritize market efficiency over collective welfare. The LPE analysis underscores that this shift from collective to individual responsibility in social security is not merely a result of economic trends but a deliberate legal and constitutional project. This is no incidental drift. It reflects a deliberate project of macroeconomic governance: a politics of alleged technocratic neutrality that prioritizes growth and inflation control over distributional justice, while narrating fiscal crises—deficits, debts—as inevitabilities that justify austerity and privatization. In this framework, the hollowing-out of public responsibility is presented as technocratic necessity, rather than political choice. The consequence is the narrowing of democratic life itself: as redistributive ambitions recede, political imagination contracts, and inequality becomes both systemic and self-reinforcing.

Building on the global trend of shifting social risks from governments to individuals, developing countries have witnessed a deliberate push toward privatized pension systems, often under the influence of international organizations like the World Bank and IMF. This rhetoric of reduced taxation and individual responsibility has restructured social security frameworks, promoting privatization as a technocratic solution to fiscal challenges.<sup>8</sup> Since the mid-1980s, the World Bank has spearheaded pension reform efforts through its three-pillar model—comprising

<sup>5</sup>See HACKER, *supra* note 1.

<sup>6</sup>See JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 378–79 (2022).

<sup>7</sup>See WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM 72–73 (2017).

<sup>8</sup>See Emmanuel Reynaud, *The Right to Social Security – Current Challenges in International Perspective*, in SOCIAL SECURITY AS A HUMAN RIGHT 1, 3–5 (Eibe Riedel ed., 2007).

non-contributory, contributory, and voluntary schemes—believing this approach would expand coverage and drive economic growth.<sup>9</sup> However, by the mid-2000s, the Bank conceded that the model's anticipated benefits had not materialized. Coverage expansion remained limited, while privatized systems generated volatile returns and incurred high administrative costs compared to their public counterparts.<sup>10</sup> This acknowledgment led to a shift in the Bank's focus toward equity, poverty reduction, and broader pension coverage. Yet, this recalibration has done little to address the deeper vulnerabilities exacerbated by privatization, particularly for women and low-income workers, who face a heightened risk of old-age poverty due to precarious contributions and insufficient benefits.<sup>11</sup>

In this discussion, constitutional law plays a central role in the political economy of social security and the pension system, providing the legal principles and limitations that shape public policy and institutional design. In this regard, this Article's approach builds on the principle that modern redistributive mechanisms were rooted in a rights-based logic aimed at ensuring equal access to essential goods.<sup>12</sup> Here, T.H. Marshall's analysis of the welfare state illustrates how the incorporation of social rights into citizenship transformed social inequality by extending beyond mere poverty alleviation to reshape the social structure itself. Marshall argued that social rights, as a universal entitlement to real income independent of market value, were designed to not only reduce class disparities, but also to fundamentally alter the social hierarchy.<sup>13</sup> This evolution represented a shift from abstract legal equality to a more substantive equality achieved through social rights such as fair wages, healthcare, housing, and social security, alongside duties to the community, including the obligation to work.<sup>14</sup>

Yet even as Marshall's analysis of social citizenship offers a foundational framework for understanding the legal construction of social rights, its universal applicability has come under sustained critique. Scholars such as Samuel Moyn have underscored that the mid-20th-century European welfare state—often idealized during the *trente glorieuses*—was predicated on deeply exclusionary social arrangements. Moyn argues that social rights during this period were largely structured around the white male industrial worker, marginalizing women, people of color, and those outside the formal labor market.<sup>15</sup> This exclusion mirrored broader geopolitical hierarchies: the benefits of social protection remained confined to national borders while wealth extraction from colonial peripheries fueled welfare provision in metropolitan centers.<sup>16</sup> Complementing this critique, Gøsta Esping-Andersen reveals how welfare regimes function as systems of stratification rather than instruments of inclusion. Liberal models, he shows, reinforce class divisions, while conservative-corporatist regimes entrench gendered and status-based exclusions.<sup>17</sup> Far from being neutral redistributive tools, welfare states operate as mechanisms of differentiation and have failed to adapt to post-industrial transformations, especially those linked to gendered labor shifts.<sup>18</sup>

<sup>9</sup>See INT'L BANK FOR RECONSTRUCTION & DEV., AVERTING THE OLD-AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH 233–54 (1994).

<sup>10</sup>See generally ROBERT HOLZMANN & RICHARD HINZ, OLD-AGE INCOME SUPPORT IN THE TWENTY-FIRST CENTURY: AN INTERNATIONAL PERSPECTIVE ON PENSION SYSTEMS AND REFORM (2005); see also Esteban Calvo, Fabio M. Bertranou & Evelina Bertranou, *Are Old-age Pension System Reforms Moving Away from Individual Retirement Accounts in Latin America?*, 39 J. SOC. POL'Y 223 (2010).

<sup>11</sup>See generally Reynaud, *supra* note 8.

<sup>12</sup>See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 479 (2014) (arguing that these rights-based modern redistributive mechanisms, such as progressive taxation and social welfare programs, not only reflect societal values but also serve as practical tools for maintaining democratic stability and cohesion).

<sup>13</sup>See T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS 28 (1992).

<sup>14</sup>See *id.* at 44–46.

<sup>15</sup>See SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 38–39 (2018).

<sup>16</sup>See *id.* at 14–15; see Cedric D'Hondt, *Book Review – Not Enough: Human Rights in an Unequal World*, 25 ROWAQ ARABI 29, 29–32 (2020) (Egypt).

<sup>17</sup>See GØSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM 23–28 (1990).

<sup>18</sup>See *id.* at 209–13.

From a law and political economy perspective, this history exposes the racialized, gendered, and imperial foundations of a welfare model too often presented as universally applicable.

Feminist scholarship has long contributed to this critical revision. Authors like Rossella Ciccia and Diane Sainsbury have proposed alternative paradigms—such as defamiliarization and the universal caregiver model—that seek to re-center care work and challenge the male breadwinner assumption at the core of many welfare systems. These insights not only illuminate the limitations of traditional European models but also underscore the need for constitutional and legal frameworks that recognize differentiated vulnerabilities and promote inclusive, solidaristic arrangements. Moreover, the continued marginalization of migrant workers and people with disabilities in European welfare states reflects how these systems remain tethered to outdated assumptions about labor, citizenship, and productivity.<sup>19</sup> In Latin America, as Emily Brearley has shown, welfare regimes evolved under fragmented and hierarchical conditions that privileged formal sector elites while excluding rural, informal, and indigenous populations—patterns that require analytical tools beyond Marshallian ideal-types to fully grasp the embedded inequalities.<sup>20</sup> These critiques deepen the argument that social rights cannot be disentangled from the legal and political structures that mediate power, identity, and inclusion.

However, this transformative vision of social rights has been steadily eroded by the rise of privatization and the over-propertization of social security systems. These developments undermine the foundational principle of solidarity by reframing social security as an individual responsibility rather than a collective guarantee. Privatized systems prioritize ownership and market valuation over universal access, thereby reinforcing economic inequality and shifting risks disproportionately onto the most vulnerable. This erosion challenges the capacity of constitutional frameworks to uphold substantive equality in the face of neoliberal reforms. As the legal architecture of social security continues to adapt to shifting political and economic paradigms, the tension between solidarity and market logic raises critical questions about the future of social rights. Understanding the interplay between constitutional law, privatization, and inequality is essential for reimagining a social security framework that balances individual agency with collective responsibility, ensuring that the transformative promise of social rights remains central to modern governance.

This tension between market-driven reforms and the foundational principle of solidarity underscores the significance of social security as a legally constructed, rights-based regime. International human rights law recognizes social security as a fundamental right, enshrined in key instruments such as the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>21</sup> Article 9 of the ICESCR guarantees “the right of everyone to social security, including social insurance,” yet its precise scope remains contested.<sup>22</sup> This ambiguity stems in part from the principle of progressive realization outlined in Article 2(1), which acknowledges that socio-economic rights may not be fully achievable immediately due to resource constraints, but nonetheless obligates states to use “maximum available resources” to make consistent progress.<sup>23</sup> While this principle reflects a pragmatic

<sup>19</sup>See Rossella Ciccia & Diane Sainsbury, *Gendering Welfare State Analysis: Tensions Between Care and Paid Work*, 1 EUR. J. POL. & GENDER, 93, 93–95 (2018) (U.K.).

<sup>20</sup>See Emily J. Brearley, *A History of Social Protection in Latin America: From Conquest to Conditional Cash Transfers*, 56 REVUE INTERVENTIONS ÉCONOMIQUES 1, 3 (2016) (Can.).

<sup>21</sup>See generally INT’L LAB. ORG., CONFERENCIA INTERNACIONAL DEL TRABAJO, LA SEGURIDAD SOCIAL Y LA PRIMACÍA DEL DERECHO, (2011) [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_152598.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_152598.pdf) (Spain); see also Guillermo Montt & Alberto Coddou, *El derecho de la seguridad social en Chile y el mundo: Análisis comparado para una nueva constitución*, 14 INFORMES TÉCNICOS 1, 3–40 (2020), [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40americas/%40oro-lima/%40sro-santiago/documents/publication/wcms\\_749292.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40americas/%40oro-lima/%40sro-santiago/documents/publication/wcms_749292.pdf) (Spain).

<sup>22</sup>International Covenant on Economic, Social and Cultural Rights, art. 9, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>23</sup>Katharine G Young, *Introduction to THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 1, 6 (Katherine G. Young ed., 2019).

recognition of fiscal realities, critics contend that its imprecision allows states to defer meaningful action, diluting accountability.<sup>24</sup> Efforts to clarify these obligations, such as General Comment No. 3 by the Committee on Economic, Social, and Cultural Rights (CESCR), have introduced key concepts like non-discrimination, non-retrogression, and “minimum core obligations,” which aim to establish baseline protections.<sup>25</sup> General Comment No. 9 further reinforced the justiciability of socio-economic rights, emphasizing their interdependence with civil and political rights and asserting their enforceability under international law.<sup>26</sup> However, despite these advances, CESCR recommendations remain non-binding, enabling states to justify reduced social spending under neoliberal austerity policies with limited consequences.<sup>27</sup> Importantly, the CESCR has maintained that socio-economic rights are neutral concerning political and economic systems, requiring only adherence to democratic principles and respect for human rights. Yet, this neutrality overlooks the profound influence of political economy on states’ capacity to equitably and sustainably fulfill their obligations to provide universal social security.

Moyn deepens this critique, arguing that contemporary human rights advocacy has become overly aligned with neoliberal market ideologies, privileging civil and political rights centered on individual freedoms while sidelining economic and social rights.<sup>28</sup> When economic and social rights are addressed, the focus often narrows to ensuring minimal sufficiency, neglecting broader egalitarian principles aimed at reducing systemic inequalities and fostering equitable resource redistribution. This approach, as Moyn observes, fails to challenge the structural forces driving economic disparities, thereby limiting the transformative potential of socio-economic rights frameworks.<sup>29</sup>

The tension between human rights advocacy and the entrenched dynamics of neoliberalism underscores a critical challenge: how can socio-economic rights serve as effective tools for structural change in a global system that prioritizes market efficiency over substantive equality? Addressing this question requires reconciling the aspirational promises of international human rights law with the political and economic realities that shape states’ capacities to meet their obligations.

The incorporation of social security into national constitutions has expanded significantly since World War I, beginning with pioneering examples such as the Constitutions of Mexico (1907), the Weimar Republic of Germany (1919), Chile (1925), and the establishment of the International Labour Organization in 1919.<sup>30</sup> By the mid-20th century, most constitutions worldwide included social security provisions, ranging from aspirational declarations to enforceable rights, profoundly shaping public policies and legal frameworks in this domain.<sup>31</sup> Constitutional guarantees play a critical role in embedding social rights into national legislation, guiding statutory interpretation, organizing public services, and, most importantly, providing judicial mechanisms to protect and enforce these rights through constitutional and supreme courts.<sup>32</sup> However, the practical

<sup>24</sup>See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 106 (1995).

<sup>25</sup>PAUL O’CONNELL, *VINDICATING SOCIO-ECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES* 36 (2012).

<sup>26</sup>See *id.* at 38.

<sup>27</sup>See *id.* at 40.

<sup>28</sup>See MOYN, *supra* note 15, at 212–14.

