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The law and political economy of highly detailed constitutional regulations: Lessons from Chile

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Abstract

This article analyzes the political economy of highly detailed constitutions, using Chile's 2023 constitutional process as a case study. Contrary to traditional constitutional theory favoring broad principles that enable future majorities to shape policy, Chile's second constitutional process approach was markedly different. We argue drafters employed specificity to shield contentious neoliberal economic arrangements from ordinary political debate. By limiting legislative discretion and expanding judicial authority, these provisions ensured fundamental economic policies would be enforced by courts, not decided democratically. This fusion of detailed rules and judicial power represents a distinct constitutional model aimed at circumscribing democratic agency. Within broader Law and Political Economy debates, we contend that such specificity acts less as a guarantor of stability and more as a mechanism of political exclusion, with profound implications for democratic legitimacy.

Key words

Highly detailed constitutional regulations; constitutional implementation processes; constitutional transitions; courts as constitutional implementation mechanisms; partisan constitutions

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Resumen

Este artículo analiza la economía política de las constituciones altamente específicas, utilizando como caso de estudio el proceso constitucional chileno de 2023. Contrario a la teoría constitucional tradicional, inclinada por principios generales que habiliten a las mayorías futuras a configurar la política, el enfoque del segundo proceso constitucional de Chile fue notablemente diferente. Argumentamos que los redactores emplearon la especificidad para proteger los controvertidos arreglos económicos neoliberales del debate político ordinario. Al limitar la discrecionalidad legislativa y ampliar la autoridad judicial, estas disposiciones garantizaban que políticas económicas fundamentales fueran aplicadas por los tribunales, y no decididas democráticamente. Esta fusión entre normas detalladas y poderes judiciales representa un modelo constitucional distintivo, destinado a limitar la agencia democrática. En el marco de los debates más amplios sobre derecho y economía política, sostenemos que dicha especificidad actúa menos como garante de la estabilidad y más como mecanismo de exclusión política, con profundas implicaciones para la legitimidad democrática.

Palabras clave

Regulaciones constitucionales altamente específicas; procesos de implementación constitucional; transiciones constitucionales; tribunales como mecanismos de implementación constitucional; constituciones partisanas

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1. Introduction

Constitutional clauses are generally crafted to be broad, allowing constitutional implementation institutions the flexibility to interpret and apply them to accommodate different political positions. The recent experiences in constitution-making that took place in Chile, however, demonstrate that drafters were inclined to incorporate detailed provisions into new constitutions. In this context, the primary aim of this paper is to investigate the reasons behind this preference for specificity. Using examples from Chile's second constituent process, we argue that drafters choose to include detailed provisions to limit the discretionary power of Congress and administrative agencies, thereby reducing the influence of democratic processes.

We argue that constitutional drafters employed a strategy of specificity to insulate contentious neoliberal economic frameworks from the realm of ordinary political domain. Concurrently, this approach sought to augment the judiciary's role in the constitutional implementation process, thereby increasing the probability that the drafters could retain control over the resultant outcomes. While it is a widely held perspective in legal scholarship that judicial review typically serves as a safeguard against potential political realignments (Hirschl 2004), what distinguishes this case is the explicit intention to secure a specific economic model. This phenomenon represents a noteworthy evolution in the design and operational dynamics of constitutions within a democratic context.

This study is thus subject to certain limitations. First, as mentioned, it focuses specifically on the details of the second consecutive constitutional process that occurred in Chile. Second, in formulating our arguments, we will take into account the constitutional provisions concerning principles and rights.

Firstly, it is true that both processes (the first went through 2019 and 2022 and was in the hands of the Constitutional Convention; the second took place in 2023 and was in the hands of the Constitutional Council) sought to safeguard specific political ideologies at a constitutional level. However, this analysis will predominantly concentrate on the second process for two principal reasons. First, the process led by the Convention has attracted substantial scholarly attention, thereby creating an opportunity to address an existing gap in the literature.[1] Second, the process the Council led was characterized by its distinct neoliberal underpinnings and the judicial framework it advocated, which makes it particularly suitable for analysis through the prism of the literature on law and political economy. This contrasts with the first process which embodied a distributive constitutional agenda-entailing both political and economic dimensions — and