<sup>29</sup>See *id.* at 214–17 (arguing that, in the post-World War II era, human rights discourse shifted away from ambitious egalitarian visions—such as those championed by welfare states and anti-colonial movements—toward a narrower focus on preventing absolute deprivation and ensuring minimal guarantees).

<sup>30</sup>See INT’L LAB. ORG., *supra* note 21, at 115.

<sup>31</sup>See, e.g., Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1043–47 (2014); see also Evan Rosevear, *Realizing Social Rights: The Material Impacts of Constitutional Entrenchment*, 7 CONTEMPORÁNEA-REVISTA DE SOCIOLOGIA DA UFSCAR 313, 313–16 (2017) (sharing a critical and empirical perspective on the constitutionalization of economic and social rights, highlighting the gap between formal legal entrenchment and tangible social outcomes).

<sup>32</sup>See INT’L LAB. ORG., *supra* note 21, at 115.

realization of social security rights remains contested, as political and economic factors heavily influence their implementation, raising questions about the gap between constitutional commitments and actual outcomes.<sup>33</sup> Adopting a realistic approach, this Article examines the LPE of Chile's social security right and pension system market-oriented transformation.<sup>34</sup>

Examining social security systems through the LPE approach provides a robust framework for understanding how legal structures interact with economic systems and societal inequalities, particularly in the context of constitutional law and social rights. Drawing on insights from Legal Realism and Critical Legal Studies, as well as the works of Robert Hale's *Coercion and Distribution in a Supposedly Non-Coercive State* (1923) and Max Weber's analysis of the role of jurists in *Economy and Society*, this approach critiques the perceived dichotomy between market dynamics and state regulation, emphasizing the law's active role in shaping and legitimizing economic and social power relations.<sup>35</sup> It builds on Poul F. Kjaer's articulation of *The Law of Political Economy*, which explores how law mediates the relationship between political and economic systems, facilitating both stability and transformation during historical and institutional shifts.<sup>36</sup> By expanding the scope of recent LPE studies, such as those by Britton-Purdy et al. in the U.S. and Kampourakis in Europe, this approach applies its insights to jurisdictions in the Global South, such as Chile, highlighting how neoliberal ideologies reshape legal frameworks.<sup>37</sup> For example, the privatization of Chile's pension system illustrates the intersection of market fundamentalism and state power, where law both structures and legitimizes economic inequalities.<sup>38</sup> This perspective critiques the expansion of property rights into areas traditionally governed by social rights, arguing that this shift undermines the principles of solidarity and social justice essential to welfare states.

Broadly speaking, a political economy approach to constitutional law views the constitution as a pivotal legal framework designed to uphold and protect fundamental societal principles such as human dignity, freedom, equality, democracy, and the rule of law. While rooted in legal realism and critical legal studies, the LPE approach distinguishes itself through a sustained focus on how legal structures encode and reproduce material power relations within capitalist systems. Unlike law and society scholarship, which often emphasizes descriptive analysis of law's social effects, or human rights approaches that focus on normative ideals and formal compliance with international standards, LPE is explicitly critical and normative. It interrogates the distributive consequences of legal arrangements and foregrounds how law facilitates, legitimizes, and stabilizes hierarchies of wealth and power. It claims that *recognizing* social rights in a constitution is not the same as *materially realizing* them. For instance, while a human rights scholar might assess whether a constitutional provision on social security aligns with global standards, an LPE scholar scrutinizes whether the design and implementation of such rights are structurally undermined—through mechanisms like privatization or fiscal austerity. Concretely, it asks whether those rights

<sup>33</sup>See Avi Ben-Bassat & Momi Dahan, *Constitutional Commitment to Social Security and Welfare Policy*, 12 REV. L. & ECON. 165, 165–167 (2016); Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 J. L. & ECON. 713, 713–17 (2017).

<sup>34</sup>Jung et al., *Realizing Social Rights*, *supra* note 31, at 333.

<sup>35</sup>See Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 43 AM. U.L. REV. 939, 958–67 (1985); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 71–73 (2014); see Martha T. McCluskey, Frank A. Pasquale III & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 297–99 (2016); see generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

<sup>36</sup>See Poul F. Kjaer, *The Law of Political Economy: An Introduction*, in THE LAW OF POLITICAL ECONOMY: TRANSFORMATION IN THE FUNCTION OF LAW 1, 3 (Poul F. Kjaer ed., 2020).

<sup>37</sup>See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1784, 1786–94 (2020); Ioannis Kampourakis, *Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe*, 1 J. L. & POL. ECON. 301, 302 (2020).

<sup>38</sup>See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 14 (2014); see also generally PIERRE ROSANVALLON, THE SOCIETY OF EQUALS (2013).

are structurally realizable or systematically undermined by institutional design, privatization, or fiscal policy. The 1980 Chilean Constitution's Article 19 No. 18, which guarantees the right to social security, exemplifies this disjuncture: the right was operationalized through individualized capitalization accounts, protected as private property, thereby embedding market logics into social protection and restricting redistributive capacity.<sup>39</sup> This legal framing, far from guaranteeing egalitarian outcomes, entrenched market logics within the heart of social protection and limited the redistributive functions of the welfare state. An LPE approach thereby reveals how constitutional provisions can be structured to serve specific economic interests, even while formally acknowledging social rights.

This example clarifies how the LPE framework departs from both human rights and realist methodologies. Realist approaches might examine judicial behavior or political incentives behind legal implementation, whereas LPE interrogates the political economy of legal form itself. It asks how the institutional design of legal rights—especially when structured through market-based logics—channels benefits to particular actors, such as private pension fund administrators, while limiting the collective realization of social protections. LPE is fundamentally concerned with how legal arrangements distribute power and material resources: who benefits, who is excluded, and how inequality is reproduced through apparently neutral legal rules.<sup>40</sup> This approach recasts constitutional law not merely as a system of formal guarantees, but as a terrain where economic orders are constituted, defended, and contested. Through this lens, constitutions are not just legal documents but instruments that entrench particular political-economic regimes.

LPE's theoretical lineage can be traced to Max Weber's visionary analysis of the legal profession and its role in the rationalization of capitalist modernity. Weber identified jurists as "prophetic" figures who, through their intellectual labor, shape the legal order and play a central role in consolidating bureaucratic authority. He argued that jurists, through their creative contributions, not only shape law but also play a decisive role in consolidating authority and structuring social order, ultimately influencing the trajectory of legal and economic rationalization. Weber identified two key trends: specialization, reflecting the broader rationalization of society, and technification, which involves a growing reliance on technical expertise in legal and administrative processes.<sup>41</sup> These trends illustrate how legal professionals actively influence the legitimacy of modern political and economic systems, emphasizing the deep intertwining of legal systems and economic structures.<sup>42</sup> As reconstructed by David Trubek, Weber's account reveals how the emergence of formally rational law—universal, abstract, and predictable—was not simply an effect of capitalism but a necessary precondition for its development.<sup>43</sup> Legal institutions evolved autonomously, producing a specialized profession with its own modes of knowledge and authority capable of generating rules conducive to calculability and legitimacy in market exchanges.<sup>44</sup> Jurists, therefore, are not neutral technicians but active agents in the construction of capitalist legal rationality.<sup>45</sup> In this sense, legal rationality is not merely supportive of capitalism but constitutive of it, embedding the rule of law as both a normative ideal and a technical infrastructure for the operation of modern economies.

This approach emphasizes how these principles shape the organization of the state, the distribution of public and private power, and the safeguarding of individual and collective rights. Applying this approach to Chapter One of the Chilean Constitution, for instance, raises critical questions about the implications of treating individuals as "born free and equal in dignity and rights" and the state's role in promoting the common good and ensuring conditions for spiritual

<sup>39</sup>See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, no. 18.

<sup>40</sup>See Britton-Purdy et al., *supra* note 37, at 1790–93.

<sup>41</sup>See MAX WEBER, *ECONOMÍA Y SOCIEDAD* 691–92 (José Medina Echavarría et al. trans., 2002).

<sup>42</sup>See *id.* at 657–60.

<sup>43</sup>See David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, *WIS. L. REV.* 720, 729–30 (1972).

<sup>44</sup>See *id.* at 736–37.

<sup>45</sup>See *id.* at 741–43.

and material fulfillment.<sup>46</sup> It also probes the meaning of living in a “democratic republic” and examines the necessary powers and roles the state must fulfill to meet its constitutional mandates.<sup>47</sup>

Through its focus on the *material constitution*, this framework addresses structural inequalities by analyzing how legal systems influence economic relations and power concentrations.<sup>48</sup> It challenges the pessimism embedded in neoliberal governance, which limits the state’s regulatory role by privileging market logics.<sup>49</sup> By emphasizing the interconnectedness of law, politics, and economics, this approach reconceptualizes the state’s role in social and economic justice, highlighting the transformative potential of constitutional law to advance equitable and democratic resource distribution. Ultimately, it underscores the importance of legal frameworks in shaping societal norms and power dynamics, offering a critical lens to address contemporary challenges in global political economies.

Bringing these ideas down to the right to social security, an LPE approach offers a novel perspective on how pension systems shape economic and social power dynamics by analyzing the impact of legal structures on economic relations and the concentration of economic power.<sup>50</sup> It critically evaluates who benefits from these dynamics and examines the macroeconomic incentives or disincentives for reforming them.<sup>51</sup> This perspective highlights the importance of understanding the state’s role not only in its legislative evolution, normative functions, and budgetary priorities but also in its practical interactions with markets and private contracts, which shape its distributive framework.<sup>52</sup> By centering on the distribution of power and resources, it challenges the allocation of authority among government branches, private corporations, and the public, calling for a justice-oriented and democratic approach to resource distribution through taxation, welfare, and public services. This approach to the right to social security critiques the expansion of property rights into domains traditionally governed by social rights, condemning this “over-propertization” as contrary to the principles of the welfare state.<sup>53</sup> The shift toward prioritizing individual economic rights in pursuit of market efficiency undermines collective social rights grounded in solidarity and diminishes the state’s capacity to redistribute resources for social justice.

The LPE approach highlights the critical role of law in shaping privatization and market-driven reforms in social security, emphasizing that markets are not neutral or inevitable constructs but are instead structured through deliberate legal design. These legal frameworks include both public regulation and private law regimes—such as property, contract, and tort law—which actively

<sup>46</sup>CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 1.

<sup>47</sup>CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art 4.

<sup>48</sup>See Marco Goldoni & Michael A. Wilkinson, *The Material Constitution*, 81 MOD. L. REV. 567, 567–87 (2018) (U.K.); see also Marco Goldoni & Michael A. Wilkinson, *Introduction: The Return to the Material Constitution in THE CAMBRIDGE HANDBOOK ON THE MATERIAL CONSTITUTION* 1, 1–5 (Marco Goldoni & Michael A. Wilkinson eds., 2023).

<sup>49</sup>See Britton-Purdy et al., *supra* note 37, at 1790.

<sup>50</sup>See Andras Uthoff, *Pensamiento Neoliberal y Financiamiento de la Seguridad Social en Chile 1981–2023 [Neoliberal Thought and Social Security Financing in Chile 1981–2023]*, 15 PERFILES ECONÓMICOS 65, 65–97 (2023) (Chile).

<sup>51</sup>ANDREA BETANCOUR, COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE [ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARRIBBEAN] [CEPAL], *EL SISTEMA DE PENSIONES EN CHILE: INSTITUCIONALIDAD, GASTO PÚBLICO Y SOSTENIBILIDAD FINANCIERA*, 205 MACROECONOMÍA DEL DESARROLLO 9–10 (2020).

<sup>52</sup>See ESPING-ANDERSEN, *supra* note 17, at 79–104.

<sup>53</sup>By “over-propertization,” I refer to the phenomenon identified by Alejandro Vergara Blanco in his analysis of Chilean private and constitutional law. See *infra* note 102. Vergara shows that the Chilean legal system—beginning with Article 583 of the Civil Code and later entrenched in Article 19 No. 24 of the 1980 Constitution—deploys a dogmatic fiction that treats a wide array of legal entitlements (real and personal rights, concessions, administrative functions, legal statuses, and even technical authorizations) as objects of property. This reconceptualization extends the category of property beyond material things and enables virtually any subjective right to be claimed as property, particularly through the *recurso de protección*, a special constitutional remedy whose significance I discuss below.

define and sustain economic systems.<sup>54</sup> Building on Max Weber’s analysis of the legal profession’s role in capitalist modernity, LPE scholars underscore how legal specialization and technification—core processes identified by Weber—continue to structure contemporary economic power. This insight is powerfully extended by Katharina Pistor in *The Code of Capital*, where she shows that property rights have undergone a process of legal coding, evolving from traditional physical assets to include financial instruments, intellectual property, and digital data.<sup>55</sup> This transformation is not a natural market development but the result of deliberate legal engineering that defines what qualifies as capital and who controls it.