[1] See, for instance, the articles reunited in the symposium of Global Constitutionalism 13(1), and also those compiled in the PS: Political Science 57(2) Politics Symposium "Constitution-Making in the 21st Century: Lessons from the Chilean Process". See also Fuentes (2022), Larraín *et al.* (2023), Tschorne (2023), Issacharoff and Verdugo (2023), Alemán and Navia (2023), Álvarez and Coleman (2024) and Suárez Delucchi (2024). In Chile, one of the few —and very recently—authors addressing both processes is Varas (2024). Other have touched upon the two process, both concentraiting in the Convention's análisis, such as Couso (2024), Palestini and Medel (2025) and Villalobos-Ruminott (2025).

permitted an unrestricted legislative process.[2] The Convention was thus primarily concerned with elaborating constitutional provisions.[3]

Conversely, the second approach, which serves as the focal point of this study, established the judiciary, and notably the Constitutional Court, as the institutional guardians tasked with upholding the neoliberal model delineated in the project. To be clear, this is not just a matter of constitutional judges being captured or colluding to help the model or defending it out of personal convictions (Chia 2025, 450-51). It is, as we will explain, a question of institutional design. This approach entailed a dramatic contraction of governmental powers, significantly curtailing administrative authority, and posing threats to legislative outcomes, including the introduction of a constitutional writ for the claim of punitive damages before legislative actions, as well as the constitutionalization of regulatory takings. Consequently, the legislative process was meant to be subject to rigorous judicial oversight in order to maintain its work — where permitted — within the confines of a very specific (as we will claim, singular) political agenda.

Secondly, we propose here to locate, and delimit, our analysis within the confines of the more political and substantive fundamentals clauses. These are the principle-like and fundamental rights provisions, including preambles. We focus on these moral-political clauses not because they are more important than procedural, power-conferring and adjective norms. We believe it is quite the opposite (Llewellyn 1934, Marmor 2007, 71). However, principle-like provisions, such as those enshrining constitutional rights, offer — as Marmor puts it — "a moral content and moral importance [that] is more salient" (Marmor 2007, 71).

Procedural norms, on the other hand — which we certainly expect to be more detailed — should follow (and in any case be interpreted in light) of the principles. If a constitution — this is for example the case of article 4 of the Chilean constitution — declares that a polity is a "democratic republic", therefore the procedures, powers and institutions it establishes should be aligned with those fundamentals values as declared. As Böckenförde put it when addressing the constitutional principle of article 20.1 of the German Basic Law, principles — in that case the democratic principle — make the State assume a certain configuration. This means that "the power of the State must be articulated in such a way that both its organization and its exercise always derive from the will of the people or can be attributed to them" (Böckenförde 2000, 47). Procedures, then, follow substance — as devices to make substance (either as foundations principles or political goals) possible.

[2] Unrestricted, especially when contrasted with Chile's constitutional practices from 1990 to 2019. Most notably, the Convention got rid of the *ex ante* or preemptive reviewing powers of the Constitutional Court, which signaled Chile's constitutional practice from 1990 to 2019, as elaborated by Chia (2025, 443-449). The Council maintained that power.

[3] As it is already well-known, this confidence in future legislation — as well as a relative overlook of actual power relations present and unfolding in Chile — took Landau and Dixon to term the Convention's proposal as a manifestation of utopian constitutionalism (2023). This departs from the constitutional proposal we will examine here, that of the Council, which coupling code-like provisions along with a weaponized constitutional court sought to get rid of that utopianism.

2. The Province of plural constitutions

Debate and disagreement are inherent to the very nature of constitutional clauses (Waldron 1999). Yet, it is important to recognize that not all debates carry equal weight in terms of their political and constitutional impact.

According to the Chilean constitution, bills addressing collective bargaining can only be filed before the Congress by the President of the Republic. Members of Congress are not allowed to do that. In fact, according to Article 65.5, bills establishing the forms and procedures of collective bargain, as well as those determining in which cases collective bargaining will not be allowed, are covered by what Article 65 consider exclusive presidential initiative. Article 4 of the same text, on the other hand, laconically states that Chile is a democratic republic.