As Weber noted, jurists are not passive interpreters but active architects of legal rationality. Pistor echoes this view, showing how lawyers endow assets with attributes such as priority, durability, universality, and convertibility—characteristics that make them function as capital.<sup>56</sup> This process disproportionately benefits specific economic actors, deepening wealth inequality. Crucially, Pistor highlights that the legal system itself assigns value to intangible assets, a dynamic clearly visible in private social security systems.<sup>57</sup> By applying her analysis, one can see how legal frameworks transform individual pension contributions into capital through attributes such as ownership, transferability, and enforceability. For example, private capitalization accounts, managed by firms like Chile’s AFPs, are legally structured as financial assets, granting private actors significant control over investment management and risk distribution. Pistor’s insights reveal that, while private property rights are traditionally framed as limits on state power, they in fact depend heavily on the state’s legal structures to define and protect these rights.<sup>58</sup> This dynamic creates comparative advantages for wealth holders, exacerbating inequality by enabling mechanisms to shield assets from redistribution. The legal coding of capital, as Pistor demonstrates, not only facilitates the commodification of previously unmarketed domains but also exposes the limitations of traditional redistributive methods like taxation.<sup>59</sup> Understanding these legal frameworks is essential to addressing the broader impacts of capitalism, particularly its erosion of democratic cohesion and its amplification of wealth disparities.

Social rights, as Emiliós Christodoulidis aptly describes, represents the “institutional embodiment of solidarity,” anchoring them collective responsibility and within constitutional frameworks.<sup>60</sup> Historically rooted in Roman law and later institutionalized through systems like social security and public services, solidarity evolved into a mechanism of reciprocity, ensuring contributions align with capacity and support is allocated by need.<sup>61</sup> However, contemporary political economy has increasingly subordinated this principle to market-driven frameworks, eroding its redistributive potential. Christodoulidis warns that framing social rights within property-based and individualist logics undermines their role in addressing collective inequality, a critique that echoes Moyn’s analysis of human rights advocacy’s complicity with neoliberalism.<sup>62</sup> Christodoulidis calls for a renewed commitment to solidarity, not as an abstract ideal, but as a dynamic constitutional principle capable of countering the privatization of risks and the erosion of social security.

<sup>54</sup>See Hanoch Dagan, Avihay Dorfman, Roy Kreitner & Daniel Markovits, *The Law of the Market*, 83 L. & CONTEMP. PROBS. i, ii–iv (2020).

<sup>55</sup>See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 2–3 (2019).

<sup>56</sup>See *id.* at 3, 54–55.

<sup>57</sup>See *id.* at 4.

<sup>58</sup>See *id.* at 3–4.

<sup>59</sup>See *id.* at 8.

<sup>60</sup>EMILIOS CHRISTODOULIDIS, *THE REDRESS OF LAW: GLOBALISATION, CONSTITUTIONALISM AND MARKET CAPTURE* 229, 231 (2021); see also Emiliós Christodoulidis, *Social Rights Constitutionalism: An Antagonistic Endorsement*, 44 J. L. & SOC’Y 123, 123–26 (2017).

<sup>61</sup>Alain Supiot, *Inaugural Lecture at Collège de France: The Grandeur and Misery of the Social State* (Nov. 29, 2012), in *NEW LEFT REV.*, July–Aug. 2013; see CHRISTODOULIDIS, *REDRESS OF LAW*, *supra* note 60, at 241–43.

<sup>62</sup>See CHRISTODOULIDIS, *REDRESS OF LAW*, *supra* note 60, at 249; see also MOYN *supra* note 15.

These global trends, characterized by the privatization of social security and the erosion of solidarity, find a particularly vivid manifestation in Chile's pension system. As we turn to examine the Chilean case, we explore how constitutional and legal frameworks have facilitated the market-driven transformation of social security, revealing both the promises and pitfalls of neoliberal reforms.

### C. Constitutionalizing Pension Privatization

It is tempting to treat the pension reform as a technocratic episode, a matter of economic management abstracted from deeper political questions. Yet to do so would be to miss the ways in which privatization became a constitutional event: a reordering of solidaristic obligations into contractual relations, a transfer of social risk from the polity to the atomized individual, all under the protective cover of constitutional legality. Privatization, in this sense, was not merely a response to fiscal pressures or ideological fervor but a redefinition of political membership itself, from participant in a community of mutual responsibility to self-entrepreneur of one's own future insecurity.

In this setting, the LPE approach offers more than a diagnostic lens; it offers a critical vantage point on the stakes of institutional design itself. Constitutions do not merely organize state power; they allocate vulnerability and security. They draw the lines between what is public and private, what is guaranteed and what is contingent, whose claims are prioritized and whose are deferred. In Chile, the constitutional enshrinement of property rights without a parallel commitment to substantive social guarantees produced a normative architecture in which market outcomes were reframed as democratic inevitabilities, and collective demands for justice were cast as threats to individual freedom.

The neoliberal transformation of Chile's constitutional framework redefined the right to social security and restructured the nation's pension system, embedding privatization into its legal and ideological core. Far from representing a retreat of the state, this shift was actively facilitated by state intervention, which rationalized and enforced a market-oriented system while simultaneously suppressing political dissent and marginalizing popular participation.<sup>63</sup> This transformation reflected a bureaucratic-authoritarian model, where technocratic decision-making replaced democratic processes, consolidating a specific political-economic order.<sup>64</sup> As Madariaga emphasizes, neoliberalism's endurance is deeply political, sustained by institutional designs that shield market reforms from democratic reversal through the creation of a pro-market elite via privatization, the exclusion of alternative policies, and the constitutional entrenchment of neoliberal principles.<sup>65</sup> As with North and Weingast's analysis, constitutional mechanisms such as the protection of property rights and oversight of financial systems played a pivotal role in legitimizing the state's intervention while ensuring economic stability.<sup>66</sup> The 1980 Constitution, rather than minimizing the state's role, functioned as a foundational instrument for

<sup>63</sup>See Iván Mauricio Obando Camino, *El derecho a la seguridad social en el constitucionalismo chileno: un continente en busca de su contenido* [*The Right to Social Security in Chilean Constitutionalism: A Continent in Search of its Content*], 10 ESTUDIOS CONSTITUCIONALES 289, 329–31 (2012) (Chile); see also Teodoro Ribera Neumann, *El Derecho a la Seguridad Social en la Jurisprudencia del Tribunal Constitucional: Comentarios a la Sentencia Rol N° 334* [*The Right to Social Security in the Jurisprudence of the Constitutional Court: Comments on Judgment No. 334*], 1 REVISTA DE DERECHO UNIVERSIDAD DE CONCEPCIÓN 179, 200–201 (2002) (Chile).

<sup>64</sup>See generally GUILLERMO O'DONNELL, *MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS* (1973).

<sup>65</sup>See ALDO MADARIAGA, *NEOLIBERAL RESILIENCE: LESSONS IN DEMOCRACY AND DEVELOPMENT FROM LATIN AMERICA AND EASTERN EUROPE* 4–9 (2020).

<sup>66</sup>See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803–05 (1989).

institutionalizing neoliberalism and redefining social security as a private, market-regulated domain.

This section examines the constitutional and legal foundations of Chile's radical social security privatization, focusing on the ideological origins and structural mechanisms that enabled this transformation. The ideological roots of this shift are grounded in the neoliberal agenda outlined in the 1973 Chicago-Boys-authored document *El Ladrillo*, which conceptualized the replacement of solidarity-based principles with market-driven policies. These ideas found their ultimate expression in the constitutional and legal framework established by the 1980 Constitution, which abolished solidarity as a guiding principle of social security and introduced a privatized pension system under Decree Law 3500. This framework prioritized private property protections and established individual capitalization accounts, managed by private pension fund administrators (AFPs), as the core of the new system. The discussion also situates this transformation within the historical context of the 1973 military coup, which dismantled the social democratic principles of the 1925 Constitution. The authoritarian regime's approach to constitutional reform ensured that the legal architecture of social security reflected its broader political agenda, institutionalizing privatization and eroding the redistributive and collective principles that once underpinned Chile's welfare state. By eliminating solidarity from both the legal and constitutional frameworks, the state redefined its role as a guarantor of market efficiency rather than collective welfare. This analysis concludes by reflecting on the broader consequences of this transformation, particularly the role of constitutional law in legitimizing and perpetuating neoliberal governance. By embedding privatization within Chile's constitutional infrastructure, the 1980 Constitution not only restructured social security but also redefined the relationship between the state, market, and citizenry.

Chile served as the experimental ground for a bold neoliberal constitutional project, one that sought to embed market supremacy within the legal framework of the state while curbing democratic pressures for redistribution and equality. Neoliberal theorists such as Friedrich Hayek, Milton Friedman, and James Buchanan actively engaged with Chile's political leadership during Pinochet's dictatorship, advancing a vision of constitutions not as expressions of popular sovereignty but as instruments to limit state power, safeguard property rights, and insulate markets from collective demands.<sup>67</sup> Their involvement—through lectures, consultations, and advocacy—made Chile a living laboratory for testing these ideas, establishing it as a key case of neoliberal constitutional experimentation.

At the core of this vision was Hayek's critique of the "decline of the rule of law," which he attributed to legal positivism, majoritarian democracy, and the pursuit of distributive justice.<sup>68</sup> For Hayek, the rule of law meant equality before the law and the absence of legal privileges—a principle he saw as fundamentally incompatible with redistributive policies, which required state intervention to allocate resources and direct individual actions.<sup>69</sup> Social security, in his view, undermined the liberal legal order by creating entitlements that conflicted with negative liberty and transformed private law into public law, subordinating general legal principles to serve specific interests.<sup>70</sup> Hayek's skepticism extended to international frameworks like the United Nations International Covenant on Economic, Social, and Cultural Rights, which he criticized for their vagueness and unenforceability within a liberal legal order.<sup>71</sup> Instead, he proposed market-based solutions for social programs, endorsing competitive mechanisms such as Friedman's

<sup>67</sup>See Benjamín Alemparte, *Towards a Theory of Neoliberal Constitutionalism: Addressing Chile's First Constitution-Making Laboratory*, 11 GLOB. CONST. 83, 86–87 (2022).

<sup>68</sup>FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* 127 (Routledge Press 2012) (1976).

<sup>69</sup>See 2 FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 117 (Bruce Caldwell ed., 2007); see also 17 FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 340–41 (2011).

<sup>70</sup>See HAYEK, *ROAD TO SERFDOM*, *supra* note 69, at 115, 133.

<sup>71</sup>HAYEK, *CONSTITUTION OF LIBERTY*, *supra* note 69, at 263–64.

voucher scheme, which he believed could be extended to retirement systems.<sup>72</sup> Friedman, in turn, championed self-funded retirement accounts as an alternative to redistributionist social programs, emphasizing individual responsibility over collective welfare. He viewed social programs as mechanisms to support individuals, not entrenched interest groups or labor unions, which he argued distorted the market's efficiency.<sup>73</sup> Buchanan further reinforced this framework by advocating for a "fiscal constitution" that would enshrine procedural constraints to prevent the unchecked growth of government programs.<sup>74</sup> Fearing political manipulation of social rights, Buchanan proposed qualified majority requirements for budget approvals to curb state expansion and fiscal irresponsibility.<sup>75</sup> Together, these thinkers shared a unified critique of redistributive policies as threats to the liberal constitutional order and argued for a constitutional framework designed to prioritize market efficiency, fiscal restraint, and individual autonomy.

Far from being a retreat from state intervention, neoliberalism—both in theory and in practice—represents a deliberate project to constitutionally reengineer the state as a facilitator of market rationality. Michel Foucault's analysis reframes neoliberal governance as a form of active state intervention aimed at fostering competition, which he argues is neither natural nor self-sustaining. For Foucault, the neoliberal state "regulates society by the market," instrumentalizing the rule of law to create and sustain market imperatives.<sup>76</sup> This governance model embeds legal and institutional mechanisms within a framework of economic rationality, transforming the state into an active agent of market optimization. As Van Horn and Mirowski argue, neoliberalism's constitutional ambition is not merely to secure market supremacy but to recalibrate societal norms and institutions in service of economic competition.<sup>77</sup> This section demonstrates that the neoliberal constitutional project in Chile was not simply a historical anomaly but a paradigmatic case of how legal frameworks can be designed to entrench economic ideologies.