Both types of norms can trigger political debates, and they have done so in the past. We believe that granting the President the exclusive power to introduce bills related to collective bargaining was part of the dictatorship's "labor plan".[4] This was one aspect of the limited democracy that the dictatorship designed for future governance. By removing the authority from members of Congress to address labor issues — particularly those related to collective bargaining — the dictatorship aimed to prevent unions and other worker organizations from unduly interfering with the political process, as they defined such interference.[5]

However, the type of disagreement Article 65.5 triggers does not have the same political significance as the disagreements that Article 4 might provoke.[6] Some disagreements relate to the form, structure and substance of a polity — its constitutional identity — whereas others address secondary issues. Some of them may not even be of any constitutional significance. The fact that both texts are included in the formal document we call constitution does not equate them in political terms.[7]

Let us insist and exemplify this with the heated political debates that the constitutional recognition of indigenous peoples sparked during Chile's first constituent process.[8] One

[4] Couso (2012, 404-5) has demonstrated that the labor plan constituted an integral component of a comprehensive agenda advanced by the Chicago Boys to fundamentally restructure the Chilean economy under the military dictatorship.

[5] There was, of course, a political economy decision, as well, behind such a regulation (Gamonal 2022, 5).

[6] To be sure, we can never rule out disagreement as to what kind of democracy we want for us to define our polity. When Brazilians were discussing their 1988 constitution, deferred the decision as to what should be Brazil's form of government to 1993, whether a republic or a monarchy. More recently, when Chile embarked in the first of the two consecutive procedures to replace the constitution, Article 135—which among others defined the general terms of that process—clearly stated that the proposal the Constitutional Convention was assigned to draft "shall respect the republican character of the State of Chile".

[7] The whole trend on the possibility of having constitutional amendments to be declared unconstitutional (Roznai 2019), for one, or to be able to note when a constitution is being dismembered instead of simply amended (Albert 2018), for another, seem to assume this (Roznai 2019).

[8] There is considerable debate surrounding which political discussions and attempts at constitutional amendments—some of which achieved success while others fell short—should be classified as significant constituent moments in Chile's history. For clarity in our discussion, we will designate the "first constituent process" as the one conducted by the Constitutional Convention, and we will refer to the "second constituent process" as the one taken on by the Constitutional Council. Thus, we will set aside the earlier discussions regarding the total number of efforts made to replace the existing Chilean constitution of 1980, focusing instead on these two distinct processes that shape the ongoing evolution of Chile's political framework.

of the most controversial debates that the constitutional draft of the Convention sparked, was the one related to the proposed form of the State. According to the draft (Article 1.1), Chile was constitutionally identified as "plurinational, intercultural, regional and ecological". The preamble which preceded this first article resorted to the same principles: "We, the people of Chile, composed of diverse nations, freely give ourselves this Constitution" (Convención Constitucional 2022). Whereas important institutional innovations, such as the elimination of preemptive and mandatory constitutional review of legislation, seldom (if ever) reached the news, the form of state and its Decolonial Constitutionalist twist (Albert 2025), were at the center of the debates that followed the publication of the draft (Larraín *et al.* 2023, 239). Some polls and early analyses have even blamed the inclusion of such controversial decisions — along with other divisive matters such a constitutional right to sexual and reproductive rights, including the right (Article 61.1) "to make free, autonomous and informed decisions about one's own body, the exercise of sexuality, reproduction, pleasure and contraception" (Convención Constitucional 2022) — as the main responsible for the rejection of the proposal.[9]

The substantial media attention and the vigorous debate that followed the inclusion of certain provisions in the proposal (as the one presented above) are primarily attributable to the political significance of the issues they address. In contrast, numerous other clauses remained largely irrelevant — the Convention's proposal to restructure an irrational model of judicial review (Bascuñán and Correa 2023, 25-28) received little, if any, attention — , as they do not possess substantive salience in defining the form and structure of a polity.

2.1. Principles and substance: towards a common pact

To tell the truth, this ambivalent reaction has a well-settled history in constitutional theory. According to Schmitt (1928/2008, 59), the constitution is not whatever that happens to be written in a textbook formally called or titled the constitution — which is a mere formal characteristic. Rather, the constitution is the "concrete manner of existence that is given with every political unity". It is its political substance, not its legal form, what shows the concrete political decision a people have made. And these principles are not (necessarily) written in a legalistic fashion. As Schmitt (1928/2008, 78) puts it, it's a common mistake to read constitutional preambles as "'mere proclamations,' 'mere statements,' or, indeed, 'commonplaces'". Quite the opposite:

> These fundamental political decisions, when properly understood, are the defining and genuinely positive element for a positive jurisprudence. The additional norms, enumerations, and detailed delimitations of competencies, the statutes for which the form of constitutional law are chosen for whatever reason, are relative and secondary to the fundamental political decisions. (Schmitt 1928/2008, 78)

[9] The recognition of the State of Chile as "plurinational", as well as the recognition of some collective rights to indigenous communities and autonomous powers to administer indigenous justice, were among the reasons that seem to have influenced the decision of those who voted against the proposal (Espacio Público 2022, Pelfini and Osorio-Rauld 2024, 65). Explaining that plurinationality was one of the most controversial proposals of the Convention, as well as one of the least developed theoretically (Charney and Núñez 2024, 160-1). Of course, this is not the only reason, especially in the context of such a complex and dynamic process. Other reasons for the rejection are analyzed — including the role of the media — in Fuentes (2022).

While Schmitt aptly highlights the importance of the political concept of the constitution, we must also consider the moral and democratic significance of emphasizing broader, principle-like clauses. Firstly, the decision of constitutions to employ general and moral language is not simply the price to be paid because of resorting to natural language; it is a vital political choice to establish foundational principles that can unite a diverse and plural polity.[10] Secondly, these broad and somewhat ambiguous constitutional principles serve as a testament to our commitment to future generations and their political agency. They provide the flexibility for interpretation, empowering those who come after us to articulate these principles in ways that resonate with their own values and societal contexts. This approach promotes inclusivity and demonstrates respect for the evolving nature of democracy.[11]

With this in mind, we assume constitutions are frameworks of principles and rules common to all and, therefore, a place where we should not seek to advance parochial projects, let alone to define detailed public policies whose soundness, political merit, economic performance, and so on, is highly contested among the members of that very same polity. The detailing and implementation of those principles and rules — this is the promise of self-government — are left for future majorities (or, in any case, to constituted institutional arrangements) to carry the task.[12]

2.2. Specificity as an anti-constitution

Constitutional specificity points exactly in the opposite direction. Specificity shows constitutional norms in a different light. It is not just a difference in detail, which they certainly have, but in the nature of the norm and their political consequences. Specificity is not just a difference in the level of detail but in the kind of norm. Ronald Dworkin (1977, 135) was clear about this: specific norms present a certain view as "the heart of the matter". This means that a particular vision gets petrified (as petrified as it can be in a legal norm) in the constitution, while others are left behind.

Or worse.

As constitutional norms carry big significance in the organization of a polity and their legal order — consider the universal impact of judicial review of legislation —, those alternatives not considered may be deemed unconstitutional in the future. Moreover,

[10] Of course, we are quite aware that reaching this consensus is politically challenging. As Cordero and Frei (2024, 633) have recently argued, rights provisions are particularly apt in triggering heated debates in our divided social worlds. Whereas fundamental rights provisions "pursues modes of inclusion", paradoxically "the struggles over their demarcation often result in narratives that build fences that reinforce the division between almost irreconcilable normative worlds"— as we will show below, this is what happened in Chile with the constitutional norms proposed to regulate, for example, abortion or social rights. However, this may be not a feature of fundamental rights clauses per se, but — as we claim here — of the level of specificity of those clauses.

[11] As Waldron (2023, 123-8) has argued when analyzing how individuals could be guided at all by standards, different from specific rules, standards presuppose (but also highlight and respect) the practical reason, evaluative judgments and the capacity for practical deliberation of those who are, not only required to be guided by norms, abut also given room to reflect what does it mean to respect those norms.

[12] However, this future development, unlike constitutional recognition, has what we could call a democratic advantage: the decisions that detail the constitutional pact are, by definition, revocable.

some constitutional norms — a trend sadly on the surge — identify their opposing alternatives considering them right away contrary to the foundations of a polity.

In other words, whereas general and principle-like constitutional norms admit value pluralism, deferring detailing for later institutional (political, juridical, administrative) stages, specificity embodies value monism, "the assumption that there is one overarching fundamental or 'correct' ordering of values that can resolve all conflicts" (Bedi 2021, 370).