The privatized pension system that came to define Chile's neoliberal transformation did not emerge solely in the post-coup context but was rooted in a pre-1973 vision. The foundational document *El Ladrillo* (*The Brick*), authored by the Chicago Boys and led by Sergio de Castro in May 1973, served as the blueprint for the neoliberal restructuring that would follow. Notably, Jaime Guzmán, one of the primary architects of the 1980 Constitution, participated in discussions around the document, signaling his familiarity with the proposed reforms to Chile's social security system before the constitutional drafting process began.<sup>78</sup> *El Ladrillo* became the economic playbook for the dictatorship, advocating for a radical reimagining of the state's role, critiquing its expansive involvement in social welfare, and championing private-sector solutions as a more efficient and equitable alternative to state paternalism.

With respect to social security, *El Ladrillo* presented an integrated vision that tied pension reform to the broader development of capital markets. The document's chapter on "Politics on Pension and Social Security" followed directly after a discussion of capital market policies, emphasizing the centrality of efficient resource allocation to economic growth. The authors argued that robust capital markets could mobilize savings and channel them toward productive

<sup>72</sup>HAYEK, CONSTITUTION OF LIBERTY, *supra* note 69, at 387.

<sup>73</sup>See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 180–92 (Univ. Chicago Press 2002) (1962).

<sup>74</sup>See JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 58–63 (1975).

<sup>75</sup>See *id.* at 151–69.

<sup>76</sup>MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978–79, at 164 (Michel Sennellart ed., 2008) (1979); see also WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 62–64 (2015).

<sup>77</sup>See Rob Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, in THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 139, 161 (Philip Mirowski & Dieter Plehwe eds., 2009).

<sup>78</sup>See SERGIO DE CASTRO, EL LADRILLO: BASES DE LA POLÍTICA ECONÓMICA DEL GOBIERNO MILITAR CHILENO [THE BRICK: FOUNDATIONS OF THE ECONOMIC POLICY OF THE CHILEAN MILITARY GOVERNMENT] 10 (1992).

investments, thereby generating stable economic growth.<sup>79</sup> This economic rationale underpinned the proposed pension system, which aimed to integrate individual savings into the broader economy, transforming workers into both savers and investors.

*El Ladrillo* criticized the existing pay-as-you-go (PAYG) pension system as inefficient, inequitable, and fiscally unsustainable. By the late 1970s, the system had fragmented into 35 separate social security funds (*cajas de previsión*) and over 150 pension regimes, creating significant disparities in benefits and eligibility criteria. Contributions from active workers were pooled to pay retirees, but there was no direct correlation between contributions and benefits. Rising costs, inflation, and administrative inefficiencies compounded the system's challenges, while demographic changes—such as declining birth rates and increased life expectancy—further strained its fiscal sustainability. The Chilean state played a critical role in sustaining this model through direct subsidies and tax revenues, but politically motivated reforms had expanded benefits without addressing structural flaws, deepening the financial burden on the state.<sup>80</sup>

To address these challenges, *El Ladrillo* proposed a dual-subsystem model. The first component, state-run and funded by taxes, would provide a minimum pension for Chileans over 65 who met work requirements—twenty-five to thirty years. The second, savings-based, would require individuals to contribute to private institutions managing inflation-adjusted, interest-generating funds. These funds, akin to pension or mutual funds, would ensure proportional benefits based on contributions, with any remaining balances inheritable.<sup>81</sup> The savings-based system was designed to promote equity, competition among fund managers, and administrative efficiency while maintaining regulatory oversight to prevent fraud and excessive risk-taking. Additionally, it envisioned financial flexibility, allowing fund managers to subcontract services to ensure optimal resource utilization.<sup>82</sup> The proposed model was not only a technical solution but also an ideological project aimed at reshaping the relationship between labor, capital, and the state. By shifting control of savings from the state to individuals, the system sought to transform workers into significant national savers, effectively blurring traditional tensions between labor and capital. In theory, this arrangement would “socialize” wealth through market mechanisms, circumventing the inefficiencies of state socialism while preserving the advantages of competitive markets.<sup>83</sup> The creation of pension funds would facilitate a transfer of wealth from the state to workers, positioning them as both economic agents and capital owners. Over time, this model promised broader participation, enhanced transparency, and socio-economic stability, aligning with the neoliberal ideal of an efficient and decentralized economy.<sup>84</sup>

The military coup of 1973 marked a pivotal moment in Chile's constitutional history, as the Military Junta swiftly declared its assumption of constituent power. While the 1925 Constitution remained nominally valid, this was contingent on its alignment with the dictatorship's reconstruction agenda. The Junta's approach to constitutional reform was not one of outright replacement but rather a reconfiguration—each provision was treated as a profound amendment to its predecessor, effectively reshaping the existing text to serve its ideological and political goals. This approach signaled an intent to overhaul Chile's constitutional framework while maintaining a façade of continuity. The 1925 Constitution holds particular significance in Chilean history as the first to incorporate social rights, including the right to social security.<sup>85</sup> It introduced

<sup>79</sup>See *id.* at 108–17.

<sup>80</sup>See LUIS HERNÁN VARGAS FAULBAUM, COMISIÓN ECONÓMICA PARA AMÉRICA LATINA Y EL CARIBE [ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARRIBBEAN] [CEPAL], REFORMAS DEL SISTEMA DE PENSIONES EN CHILE (1952–2008) (2018); Mauricio Soto, *The Chilean Pension Reform: 25 Years Later*, 12 PENSIONS: INT'L J. 98, 99–102 (2007).

<sup>81</sup>See DE CASTRO, *supra* note 78, at 130–33.

<sup>82</sup>See DE CASTRO, *supra* note 78, at 132–33.

<sup>83</sup>DE CASTRO, *supra* note 78, at 135.

<sup>84</sup>See DE CASTRO, *supra* note 78, at 134–36.

<sup>85</sup>See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P] art. 10, no. 14; see PABLO RUIZ-TAGLE, FIVE REPUBLICS AND ONE TRADITION: A HISTORY OF CONSTITUTIONALISM IN CHILE (1810–2020) 113–20 (2021).

guarantees aimed at protecting work and ensuring social security, embedding these principles into the constitutional framework. This commitment deepened in 1971 with the adoption of a constitutional reform also known as the “Statute of Democratic Guarantees” (Law No. 17.398), inspired by the International Covenant on Economic, Social, and Cultural Rights adopted by the United Nations in 1966. For the first time, the right to social security was explicitly articulated as an independent guarantee, with the State obligated to “adopt all measures aimed at satisfying the social, economic, and cultural rights necessary for the free development of personality and human dignity, for the comprehensive protection of the community, and to promote an equitable redistribution of national income.”<sup>86</sup> However, by 1976, the military regime, seeking to consolidate its authority and reassure its supporters, enacted a series of constitutionally ranked provisions. Among these was Constitutional Act No. 3, which repealed the 1971 provision but retained elements of its ethos. It framed social security as a “system” intended to meet individual and family needs in a manner that was “uniform, solidary, and sufficient.”<sup>87</sup> This language reflected a transitional moment—while the principle of solidarity was nominally preserved, the seeds of its eventual exclusion under the 1980 Constitution were sown.

The 1980 Constitution marked a decisive departure from earlier principles of solidarity and sufficiency in social security, reflecting the neoliberal reorientation of Chile’s legal framework. Drafted under the guidance of the *Comisión de Estudios de la Nueva Constitución* or Commission for the Study of the New Constitution (CENC), this shift was informed by the Military Junta’s intention to implement a comprehensive reform of the social security system. Following the advice of experts like Ramón Camiruaga, the Commission opted for a minimalist regulatory approach, aimed at operationalizing the principle of subsidiarity while reducing the state’s role to one of supervision rather than direct provision.<sup>88</sup> This deliberate restructuring underscored the protection of private property and economic freedoms, granting greater autonomy to intermediate bodies. As articulated in Article 1, the Constitution enshrined the principle that the state should intervene only when these bodies were unable to fulfill their functions or when broader coordination was inherently required (Article 1).

The subsidiarity principle, a cornerstone of the 1980 Constitution, was further refined by Jaime Guzmán, who emphasized that the state’s role should be strictly limited, avoiding encroachment into areas where private entities could operate more effectively and efficiently.<sup>89</sup> This vision extended to the regulation of social security, which was framed within the broader “Economic Public Order” inaugurated by the new constitutional text. This framework, grounded in subsidiarity, consciously excluded the principle of solidarity, signaling a stark break from earlier constitutional commitments to collective welfare.<sup>90</sup> In doing so, the Constitution institutionalized a market-oriented approach to social security, aligning with the broader ideological shift toward neoliberal governance.

Despite numerous political changes over the decades, the regulation of the right to social security under Article 19, No. 18 of the 1980 Constitution has remained unchanged, underscoring the enduring influence of its neoliberal foundations.<sup>91</sup> Introduced through Decree Law No. 3.464, this provision enshrined the “right to social security” but imposed significant constraints on its exercise, requiring a qualified quorum for any related legislative changes. Additionally, the

<sup>86</sup>CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 10, no. 16 (1971); see also Héctor Humeres Noguera, *El Derecho a la Seguridad Social en las Constituciones Políticas de Chile: Una Nueva Panorámica (1833–2012)* [*The Right to Social Security in the Political Constitutions of Chile: A New Overview (1833–2012)*], 2 REVISTA CHILENA DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL 29, 31–32 (2011) (Chile).

<sup>87</sup>Decree Law No. 1552 art. 1 No. 21, Septiembre 11, 1976, DIARIO OFICIAL [D.O.] (Chile).

<sup>88</sup>COMISIÓN DE ESTUDIOS DE LA NUEVA CONSTITUCIÓN [COMMISSION FOR THE STUDY OF THE NEW CONSTITUTION] [CENC], Sess. No. 204 (Apr. 27, 1976) (Chile).

<sup>89</sup>CENC, Sess. No. 388 (June 27, 1978) (Chile).

<sup>90</sup>CENC, Sess. No. 205 (Apr. 28, 1976) (Chile); Humeres, *supra* note 86, at 41.

<sup>91</sup>See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19, no. 18.

provision assigned the state a supervisory role focused on “guaranteeing access” to basic uniform benefits, whether provided by public or private institutions. This minimalist formulation reflects the drafters’ awareness of the Junta’s plan for radical social security reform. As records from the CENC’s meetings reveal, the drafters intentionally left space for legal development, limiting the constitutional provision to a skeletal framework that could accommodate the regime’s sweeping policy changes.<sup>92</sup>

In this context, the strong constitutional protection of the right to social security has significant implications for potential reforms. Some argue that fundamentally altering the Chilean pension system would necessitate not only legal amendments but also a profound revision of the Constitution itself, as these changes would conflict with the entrenched guarantees of private property and the neoliberal principles embedded in the current framework.<sup>93</sup>

In 1978, the appointment of José Piñera as the Military Junta’s Minister of Labor by Pinochet marked a pivotal moment in Chile’s neoliberal transformation, as he spearheaded a radical overhaul of the country’s social security system. Piñera argued that Chile, having stabilized its macroeconomic indicators, now required a “strategy of economic liberalization” to modernize its institutions and align them with the broader constitutional and economic reforms of the regime.<sup>94</sup> This strategy, dubbed the “Seven Modernizations,” encompassed sweeping reforms across labor, social security, health, education, mining, agriculture, and regionalization, cementing neoliberalism as the guiding ideology of Chile’s governance model. Alfred Stepan observed that by 1978, the regime’s reforms had evolved into a more sophisticated structural overhaul, heavily influenced by the ideas of Friedrich Hayek and public-choice theorists such as James Buchanan and Gordon Tullock.<sup>95</sup> Social security reform stood as the centerpiece of this transformation, directly tied to the restructuring of Chile’s financial system. The existing pension model, was perceived by Piñera as a fiscal burden and a mechanism for securing privileges through political lobbying. He criticized this model for violating the principle of equality before the law, a foundational element of Hayek’s philosophy, and described it as a “perverted” democracy where political power facilitated the distribution of sector-specific benefits rather than serving the common good.<sup>96</sup>

Piñera’s vision for social security reform was profoundly shaped by Friedman’s ideas, particularly those articulated in Chapter XI of *Capitalism and Freedom*. Piñera often cited this chapter as the inspiration behind his belief that social security could and should be privatized in a free society. In his critique of the U.S. Social Security program, Friedman had argued that retirement security should be based on individual responsibility, allowing citizens to purchase private annuities rather than relying on state-run programs.<sup>97</sup> Drawing an analogy to automobile insurance, Friedman posited that while state laws may mandate the purchase of insurance, they need not require a state monopoly to provide it. This framework resonated with Piñera, who sought to dismantle Chile’s state-managed pension system and replace it with a privatized, market-oriented model.