What might, then, explain the drive to establish very specific provisions when drafting constitutions? Ginsburg (2010, 84), for example, has argued specificity may be required the larger and plural the group of people to be ruled by such a constitution is:

> As the audience for legal speech becomes more 'extensive,' more specific forms of legal delineation may be required as processing costs increase. Extensivity is related to such factors as audience size, degree of shared background knowledge, heterogeneity, and definiteness of the membership. Larger, more plural groups, with fewer common understandings, and those whose membership is not well known in advance, require more elaboration of the rules. More intimate, smaller groups with shared understandings and background knowledge can rely on intensive forms of communication, and require less reliance on definite terms.

However, this is not the whole picture. First, the reasons provided by Ginsburg for advocating specificity align with the fundamental justifications for establishing a legal order (Hart 2012, 198). In the context of constitutions, it is the lack of "closely-knit" relationships (Hart 2012, 198), coupled with the reality of sharing the same polity, that calls for a more general approach. Second, while Ginsburg's analysis is not limited to constitutional principles and fundamental rights — he may indeed be considering the need to specify constitutional provisions related to institutional arrangements — if we examine his examples, it is clear that he also considers principles and fundamental rights. Third, the specificity he advocates — which differs from the approach we are discussing — tends to overlook the interests of future generations and their constitutional agency, assuming that the constitution and its terms remain unchanged. Although we acknowledge that institutional design might require a higher degree of specificity, if his work were confined solely to that area, there is little justification for sidelining matters of institutional design if we genuinely value the moral and political agency of all individuals equally (Waldron 1999, 295-6).

Finally, and most importantly, while Ginsburg has suggested, along with others in a different work, that specificity may contribute to constitutional endurance (Elkins *et al.* 2009, 84), this view presents only a partial picture. More specific norms may indeed play a role in promoting constitutional endurance, provided these norms have been collectively agreed upon rather than unilaterally imposed (Elkins *et al.* 2009, 79).

We pursue a different line here. We assume that constitutional drafters want to insulate the implementation of such provisions from democratic contestation, thereby decreasing the possibility that some actors have a say on their implementation and increasing the chances that other actors can control this implementation process. Whereas this is a regular tenet of modern constitutionalism (some may say that is the very task of constitutional norms), such an approach would normally assume the matters protected

from ordinary politics have been extensively agreed. This is a big "if" that constitutional politics, certainly in the recent cases of Chile, calls into question.

3. The political economy of specificity

The Law and Political Economy (LPE) literature offers useful analytical lenses to support the aforementioned assumption, as it invites us to examine how relations of power are legally and politically configured and reconfigured over time (Wilkinson and Lokdam 2023, 2726). It must be noted, however, that rather than providing a comprehensive conceptual or methodological framework (Kampourakis 2021, 301-303, Wilkinson and Lokdam 2023, 2726), LPE perspective shift towards studying law as a shaper of economic and market relations and, consequently, as a distributor of economic power (Britton-Purdy *et al.* 2020, Wilkinson and Lokdam 2023). As Kampourakis (2021, 301-303) states: "LPE is premised on an understanding of the economy as a product of legal ordering. Law is not merely an external regulatory force superimposed on otherwise "natural" and "neutral" markets. Rather, it is an intrinsic part of the creation of markets in the first place, as its permissions, prohibitions, and entitlements backed up by public power determine the bargaining power of different actors." In these terms, taking power as a central unit of analysis primarily implies the prioritization of certain analytical questions in the study of legal (or constitutional) arrangements.

This is crucial when analyzing constitutional design. Indeed, as Christodoulidis and Goldoni (2017) argue (regarding social rights regimes, though we believe it is applicable to a more broadly extent), "each regime of social rights is always associated with a particular political economy, that is, each regime crystallizes around specific and politically organized relations of production and reproduction of the societal order". Specifically, Moudud (2025, 111) states that "constitutional law lurks deep beneath the surface of the economy and plays a key regulating role with regard to distributional issues and broader governance questions facing society". Therefore, the use of this perspective for the analysis of constitutional clauses is essentially justified for two reasons. First, because constitutions are typically considered the locus of fundamental decisions regarding political and economic order. Second, because if the LPE perspective is appropriate (as we believe), it is possible to unveil the motives behind those decisions through LPE's analytical lenses. In a sense, we take LPE's hypotheses and perform an inverse exercise: by considering the effects of legal rules on configuring political-economic relations, it becomes possible to analyze the motives behind the foundational decisions that established those rules.

The Law and Political Economy Literature has also suggested the role of law in endowing some precise actors with more bargaining power (Britton-Purdy *et al.* 2020, 1821). More specifically, this literature has unveiled how structures might insulate private power from democratic contestation (Kampourakis 2021). This is significant for this work's thesis. Indeed, LPE scholars have highlighted how, specifically, constitutionalization entails removing issues from "politics" or democratic deliberation, and how modern constitutional law framed as a virtue that certain matters lie beyond politics. As Britton-Purdy *et al.* (2020, 1811) note: "The third defining move was a growing public-law skepticism toward political judgments about distribution and economic ordering, based on the conviction that these judgments are likely to enforce

and entrench the kinds of "capture" that James Buchanan's "political economy" emphasized."

Paradoxically, while constitutional mechanisms are seen as solutions to social or economic problems, the mere act of constitutionalizing matters has often had the opposite of the intended effect, which occurs precisely because the theoretical framework of neoclassic economic typically does not provide an analysis of how the initial distribution of property rights has been established and perpetuated. As Chadwick (2022, 15-17) observes: "there may be something in the form of constitutional democracy as a mode of government that conspires in the (re)production of social and economic inequalities. Loughlin hints at such a connection: "[T]he critical question is whether this development [rising economic inequality] has been caused by the erosion of constitutional democracy or by its evolution." Thus, the paradox arises from the mistaken view that constitutionalizing certain matters, thereby removing them from democratic debate, can solve inherently political problems.Furthermore, as argued by Chadwick, neoliberalism's profound influence on the constitutional configuration of states and its shaping of economic power relations must be considered:

> Another increasingly influential explanation for rising levels of inequality is that with the rise of neoliberalism in the 1970s, the constitutional foundations of the State have become progressively eroded, resulting in a situation in which governments are no longer able to enact laws that favor the common interests of the population at large. This is seen to be due to the 'constitutionalization' of a more expansive set of economic rights and governance paradigms (trade and capital liberalization, central bank independence, privatization of industries) that, in addition to the protection of private property, are being placed beyond democratic negotiation. (Chadwick 2022, p. 17)

The preceding points can be summarized as follows: The decision to remove a specific matter from democratic deliberation thus stems from the intention to shield its regulation from the fluctuations of politics. That is, it seeks to ensure neutrality or prevent legislators from making ill-advised decisions in the heat of the moment. However, withdrawing certain issues from democratic deliberation may equally stem from an attempt to petrify the design of economic power relations — or, in other words, to perpetuate a specific political vision of how such relations should be configured.

In the rest of the work we will move on to examine, in light of the recent constituent processes Chile went through, whether such reasons (the insulation of the implementation of constitutional provisions from democratic contestation) may push constitutional drafters from leaving the task of offering properly constitutional provisions (recall, provisions common to all and therefore norms no one can exclusively calls his or hers) and assume the constitution as a tool to advance rather specific, maximalist, and policy-oriented options that precludes future democratic disagreements (that is, the use of constitutional norms to shield a certain economic rationale).

We contend that a distinctive characteristic exists within the Chilean constitutional processes, particularly exemplified by the second process of 2023. This process is notable for its combination of specificity in legal norms; a specific and salient economic model; and the delegation of substantial judicial review powers to the courts. Such circumstances challenge the prevailing literature, which posits that robust judicial systems typically arise from multilateral constitution-making processes — that is where

drafting bodies are composed of representatives from diverse political factions (Ríos-Figueroa and Pozas-Loyo 2010). In Chile, the unilateral nature of the second constituent process (Heiss and Suárez-Cao 2024, 282) produced highly intricate constitutional provisions and concentrated power within the judiciary. By weaponizing courts, these provisions were ostensibly designed to mitigate potential democratic reappropriation of the constitution, thus furthering the original constitutional project of the dictatiorship.[13]

Of course, we cannot touch upon every possible reason accounting for that shift. This is why, considering these recent experiences, whose consequences are still unfolding, we want to focus on the law and political economy behind such a decision.