The reforms introduced by Piñera established a new system of individual capitalization accounts managed by private Pension Fund Administrators (AFPs). Workers were required to save for their retirement by contributing to these accounts, which AFPs invested in capital markets in exchange for administrative commissions. The state’s role was reduced to regulating the private market to ensure compliance and transparency. Piñera emphasized that the new system was built

<sup>92</sup>CENC, Sess. No. 403 (July 18, 1978) (Chile).

<sup>93</sup>See Florencia Larrain, *El Sistema Privado de Pensiones en Chile y sus Resguardos Constitucionales* [*The Private Pension System in Chile and its Constitutional Safeguards*], 39 REVISTA CHILENA DE DERECHO 541, 546–49 (2012) (Chile).

<sup>94</sup>JOSÉ PIÑERA, *EL CASCABEL AL GATO: LA BATALLA POR LA REFORMA PREVISIONAL* 10 (1991).

<sup>95</sup>See Alfred Stepan, *State Power and the Strength of Civil Society in the Southern Cone of Latin America*, in *BRINGING THE STATE BACK IN* 317, 322 (Peter B. Evans, Dietrich Rueschemeyer & Theda Skocpol eds., 1985).

<sup>96</sup>PIÑERA, *supra* note 94, at 3–4.

<sup>97</sup>See FRIEDMAN, *supra* note 73, at 183–85.

on the principles of free choice and competition, aiming to dismantle inefficient state monopolies while fostering individual financial responsibility.<sup>98</sup> Upon retirement, workers could use the funds accumulated in their accounts to purchase life pensions, ensuring a direct correlation between contributions and benefits.<sup>99</sup> This transformation of Chile's social security system was not merely a policy shift but a paradigmatic redefinition of the relationship between the state, the individual, and the market.

The enactment of Decree Law 3500 in 1980 marked a pivotal moment in the restructuring of the country's social security framework.<sup>100</sup> Coinciding with the enactment of the new Constitution, at its core, the law institutionalized the principle of subsidiarity, emphasizing workers' ownership of their pension funds as a fundamental component of property rights. Explicitly declaring that "the resources derived from contributions made by the worker shall always be their property," the law redefined retirement savings as constitutional and legally protected assets, enshrined within Chile's constitutional doctrine and upheld by the Constitutional Court under Article 19, No. 24 of the Constitution.<sup>101</sup> This recognition of property rights, also reflected in the Civil Code (arts. 565 and 583), has been pivotal in the evolution of constitutional and civil law and its application to modern issues. The property rights, sometimes referred to as a "distortion" of property rights or over-propertization, have been increasingly protected through the *recurso de protección*, a key judicial claim for defending subjective rights related to incorporeal assets.<sup>102</sup> Furthermore, the jurisprudence has indicated that imposing severe regulations on retirement options, such as life annuities, would infringe upon the affiliate's property rights over their pension funds, thus limiting legislative power to affect acquired rights and restricting the scope of legal limitations on property.<sup>103</sup>

However, not everything about Decree Law 3.500 was a straightforward process. According to recently declassified documents, General Pinochet had his own reasons for skepticism.<sup>104</sup> A secret act by the Military Junta reveals the role of Minister Piñera in persuading the General of the benefits of the legislative project just one month before its enactment. Secret Act No. 398-A sheds light on Pinochet's strategic concerns during the discussions about the new pension system. He expressed significant distrust toward private sector actors, stating that he believed businessmen were not yet capable of managing large sums of money and sarcastically referring to them as "artists" who might exploit the system: "Every measure adopted, Mr. Minister, every single one, is insufficient, because here we have 'artists' . . . Mark my words: someone will eventually emerge and start exploiting it."<sup>105</sup> This comment underscores Pinochet's apprehension about the system's vulnerability to corruption and irregularities. Additionally, the act reveals his calculated effort to shape public perception regarding the exclusion of the Armed Forces from the new system:

<sup>98</sup>See PIÑERA, *supra* note 94, at 18–25.

<sup>99</sup>See PIÑERA, *supra* note 94, at 19.

<sup>100</sup>See Decree Law No. 3.500, Noviembre 13, 1980, DIARIO OFICIAL [D.O.] (Chile).

<sup>101</sup>Decree Law No. 3.500 art. 20(G)(H), Noviembre 13, 1980, DIARIO OFICIAL [D.O.] (Chile).

<sup>102</sup>See, e.g., Alejandro Vergara Blanco, *La Propietarización de los Derechos [The Ownership of Rights]*, 14 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DE VALPARAÍSO 281, 281–91 (1991) (Chile); see generally also ALEJANDRO GUZMÁN BRITO, *LAS COSAS INCORPORALES EN LA DOCTRINA Y EN EL DERECHO POSITIVO* (1995); Hernán Corral Talciani, *Propiedad y Cosas Incorporeales: Comentarios a Propósito de una Reciente Obra del Profesor Alejandro Guzmán Brito [Property and Incorporeal Things: Comments on a Recent Work by Professor Alejandro Guzmán Brito]*, 23 REVISTA CHILENA DE DERECHO 13, 13–18 (1996) (Chile).

<sup>103</sup>Tribunal Constitucional [T.C.] [Constitutional Court], Decision No. 334 of 2001, Requerimiento formulado por diversos senadores para que el Tribunal resuelva la constitucionalidad del proyecto de ley, que modifica el Decreto Ley No. 3500, de 1980 [Request made by several senators for the court to resolve the constitutionality of the bill, which modifies Decree Law No. 3500 of 1980] (Chile); Ribera Neumann, *supra* note 63, at 200.

<sup>104</sup>See BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE, *Historia del Decreto Ley 3500 [History of Decree Law 3500]*, <https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7552/> (last visited Aug. 13, 2025) (Chile).

<sup>105</sup>Acta Secreta [Secret Act] No. 398-A, Junta Militar de Gobierno [Military Governing Board], Octubre 14 1980, at 4, 7 (Chile).

The idea is that it should not appear that we are the exception, that we include everyone in the system, but we ourselves do not participate in it . . . the wording must conceal what we are going to do; otherwise, we will look very bad in the eyes of the public.<sup>106</sup>

This statement highlights Pinochet's deliberate strategy to avoid public criticism and create an illusion of fairness while preserving institutional privileges.

Decree Law 3.500 introduced a market-oriented pension system that fundamentally departed from the traditional Pay-As-You-Go (PAYG) model. This system was retained exclusively for the Armed Forces, while the rest of the population was forced to adopt the new one. Workers were required to contribute 10% of their taxable income into individual capitalization accounts, managed by AFPs, which assumed responsibility for collecting, investing, and disbursing funds in compliance with legal standards.<sup>107</sup> This framework shifted the burden of retirement savings onto individuals, emphasizing efficiency and sustainability while fostering personal financial responsibility. By tying retirement benefits directly to individual contributions and market performance, the system effectively dismantled the collective pooling of resources inherent to the PAYG model.

AFPs operated under a tightly regulated competitive framework aimed at ensuring profitability and risk management. Article 45 outlined permissible investments, including government securities, corporate bonds, real estate instruments, and even derivatives such as options and futures, mandating diversification to balance returns with security. Regulatory oversight by the Central Bank and the Superintendency of AFPs enforced compliance with these standards, requiring AFPs to maintain reserve funds to cover shortfalls if investment performance fell below the minimum benchmark.<sup>108</sup> This dual emphasis on profitability and risk mitigation was designed to instill confidence in the system while promoting prudent investment strategies. Competition among AFPs was central to the system's design, granting contributors the ability to switch administrators at no cost to encourage efficiency and improve service quality.<sup>109</sup> AFPs derived their revenues from commissions charged on contributions or account balances, with transparency requirements obligating them to provide monthly reports on account performance and associated fees.<sup>110</sup> This structure reflected the broader neoliberal commitment to market-driven solutions, positioning competition and consumer choice as mechanisms for improving the system's functionality.

As anticipated, Decree Law 3.500 also embodied Pistor's concept of the legal coding of capital, where law transformed assets into capital by assigning them attributes such as priority, durability, universality, and convertibility. Mandatory pension contributions were legally shielded from creditors and treated as property rights, ensuring contributors' claims took precedence. Durability was institutionalized through state-backed protections that preserved these rights over time, even amidst market volatility. Universality was achieved by binding all participants—contributors, AFPs, and regulators—within a cohesive legal framework, ensuring the enforceability of these rights across financial markets. Convertibility enabled retirement savings to function as capital within investment markets, generating returns while retaining their protected status. However, Pistor's critique of the legal coding of capital highlights the inequities inherent in this system. While contributors assumed the investment risks, AFPs profited from management commissions, reflecting the broader neoliberal trend of prioritizing private entities over public welfare.

The pension system's transformation, legally and constitutionally codified, yielded profound and lasting consequences that reshaped the country's socio-economic and political landscape.

<sup>106</sup>*Id.* at 99.

<sup>107</sup>See Decree Law No. 3500 art. 17, 23, Noviembre 13, 1980, DIARIO OFICIAL [D.O.] (Chile).

<sup>108</sup>See *id.* art. 37.

<sup>109</sup>See *id.* art. 32.

<sup>110</sup>See *id.* art. 28, 31.

Foremost among these was the depoliticization of workers. By tying pension benefits directly to individual contributions, the system dismantled opportunities for collective action and effectively eliminated the influence of pressure groups demanding sector-specific privileges. This design reflected the neoliberal emphasis on market mechanisms as inherently optimal solutions to societal challenges, sidelining redistributive policies and collective bargaining. This constitutional project's consequences were profound: it produced a deep financialization of everyday life, channeling workers' savings into capital markets, enriching a new class of financial actors, and entrenching economic inequality under the banner of "freedom" and "efficiency." It depoliticized questions of welfare and security, framing them as technical matters of individual planning rather than collective concern, and disciplined democratic energies by embedding within law and policy the premise that market outcomes were neutral and inevitable, not the product of political choice. This depoliticizing logic was further entrenched at the constitutional level: The Constitution prohibits individuals holding leadership positions in trade unions or neighborhood organizations from running for Congress while in office, thereby legally excluding organized labor from formal political representation.<sup>111</sup> Through this lens, workers were "disciplined" by the logic of the market, transformed into "indirect partners" in the financial sector. This alignment with neoliberal ideology aimed to minimize resistance to the capitalist system by embedding workers within the financial framework, reducing their incentive to challenge systemic inequalities.<sup>112</sup>

Additionally, privatization facilitated a massive transfer of wealth from the public sector to private entities, estimated at 20% of Chile's GDP. Within just two months of implementing the reforms, Chile's two largest economic groups had already gained control over these newly privatized pension funds, significantly amplifying wealth concentration. This redistribution not only entrenched existing economic disparities but also made it increasingly challenging to introduce meaningful reforms in subsequent decades, as concentrated financial power translated into political influence.<sup>113</sup> Over time, this concentration of wealth and influence fortified the structural and ideological foundation of the privatized system, creating entrenched interests that resisted change. A notable consequence of this privatization was the rise of a powerful and well-organized interest group: the AFPs association. Representing the private administrators of pension funds, this organization became a dominant actor in the national discourse on social security. It consistently lobbied against constitutional and legal reforms that could threaten its members' economic interests, framing its efforts as the defense of individual property rights and financial stability. This influence demonstrates how the reforms not only redefined the economic role of the state but also reshaped the balance of political power, effectively institutionalizing a new actor that prioritized market imperatives over broader societal considerations.