4. Specificity, Neoliberal ordering and (dis)trust

Within the legal theory literature, one of the basic requirements of a legal rule concerns its generality (Fuller 1964, 270-1). As explained by Raz (1979, 213), this means that the establishment of particular laws ought to be determined by open and relatively stable legal rules. Moreover, following Fuller (1964), generality is one of the traits that provide any legal rule its morality. In a similar vein, it has been argued that along other demands (such as, inter alia, equality and nonretroactivity), generality is one of the constituent elements of formal legality, which in turn is one of the main meanings ascribed to the idea by the Rule of Law (Tamanaha 2004, 119). Lastly, generality (as publicity and prospectivity), has been deemed one of the requirements that Rule of Law Constitutionalism must satisfy (Tushnet 2015, 416).

The generality of legal rules has also been a recurrent topic within constitutionalism. First, and from a constitutional design perspective, it has been suggested that as Constitutions aim to endure, that purpose — one of the basic goals of constitutionalism — is best served if they contain general rules (Hammons 1999, 838). Another benefit of drafting general constitutional provisions is that they allow to accommodate the legislative rules that future generations might see fit to approve (Lutz 1982 38-39), always within the frames, however ample, of the constitution itself. Alternatively, the relative generality of a given rules has also been deemed as a warrant against arbitrary action. In effect, the prohibition of bill of attainder contained in the Bill of Rights of the U.S. constitution has been explained in such a light (Waldron 2016).

Yet, if one delves into constitutional texts, it is not too difficult to find rather specific provisions. Consider for instance article 37, paragraph 4 of the constitution of Hungary, concerning the Hungarian Constitutional Court's review powers over Laws referring to the government's budget and taxes. Said provision expresses that such review powers may only be exerted when the government's debt exceeds half of the internal brute product and so long as their exercise is grounded on the following fundamental rights: life and human dignity; protection of personal data; freedom of thought, conscience and

[13] While it is accurate to assert that the first process also resulted in a highly detailed proposal, it can be characterized as institutionally open (Lovera 2023, 195-8). To begin, it excluded preventive constitutional review, which serves as the foundation for the proposal currently under examination. Furthermore, it exhibited a degree of generosity in its delegations to legislation as an implementing device—precisely what we contend the second draft rejects. Although this openness may be susceptible to other forms of critique (Landau and Dixon 2023), it does not lend itself to accusations of being undemocratic from an institutional perspective.

religion and, lastly, rights related to the protection of Hungarian citizenship. One can also consider for these regards section 6 of article 19 number 24 of the Chilean constitution which, after prescribing that the government owns all mines, goes to detail what is encompassed by this term and includes guano deposits, metalliferous sands, salt mines, coal and hydrocarbon deposits and other fossil substances, with the exception of superficial clays.[14]

What, then, can explain the existence of this specific clauses? A first justification can be provided by the fact that general rules leave too much room for judgement at their implementation state, and that might hinder the consecution of goals very endeared to the drafters of a given constitution. This can help to understand the presence of such an amount of wordiness in the aforementioned provision of the Chilean constitution concerning mines: Were it not for its explicit establishment, the Congress might have concluded that any of the the listed terms are not mines and therefore are not owned by the government, and consequently are suitable for private appropriation. Therefore, the establishment of specific rules serves the purpose of reducing the discretion of implementing officials. Though in a more radical fashion, this can also be illustrated by the provision in the Hungarian constitution, which in stating the cases and the justifying grounds for the Constitutional Court's review powers over laws concerning governmental budget and taxes, constrains the implementation powers of said Court.

An alternative framing for implementation powers and room for judgement is the term discretion. The more general a rule is, the more discretion officials have for its implementation. The granting of discretion, through the establishment of general constitutional rules, to constitutional implementation institutions as legislatures and administrative agencies has been considered troublesome by some authors. Concerning legislative discretion, it has been argued that as legislation is primarily concerned with the organization of the State's administrative apparatus, the projection of such managerial mentality to ordinary citizens might severely hinder markets and liberty (Hayek 1973). Similarly, it has been argued that when the State uses instrumentally law to control its citizens, that is nor Rule of law but Rule by Law (Tamanaha 2004).[15] Valenzuela and Cordero (2023) have highlighted the role that this later, and broader, conception of the Rule of Law plays for the enactment of neoliberalism itself.

As Wendy Brown (2019, 20) explains, as a governmental rationality neoliberalism secures that "all governing is for markets and oriented by market principles". More specifically, the idea is to bound government action through specific rules, which make it possible for economic actors to foresee the use of governmental powers (Kampourakis 2021, 306). Additionally, these rules also serve the purpose of attempting to insulate the economy from democratic contestation (Kampourakis 2021, 303). Therefore, the establishment of specific rules in constitutional texts fits comfortably within the bounds of neoliberal legality.