The initial years of implementing Chile's privatized pension system strategically framed the reform as a technocratic solution, deliberately distancing social security from its historical association with redistributive policies and collective welfare. During this period, the prevailing constitutional doctrine defined the right to social security as a set of norms with an "economic projection."<sup>114</sup> Similarly, constitutional jurisprudence viewed pension rights as integral to the configuration of the "Economic Public Order," recognizing their dual social and economic purpose.<sup>115</sup> This perspective sought to depoliticize the issue by framing social security within the "Economic Public Order," which was conceptualized as an apolitical and neutral technical framework. As articulated by Cea, the "Economic Public Order" was defined as the "set of principles and legal norms that organize the country's economy and empower the authorities to

<sup>111</sup>See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 57, no. 7.

<sup>112</sup>ALEJANDRO FOXLEY, *LATIN AMERICAN EXPERIMENTS IN NEOCONSERVATIVE ECONOMICS* 105–06 (1983).

<sup>113</sup>See *id.* at 106; see also PAUL CRAIG ROBERTS & KAREN LAFOLLETTE ARAUJO, *THE CAPITALIST REVOLUTION IN LATIN AMERICA* 32 (1997).

<sup>114</sup>Arturo Yrarrázaval Covarrubias, *Principios Económicos de la Constitución de 1980 [Economic Principles of the 1980 Constitution]*, 14 *REVISTA CHILENA DE DERECHO* 97, 106–07 (1987) (Chile).

<sup>115</sup>Tribunal Constitucional [T.C.] [Constitutional Court], Decision No. 519 of 2006, consideration 12 (Chile).

regulate it in harmony with the national society's values as formulated in the Constitution."<sup>116</sup> However, as some scholars have observed, this framework remains ambiguous, with no clear consensus on its precise essence or scope despite doctrinal definitions and judicial recognition.<sup>117</sup> The next and final section will explore and reflect over the system's further contestation and legitimation.

The contemporary Chilean struggle over pension reform—and more broadly, over constitutional transformation—emerges as a struggle over the very meaning of democratic self-rule. It is a contest between two conceptions of law: one that defers to market distributions as natural facts, and another that reclaims law's constitutive role in crafting a polity where solidarity is not an accident of charity but a principle of justice. Whether Chile, and by extension other societies structured by similar neoliberal inheritances, can re-anchor social rights within constitutional democracy remains an open and urgent question.

#### D. Legitimation and Contestation

This section examines the role of law in legitimizing the privatization of Chile's social security and pension systems while exploring the reintroduction of solidarity through legislative and judicial developments. It does so by analyzing how different actors have either legitimized the private pension order or challenged it, particularly as Chile entered the 21st century. The section distinguishes between the strategies of the AFP system's defenders—through legal, political, and ideological mechanisms—and those of its challengers, including social movements, litigation, and constitutional reform initiatives. From an LPE approach, it outlines the actors and their strategies and the ways they engage with the process of legitimation and contestation. Following the constitutional exclusion of solidarity principles in the 1980 Constitution, Chile's transition to democracy ushered in reforms aimed at addressing the social costs of the privatized system. Crucially, the section shows why the 1980 reform proved so resistant to change: it created a self-reinforcing political economy, with legal structures—such as constitutional protections for private property and economic freedoms—fortified by powerful private interests and legitimating discourses that framed privatization as both modern and efficient. The section highlights key legislative milestones, such as the establishment of the Solidarity Pillar in 2008 and its evolution into the Universal Guaranteed Pension (PGU) in 2022, as well as judicial interpretations affirming social security as a right linked to human dignity. It also delves into the challenges to the privatized model posed by legislative reforms, judicial claims, and social movements like “No + AFP.” Additionally, the section explores the paradoxical impact of the three pension fund withdrawals approved during the COVID-19 pandemic, which reinforced the privatized system while influencing Chile's two recent constitution-making processes. Together, these developments illustrate the ongoing legal, social, and political debates surrounding solidarity and the privatized pension framework in Chile.

During the dictatorship, the notion of “popular capitalism” emerged as a central ideological strategy to legitimize the privatized economic model imposed by the regime. Introduced in the mid-1980s as part of a broader reprivatization effort, this policy aimed to restore private control over banks, AFPs, and state-owned enterprises that had been intervened during the 1981–1983 economic crisis. Promoted as both a normalization and democratizing measure, popular capitalism combined recapitalization with policies designed to diffuse share ownership among workers and small investors—often facilitated by subsidized credit and favorable legal conditions.<sup>118</sup> The regime portrayed this initiative as a pathway toward mass economic

<sup>116</sup>José Luis Cea Egaña, *Notas Sobre Orden Público Económico*, 135 GACETA JURÍDICA 18, 18–19 (1991) (Chile).

<sup>117</sup>Arturo Fermandois, *El Orden Público Económico Bajo la Constitución de 1980* [*The Economic Public Order Under the 1980 Constitution*], 4 IUS PUBLICUM 63, 63–64 (2000) (Chile).

<sup>118</sup>See generally Mario Valenzuela S., *Reprivatización y capitalismo popular en Chile* [*Reprivatization and popular capitalism in Chile*], 33 ESTUDIOS PÚBLICOS 175 (1989).

participation, constructing the image of Chile as a “nation of owners” where even workers became shareholders through their AFP accounts. This narrative, which depicted privatization as emancipatory and inclusive, served to legitimize the new neoliberal order by linking private ownership with social advancement. However, as later critiques and empirical evidence revealed, this promise was largely symbolic: contributors had no real control over their pension funds, and ownership remained concentrated in a small financial elite.<sup>119</sup> The 1981–1983 crisis further exposed the model’s contradictions, as the state absorbed financial losses while private actors retained profits. Ultimately, while popular capitalism functioned as a potent legitimation strategy, it failed to deliver on its egalitarian promises, highlighting the disconnect between the rhetoric of inclusion and the realities of economic concentration. Drawing on Foucault’s concept of governmentality, Chile’s pension regime can be understood not only as a set of institutions but as a mode of governance that produced entrepreneurial subjects. Through the institutionalization of individual accounts, the law actively reconfigured social protection into a matter of personal investment, responsabilizing citizens to manage their own future welfare.<sup>120</sup> This internalization of market rationality—encouraging each contributor to see themselves as a “pension saver” rather than a rights-bearing worker—played a central role in legitimizing the system for decades, even in the face of structural inequities.

In the country’s highly concentrated economy, profitability plays a central legitimating role—particularly in sectors shaped by privatization. From an LPE perspective, the enduring power of the AFP can be traced to its extraordinary profitability and market structure. Historically, AFPs have yielded returns on equity far exceeding those in comparable industries, nearly doubling the profitability of commercial banks between 1990 and 2004—an indicator of sustained rent-seeking within an oligopolistic framework. This exemplifies the active role of law in structuring economic distribution: legal rules mandating individual contributions and allowing high management fees created a lucrative financial sector with entrenched interests.<sup>121</sup> Pension funds themselves became major shareholders in Chilean businesses, further embedding the system into the country’s economic fabric. A study by Fernando López, analyzing the period 2006–2015, confirms that AFPs continued to earn profits well above competitive benchmarks, with returns nearly five times higher than what would be justified by their market risk.<sup>122</sup> This excess was facilitated by low affiliate mobility and weak competitive pressures, enabling firms to charge high fees without fear of losing clients. As a result, the AFP system not only became economically entrenched but also legally and politically resilient.

As Eduardo Silva argues in his seminal work *The State and Capital in Chile: Business Elites, Technocrats, and Market Economics*, originally published in 1996, Chile’s neoliberal transformation cannot be fully explained by the authoritarian insulation of technocrats during the Pinochet dictatorship. Instead, Silva emphasizes the formative role of business elites and landowners, whose shifting coalitions—with varying power resources—actively influenced the design, sequencing, and implementation of market reforms.<sup>123</sup> These actors did not merely adapt to neoliberalism; they helped consolidate it through strategic alliances with the state. This dynamic is especially evident in the development of the pension system, where the emergence of a highly profitable AFP industry illustrates the entrenchment of neoliberal logics through mechanisms of

<sup>119</sup>See Barbara E. Kritzer, Stephen J. Kay & Tapen Sinha, *Next Generation of Individual Account Pension Reforms in Latin America*, 71 SOC. SEC. BULL. 35, 50–51 (2011) (explaining that by the late 1990s, the market had consolidated into a few dominant firms, often owned by large domestic conglomerates or foreign financial institutions such as American International Group and Bankers Trust, which already held significant ownership stakes as early as 1989).

<sup>120</sup>See FOUCAULT, *supra* note 76, at 2; see also BROWN, *supra* note 76, at 47–50.

<sup>121</sup>See Kritzer et al., *supra* note 119, at 35–76.

<sup>122</sup>See Fernando López, *Industria de AFP chilena: ¿cuánto gana y cuánto debería ganar?* [Chilean pension fund industry: how much does it earn and how much should it earn?], 31 REVISTA DE ANÁLISIS ECONÓMICO, 101, 113 (2016) (Chile).

<sup>123</sup>See generally EDUARDO SILVA, *THE STATE AND CAPITAL IN CHILE: BUSINESS ELITES, TECHNOCRATS, AND MARKET ECONOMICS* (Routledge 2024) (1996).

elite capture and institutional co-optation. The phenomenon of revolving doors—where AFP executives often held or nominated high-level government positions—alongside the aggressive lobbying power of the AFP Association, created formidable barriers to reform. These interlocking networks of profit, ownership, and political influence translated into structural power that shielded the pension model from substantive change. In this context, the material constitution—understood as the configuration of political power grounded in economic interests—was shaped and defended by actors mobilized in defense of the AFP system. Investigations such as those by CIPER Chile have documented how AFP boards have been systematically populated by former ministers, legislators, and regulators from across the political spectrum, revealing a deliberate strategy of elite integration.<sup>124</sup> This tight entanglement between economic and political elites has underpinned the legitimation and durability of Chile’s pension model, reinforcing a neoliberal institutional framework deeply embedded in the country’s democratic order.

An LPE perspective reveals that the post-1990 resilience of Chile’s privatized pension system cannot be understood solely through legal formalism or market logic; rather, it reflects the strategic entrenchment of powerful economic interests, most notably the AFP Association (AAFP) and its political allies. As Bril-Mascarenhas and Maillet demonstrate, the pension industry cultivated its influence through a dual strategy: long-term institutional investments that built structural power and short-term tactical responses aimed at neutralizing reform threats.<sup>125</sup> These efforts involved consistent lobbying, participation in official reform commissions, and aggressive public campaigns that mobilized legal discourses—particularly around property rights and freedom of choice—to frame privatization as both legitimate and untouchable. The AAFP, acting as a unified corporate front for the pension fund administrators, has played a central role in this process by deploying vast financial and communicational resources to resist solidaristic alternatives. Notably, the Association’s campaigns, in the context of the recent pension reform discussions—such as the 2022–2023 “#YoQuieroElegir” initiative—framed individual pension accounts as expressions of personal liberty and private property, even as they were financed using fees paid by contributors themselves. This reveals how legal and ideological narratives are tightly interwoven with material interests: by invoking constitutional protections and leveraging its privileged access to legislative debates, the AFP industry has not merely defended the status quo but actively shaped the boundaries of what is politically and legally feasible in Chilean pension policy. Such dynamics underscore the importance of analyzing how business power operates through law, discourse, and institutional design to preserve neoliberal entitlements in democratic settings.

Yet, legislative and judicial developments in Chile illustrate the resurgence of solidarity as a foundational principle in the country’s social security framework, despite its deliberate exclusion from the 1980 Constitution. While the constitutional omission of solidarity reflected the neoliberal agenda of the Pinochet era, subsequent reforms have actively reintroduced this principle, underscoring its critical role in addressing socioeconomic inequalities. The 2008 reform under Law No. 20.255 established the Solidarity Pillar, which provided financial support to individuals without pension rights, introduced a gender-based child bonus for women, and marked a pivotal step toward a mixed pension system.<sup>126</sup> This was further advanced by the 2022 Universal Guaranteed Pension (PGU) under Law No. 21.419, which expanded coverage to nearly 600,000 previously underserved individuals and increased benefits. Solidarity principles are also

<sup>124</sup>CENTRO DE INVESTIGACIÓN PERIODÍSTICA [CENTER FOR JOURNALISTIC INVESTIGATION] [CIPER], *Nómina de Directores y Ejecutivos de AFP con Nexos Políticos* [List of AFP Directors and Executives with Political Connections], CIPER (June 29, 2020), <https://ciperchile.cl/wp-content/uploads/Nomina-directores-y-ejecutivos-AFP-con-nexos-pol%C3%ADticos.pdf> (Chile).

<sup>125</sup>See Tomás Bril-Mascarenhas & Antoine Maillet, *How to Build and Wield Business Power: The Political Economy of Pension Regulation in Chile, 1990–2018*, 61 *LAT. AM. POLS. & SOC’Y*, 101, 101–03 (2019).

<sup>126</sup>See generally Alberto Arenas, *Historia de la Reforma Previsional Chilena: Una Experiencia Exitosa de Política Pública en Democracia* (Int’l Lab. Org., Working Paper No. 994687853402676, 2010); see ALEXIS GUARDIA B., REGINA CLARK M. & GONZALO D. MARTNER, *ROMPIENDO MITOS: LA REFORMA DEL SISTEMA DE PENSIONES EN CHILE* (2007).

reflected in the health system through initiatives like Plan AUGE. Additionally, programs such as Chile Solidario and the Solidarity Unemployment Fund (Fondo de Cesantía Solidario, FCS) demonstrate solidarity-based mechanisms: Chile Solidario provides direct financial support to vulnerable families, while the FCS functions as a collective fund, financed by employer and state contributions, to assist all affiliated workers during periods of unemployment. Judicial interpretations by the Constitutional Court have reinforced these reforms by linking the right to social security to human dignity and other social rights, such as education and health, thereby broadening its scope and essence beyond the constraints of Article 19, No. 18 of the Constitution.<sup>127</sup> The Court has consistently affirmed the state's responsibility to protect social security rights through both public and private actors, framing solidarity as essential to the realization of human dignity.<sup>128</sup> However, despite these advancements, the Chilean pension system continues to face criticism for its reliance on market-based mechanisms, which perpetuate pension insufficiency and high administrative costs due to private sector involvement.<sup>129</sup> The evolution of Chile's social security framework thus reflects ongoing tensions between neoliberal policies and demands for greater social justice, with solidarity serving as a contested yet enduring principle.

The intense social criticism directed at Chile's individual capitalization pension system which had a peak in 2016 reflected a deeper conflict over the privatization of social rights and the role of solidarity in public policy. At the heart of this critique was the rise of the "No + AFP" movement, a powerful grassroots coalition advocating for a fundamental transformation of the pension system. Here, the No + AFP movement was at the centerpiece of the contestation narrative. Beginning around 2013 and gaining massive traction by 2016, the No + AFP movement emerged as a broad citizens' campaign demanding an end to the private pension system. In July 2016, it organized one of Chile's largest demonstrations in decades, with hundreds of thousands marching in Santiago and other cities. Driven by the convergence of traditional labor-union activism and digitally coordinated, citizen-led mobilization via social media, the movement expanded its base, amplified public critique of the pension system, and fostered new, decentralized forms of political participation beyond formal organizations.<sup>130</sup> It unified diverse groups—labor unions, retirees, students, and middle-class workers—under the slogan "No más AFP," signaling a profound legitimacy crisis for the privatized pension model. The scale and visibility of these protests revealed the depth of discontent and the momentum building years before the 2019 social unrest. Rejecting the neoliberal model of individual capitalization, the movement proposed a solidaristic alternative financed collectively by workers, employers, and the state.<sup>131</sup> In theoretical terms, the No + AFP movement can be interpreted as a response to a legitimation crisis in the Habermasian sense, wherein the neoliberal state—after decades of privileging market efficiency over social protection—could no longer justify itself to a citizenry facing precarious retirements.<sup>132</sup> The movement challenged the moral and institutional foundations of the AFP model, forging a counter-hegemonic claim that social security is not a private commodity but a public right rooted

<sup>127</sup>Tribunal Constitucional [T.C.] [Constitutional Court], Decision No. 1287 of 2008, consideration 23; Tribunal Constitucional Decision No. 790 of 2007, consideration 31; Tribunal Constitucional Decision No. 1572 of 2009, consideration 56.

<sup>128</sup>Tribunal Constitucional [T.C.] [Constitutional Court], Decision No. 1710 of 2010, consideration 131; Tribunal Constitucional, Decision No. 976 of 2007, consideration 37.

<sup>129</sup>See Silvia Borzutzky, *Pension Market Failure in Chile: Foundations, Analysis and Policy Reforms*, 28 J. COMP. SOC. WELFARE 103, 103–05 (2012).

<sup>130</sup>See Natalia Miranda Torres, *Activismos Convergentes En El Movimiento "No más AFP" [Converging Activisms in the "No More AFP" Movement]*, 16 PERSPECTIVAS DE LA COMUNICACIÓN 1, 4–6 (2023) (Chile).

<sup>131</sup>See Luis Mesina, *Chile y las AFP. A 36 años un sistema totalmente fracasado [Chile and the AFPs. After 36 years, a completely failed system]*, 204 EL DIARIO 86, 88–90 (2017); Camila Andrade, *¿Cuánto más soporta el Pilar Solidario? La experiencia de la vejez en el Chile actual [How much longer can the Solidarity Pillar bear? The experience of old age in contemporary Chile]*, in HILOS TENSADOS: PARA LEER EL OCTUBRE CHILENO 217, 217–20 (Kathya Araujo ed., 2019).

<sup>132</sup>See JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 46–50, 68–75 (1975).

in solidarity. This demand for systemic reform extended beyond technical adjustments, calling instead for constitutional changes to rectify the perceived injustices perpetuated by the current system. The movement's influence reached its zenith in 2019, when it mobilized hundreds of thousands of Chileans in nationwide protests that underscored widespread dissatisfaction with the status quo. However, its momentum diminished during the COVID-19 pandemic as temporary measures, such as the authorization of pension fund withdrawals, alleviated immediate financial pressures but left structural deficiencies unaddressed. This trajectory illustrates the persistent tension between neoliberal policies and demands for social justice, framing the “No + AFP” movement not merely as a reaction to economic grievances but as a pivotal moment in Chile's broader struggle to redefine the social contract in favor of equity and solidarity.

As the No + AFP movement gained traction and expanded its public support, both the government and the pension fund industry deployed a series of counter-narratives aimed at defending the existing system and reframing the terms of the debate. The second administration of President Sebastián Piñera (2018–2022), along with spokespersons from the AFP Association, consistently argued that the core problem was not the individual capitalization model itself, but rather low contribution rates, increasing life expectancy, or early retirement decisions—thus shifting responsibility onto individuals and reinforcing the logic of neoliberal paternalism. These legitimation efforts were complemented by media campaigns, such as the AFP Association's widely publicized message that “the funds belong to the workers,” accompanied by warnings that a public alternative would endanger individual savings.

Between 2019 and 2020, a controversial judicial strategy emerged, challenging the foundations of Chile's pension system and exposing the contradictions within its property rights-based framework. Through the filing of *recursos de protección*, these actors aimed to push the legal boundaries of the system, arguing that AFPs illegitimately assumed ownership of contributors' savings by denying individuals the ability to fully use, enjoy, and dispose of their pension funds. This, they claimed, violated the constitutional guarantee of property rights under Article 19, No. 24. Importantly, this legal mobilization was not isolated: the No + AFP movement strategically used legal avenues as part of its broader contestation of the system. Politically, it exerted pressure on President Bachelet's second administration (2014–2018), contributing to the introduction of a pension reform bill in 2017. Legally, movement leaders and sympathetic lawyers explored constitutional claims and court actions, seeking to expose the internal contradictions of the legal framework. Even if ultimately unsuccessful, this dimension of the struggle illustrates an LPE approach to contestation—using the law's own tools to challenge the system's structural limits. Movement leaders not only marched in the streets but also pursued judicial avenues, albeit with limited success, revealing the rigidity of the constitutional order and reinforcing the case for more radical change, such as a new constitution. The legal actions aimed not only to advocate for the full withdrawal of pension funds but also to unveil the tension between the system's neoliberal principles and the constitutional protections of individual rights. However, critics have noted that this strategy was less about safeguarding constitutional principles and more about advancing a disruptive narrative that amplified public discontent without offering sustainable solutions. While some appellate courts sided with these arguments, the Supreme Court ultimately upheld the AFPs' administrative authority, solidifying the framework's legitimacy. However, this strategy contributed to a broader momentum, influencing the political climate that led to the authorization of pension fund withdrawals during the COVID-19 pandemic. By prioritizing short-term populist gains over constructive reform, the proponents of this strategy deepened the ideological polarization surrounding social security, complicating efforts to address the fundamental challenges of equity, sustainability, and social justice within Chile's pension system.

The increasing subordination of social needs to financial imperatives in Chile's pension system has been starkly revealed by the events surrounding the COVID-19 pandemic, highlighting the system's inherent contradictions and vulnerabilities. This dynamic was particularly evident in the approval of three pension fund withdrawals by Congress between 2020 and 2021, each allowing

individuals to withdraw 10% of their capitalization funds. These withdrawals, enacted under Laws No. 21,248 (July 30, 2020), No. 21,295 (December 10, 2020), and No. 21,330 (April 28, 2021), were presented as temporary relief measures, with each permitting a one-year window for claims. The first withdrawal, initiated by deputies and unopposed by the Government, proceeded smoothly. However, the second withdrawal was declared unconstitutional by the Constitutional Court on the grounds that it violated the President's exclusive initiative over expenditure, yet it was still implemented under Law No. 21,295.<sup>133</sup> The Government's subsequent challenge to the third withdrawal was dismissed by the Court, which declined to process the case, leaving the measure intact.

The withdrawals from Chile's pension funds between 2020 and 2021 had a decisive impact on the constitutional debates that unfolded between 2020 and 2023, shaping both the content of constitutional proposals and public perceptions of the reform process. Before the pandemic, Chile was already grappling with institutional instability following the *estallido social* of October 2019, a period marked by widespread, often violent, decentralized demonstrations exposing deep societal discontent. In response to this crisis, leaders of all major political parties agreed on a roadmap for constitutional change, institutionalized through a constitutional reform that set the stage for the election of a Constitutional Convention in July 2021. The left-leaning Convention initiated the drafting of a new constitution, placing the right to social security and the pension system at the center of its deliberations. A significant focus of the debate revolved around whether private pension savings should be explicitly protected as property rights, reflecting ongoing tensions between neoliberal principles and demands for solidarity-based reforms.<sup>134</sup>

Citizen participation played a crucial role in shaping these discussions, as the norm-making process allowed for citizen-initiated proposals. The most supported initiative, "Not with My Money," which garnered 60,852 signatures and opposed the use of pension savings for purposes other than individual benefits, was ultimately rejected by the Convention. This rejection, particularly of such a popular proposal, significantly damaged public opinion toward the Convention's work, marking a turning point in the growing skepticism toward the process.<sup>135</sup> Instead, the Convention adopted a framework reminiscent of the "No + AFP" movement, though with less public endorsement (24,110 signatures), enshrining principles such as universality, solidarity, and equality in its proposed article on social security (article 45, Constitutional Convention proposal). The proposal emphasized the State's leading role in managing a "public social security system" and constitutionally prohibited the use of social security resources for purposes unrelated to benefit payments.

The backlash against the Convention's rejection of widely supported proposals reverberated throughout Chilean politics. In April 2022, President Gabriel Boric's administration introduced a constitutional reform bill explicitly guaranteeing the ownership of individual pension savings, ensuring that these funds could not be expropriated (Bulletin 14921-07, 2022). However, this attempt to address public concerns was insufficient to restore trust. The constitutional proposal was decisively rejected in the September 2022 national referendum, with over 60% of voters opposing it. This outcome underscores the difficulty of reconciling deep ideological divides in

<sup>133</sup>Tribunal Constitucional [T.C.] [Constitutional Court], Decision No.9797 (2020) (Chile); see generally IVÁN ARÓSTICA, *ESTADO DE DERECHO Y REVOLUCIÓN LEGAL (CHILE: 2014-2020)* (2023).

<sup>134</sup>See Matías Guiloff & Gonzalo Mellado, *Una Cuestión de Desconfianza: La Consagración de Disposiciones Constitucionales Altamente Específicas* [A question of distrust: The drafting of highly specific constitutional provisions], 21 INT'L J. CONST. L. 1360, 1376 (2023).

<sup>135</sup>Macarena Segovia & Paulina Toro, *Los Cuatro Días Clave que Llevaron al Rechazo al Tope de las Encuestas y los Cinco Meses de Campaña para Mantener esa Ventaja* [The Four Key Days that propelled the "Reject" Vote to the Top of the Polls and the Five Months of Campaigning to Maintain that Advantage], CIPER (Sept. 5, 2022), <https://www.ciperchile.cl/2022/09/05/los-cuatro-dias-clave-que-llevaron-al-rechazo-al-tope-de-las-encuestas-y-los-cinco-meses-de-campana-para-mantener-esa-ventaja/> (Chile).

Chilean society, where public discontent over the pension system reflects broader struggles to redefine the relationship between market-driven policies and social justice.

Only months after this national referendum and in an effort to revive the constitutional reform process, Chile's dominant political parties designed a fast-track constitution-making process in 2023, culminating in the establishment of a smaller Constitutional Council under the guidance of an Expert Commission. Installed in June 2023, this Council was dominated by the far-right Republican Party, led by José Antonio Kast, a staunch defender of the 1980 Constitution and its neoliberal economic model. Working from a preliminary draft prepared by the Expert Commission, the Council's proposal fully embraced the core tenets of the "Not with My Money" popular initiative, reflecting a decisive pivot toward individual property rights within the pension system. The draft explicitly guaranteed three key elements: personal ownership of pension contributions, the freedom to choose between state and private administrators, and the prohibition of any expropriation or appropriation of these contributions by the state—Article 16, Paragraph 28, Letter b.

By October 31, 2023, just weeks before the final referendum set for December, José Piñera, architect of the 1980 pension reform, published an article titled "Win-win para la Revolución Liberal." In this piece, Piñera celebrated the draft as a "modernized version" of the 1980 Constitution, retaining its fundamental principles and framing it as a "win-win" scenario for Chile's liberal revolution. Regardless of the referendum outcome, he argued, the proposal entrenched the foundational elements of the individual capitalization system.<sup>136</sup> Piñera further asserted that the draft reflected a shift in Chilean attitudes toward rejecting the statist proposals of the prior Constitutional Convention, which he claimed had threatened citizens' pension savings.

Although the constitutional proposal was ultimately rejected, it underscores the contentious nature of the current debate over social security in Chile. Piñera's influence, however, has extended beyond Chile, reflecting the ideological reach of what he calls the "Liberal Revolution." José Antonio Kast's earlier gifting of Piñera's book to Jair Bolsonaro underscored Piñera's regional prominence, while his recent presentation in June 2024 in Argentina, supported by the CATO Institute, endorsed Javier Milei's libertarian turn. During this presentation, Piñera emphasized Chile's "economic miracle," attributing its success to the privatization of the pension system and the legal codification of property rights, including over intangible assets such as mining concessions.<sup>137</sup> This narrative reinforces the argument that constitutional law serves as the backbone of radical economic transformations, illustrating the enduring global influence of Chile's neoliberal experiment.

## E. Conclusion

The ongoing debate over Chile's pension system reflects a broader ideological struggle between the principles of solidarity that underpin social rights and the individualism and property rights central to neoliberal governance. This debate highlights the critical tension within welfare states, which are conceptualized as networks of public and private institutions designed to redistribute risk. Analyzing whether these policies prioritize solidarity or market orientation reveals the consequences of increased exposure to market forces, including unequal distributional outcomes and heightened uncertainty for workers.<sup>138</sup> As Chile's case demonstrates, the abandonment of

<sup>136</sup>José Piñera, Note, *La Constitución Win-Win para la Revolución Liberal* [*The Win-Win Constitution for the Liberal Revolution*], *ECONOMÍA Y SOCIEDAD* 1, 1 (Oct. 31, 2023), <https://www.economiaysociedad.cl/la-constitucion-win-win-para-la-revolucion-liberal>.

<sup>137</sup>CATO INSTITUTE, *José Piñera sobre las Reformas que Cambiaron a Chile* [*José Piñera on the reforms that changed Chile*], (YouTube, July 26, 2024), <https://www.youtube.com/watch?v=EMGP0jmLYno&t=14s>.

<sup>138</sup>See MICHAEL A. MCCARTHY, *DISMANTLING SOLIDARITY: CAPITALIST POLITICS AND AMERICAN PENSIONS SINCE THE NEW DEAL* 160 (2017).

solidaristic approaches exacerbates social inequalities, underscoring the urgent need to rethink welfare policies to balance collective welfare with individual rights.

The AFP system in Chile has faced widespread criticism for its low level of competitiveness, driven by structural and operational shortcomings that undermine its effectiveness. Currently, only seven AFPs manage the system, with three—Habitat, Provida, and Capital—controlling a significant share of affiliates and managed funds. This concentration limits contributors' options and restricts meaningful competition. Additionally, the lack of differentiation in product offerings and the reliance on similar investment strategies result in uniform profitability outcomes, offering little incentive for innovation. Bureaucratic obstacles, insufficient information, and minimal variation in management fees further hinder the mobility of affiliates, while high regulatory and capital requirements create substantial barriers to entry for new competitors. Critics also highlight the high commissions charged by AFPs and their failure to propose viable solutions to address the system's persistently low pension payouts. Compounding these concerns are allegations that AFPs interfere in political debates to block reforms aimed at introducing greater state involvement and solidarity-based mechanisms, prioritizing their commercial interests over the well-being of retirees. These structural deficiencies and governance issues have fueled widespread public dissatisfaction, intensifying calls for comprehensive reforms to create a more equitable and effective pension system.

The reform of Chile's pension system is at the center of national discourse, reflecting a shared recognition of the system's grave inadequacies. There is broad consensus that the current pension amounts and contribution rates are extremely low: 80% of pensions paid are below the minimum wage, and only 12.5% exceed 503,000 pesos. The average is close to the poverty line and far from ensuring a "minimum standard of living."<sup>139</sup> While there is widespread agreement on the insufficiency of pension amounts and contribution rates, the path toward reform remains deeply contested. At the heart of the debate is the allocation of additional contributions: should they strengthen individual accounts, maintaining the existing model, or be directed to a common fund that reflects a more collective and solidaristic approach? Similarly, questions arise over whether contributors should have the option to choose between state and private management of these funds. These debates encapsulate a broader ideological struggle over the future of social security in Chile, mirroring global tensions between privatized and public welfare systems. With an aging population and increasing public demand for a fair and adequate pension system, the urgency for structural reform is undeniable.

President Boric's administration has advocated for a solidaristic approach to pension reform, proposing measures such as increasing the Universal Basic Pension (PGU) and redirecting additional employer contributions toward collective funds aimed at social redistribution. However, the political opposition has framed these initiatives as threats to property rights and individual choice, arguing that they limit personal autonomy and grant excessive control to the state over pension fund management. The growing polarization between political extremes—those on the right who reject any redistribution of additional contributions and those on the left advocating for the dismantling of the current system—poses a significant obstacle to meaningful reform. This ideological divide presents significant challenges to reaching a consensus, particularly as President Boric's administration enters its final year and the center-right coalition gains momentum. However, the ongoing debate underscores the importance of finding common ground to address the pressing need for pension reform.

<sup>139</sup>Recaredo Gálvez Carrasco & Marco Kremerman Strajilevich, *Pensiones bajo el mínimo: Los montos de las pensiones que paga el sistema de capitalización individual en Chile (Datos 2021)* [*Pensions below the minimum: The pension amounts paid by the individual capitalization system in Chile (2021 Data)*] 5–6 (June 2021) (working paper), [https://fundacionsol.cl/cl\\_luzit\\_heramientas/static/adjuntos/6770/PBM2021.pdf](https://fundacionsol.cl/cl_luzit_heramientas/static/adjuntos/6770/PBM2021.pdf); Rodrigo Monteiro Pessoa, *La vulneración al mínimo vital en el sistema de seguridad social chileno* [*The violation of the minimum living standard in the Chilean social security system*], 29 REVISTA LATINOAMERICANA DE DERECHO SOC. 219, 219–38 (2019).

In this context, the enactment of Law No. 21.735 on March 26, 2025, marks a defining moment in the contested trajectory of Chile's pension system. Promoted by President Gabriel Boric's administration and approved with cross-partisan support, the law introduces a structurally hybrid model that retains the individual capitalization pillar while embedding redistributive elements through a newly created Social Insurance Fund. Rather than dismantling the Administradoras de Fondos de Pensiones (AFPs), which have operated as the institutional backbone of Chile's privatized pension regime for over four decades, the reform reconfigures their role. A new 7% employer contribution—added to the existing 1.5% disability and survivorship insurance—yields an additional 8.5%, split between individual accounts—4.5%—and the Social Insurance Fund—4%—thereby institutionalizing a partial shift toward solidarity without removing AFPs from the system's core.

The reform also strengthens the Universal Guaranteed Pension (PGU), setting a gradual path toward a benefit floor of CLP 250,000, initially benefiting retirees over the age of eighty-two. In addition, it introduces targeted mechanisms to mitigate gender disparities in pension outcomes, such as a compensation formula for women and a contribution-based supplement of 0.1 UF per year, up to a twenty-five-year cap. Institutional innovations—such as multigenerational investment funds, random affiliate assignment for AFP bidding rounds, and extended coverage for individuals with contribution gaps—signal an effort to improve equity within the system's existing structure. However, despite these advances, the persistence of the AFPs as privileged market actors underscores the limits of the reform. By layering solidarity-based instruments onto an architecture still centered on private capital accumulation, the law reflects a negotiated compromise—one that reinscribes the structural tension between privatization and social protection at the heart of Chile's welfare regime.

This symbolic durability is evident in the reaction of José Piñera to the reform. Years before, in a 2016 television interview, he famously compared Chile's individual capitalization model to a "Mercedes-Benz that just needed gasoline."<sup>140</sup> Following the approval of the 2025 reform, which preserved the AFPs and maintained core elements of the private pension architecture, Piñera declared: "Long live the individual capitalization system. Viva Chile."<sup>141</sup> His statement reaffirms the ideological coherence and adaptive durability of the model he helped build. Even as political pressures introduce redistributive mechanisms, the fundamental structure remains intact—reinvigorated, in Piñera's metaphor, not replaced. This response encapsulates the enduring power of elite narratives to reframe reforms as reinforcement, highlighting how the LPE approach operates not only through institutions and legal codes, but also through symbolic legitimation strategies that shape public discourse and preserve foundational market logics.

The debate surrounding Chile's pension reform has far-reaching implications, offering valuable lessons for countries grappling with the tension between privatization and social rights. In the context of aging populations, economic inequality, labor market disruptions, and political polarization, Chile's experience underscores the critical need to embed solidarity and inclusivity into legal frameworks to ensure that social security fulfills its fundamental purposes: safeguarding human dignity, promoting social cohesion, and sustaining a resilient constitutional democracy. The global relevance of this case lies in its dual role as a cautionary tale and a roadmap for rethinking social security. Moving beyond market imperatives to prioritize solidarity requires policymakers to confront the legal and ideological barriers that entrench privatized systems, particularly the dominance of property rights in social policy. This includes expanding universal protections, strengthening redistributive mechanisms, and embedding these principles into constitutional and legal frameworks to ensure their long-term durability. Comparative studies of

<sup>140</sup>See EL INFORMANTE, TVN, *Entrevista a José Piñera, el padre de las AFP* [Interview with José Piñera, the father of the AFPs] (YouTube, Aug. 3, 2016), [https://www.youtube.com/watch?v=J-gD\\_B\\_hxE&t=661s](https://www.youtube.com/watch?v=J-gD_B_hxE&t=661s).

<sup>141</sup>José Piñera (@josepinera), X (formerly Twitter), (Jan. 30, 2025), <https://x.com/josepinera/status/188493773569933279>

successful mixed systems could offer practical insights into integrating individual agency with collective welfare, providing a pathway for reform.

From a research perspective, the Chilean case raises profound questions about the interplay between constitutional design, property rights, and market structures in shaping social outcomes. It highlights how the phenomenon of “over-propertization” can transform social rights into individualized assets, undermining collective entitlements and eroding solidarity-based welfare models. This case demands a critical reevaluation of the role law plays—not merely in structuring social policy, but in enabling or resisting neoliberal reforms that entrench inequality and weaken social safety nets. Scholars and citizens alike are thus called to reflect on how legal frameworks can either reproduce vulnerability or cultivate new forms of collective security and democratic belonging. The challenge, ultimately, is not only to reform specific policies but to reconstruct the legal and political foundations upon which a more inclusive and resilient democracy depends.

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