Tushnet (2019) explicitly identifies that modern global constitutionalism (a somewhat basic content that should be embedded in all domestic constitutions) has affinities with the twenty-first century neoliberalism, as an important component of this ideology is the

[14] Translation taken from constituteproject.org.

[15] For a classic statement of the concern of granting administrative agencies with discretion, see Dicey (1885/1982).

distrust of popular politics, a strong protection of property rights (and a slighlty preference for first generation rights in general), as well as the structural need of rights protecting courts, among others. There is, indeed, a growing literature on the diverse forms that legal design, both national and international, takes under neoliberalism, along with the constant reforms it undergoes to adapt (Brabazon 2017, Biebricher 2019, Chadwick 2022, Valenzuela and Cordero 2023).

As Thomas Biebricher (2019) argues, neoliberalism is more clearly defined by recognizing its "oppositional stance" and how these changes over time. Thus, far from being an enemy of the state (indeed, neoliberal proponents position themselves against laissez-faire and self-regulating markets), the neoliberal project also employs the state as a means of perpetuation: "neoliberalism must be understood as a discourse in political economy that explicitly addresses the noneconomic preconditions of functioning markets and the interactive effects between markets and their surroundings" (Biebricher 2019).

The 1980 Chilean constitution is illustrative in this regard. Indeed, within the Chilean academia — although not explicitly aligned with a theoretical framework such as the one described — there is an extensive literature on how the Chilean dictatorship used the 1980 constitution as a vehicle to entrench its neoliberal project, thereby establishing a constitutional order with an economic content tailored to its needs (Atria 2013b, Muñoz 2016, Viera and García-Campo 2024).

In this sense, the State, in addition to being stripped of the goals and principles that had driven the social and welfare policies of the 1924–1970 period, was subjected to a (negative) mandate of subsidiarity that required it to withdraw from the economic sphere. Nevertheless, this withdrawal also entailed a (positive) mandate for the State to enable a competitive market for various economic activities (Herrera 2015, 105–110; Letelier 2015, 114–115), which ranged from education and health to the financial market. Thus, the State was required to provide goods and services in those areas where private actors were absent.

5. Chile as a test case: a common thread

The dictatorship deliberately sought to establish a constitution in order to shield its political legacy from, rather than to welcoming, future democratic governments. What was the economic and social model the dictatorship imposed and later constitutionally shielded from politics? A neoliberal order.

Indeed, the influence of Hayek, Friedman, and Buchanan, to name only a few, on the dictatorship's ideological configuration is undeniable. The first exerted his influence primarily through Jaime Guzmán, its most prominent intellectual (Cristi 2011, 77–80); the second, through the group of Chilean economists trained at the University of Chicago School of Economics, which later became known as the "Chicago Boys" (Valdés 1989); and the third, as Moudud (2025, 199) notes, through the constitutional arrangements concerning central bank independence and the plan for a "fiscal Constitution" with the legal enforcement of austerity". There are many ways through which this goal can be achieved, including an ideological hegemony (Couso 2013, 4). But constitutional law plays its share (Couso 2017, 353; 2018; Ruiz-Tagle 2021, 151-6).

In fact, the primary objective of the dictatorship's constitutional model was to protect the military regime's work and its newly established economic and social model (Cristi and Ruiz-Tagle 2014). To attain such a goal, the will of the people, as Ruiz-Tagle has put it, needed to be distorted (2021, 151). The constitutional model of the dictatorship was built around the idea of "a tilted field", as Jaime Guzmán (1979), the junta's principal constitutional mastermind, put it: "if the adversaries come to govern, they will be constrained to follow an action not so different from the one we would follow, because — if the metaphor is valid — the margin of alternatives that the field imposes on those who play on it is sufficiently reduced to make the contrary extremely difficult".

Overall, that scheme — whose details came to be known as "the Constitution's locks", a phrase coined by legal scholar Fernando Atria (2013a) — sought to hinder the operation of democratic politics, in general, giving veto power to the right-wing parties that took the torch to perpetuate the dictatorship's legacy (Bassa 2020). This has resulted in what has been termed a "straightjacket" (Suárez 2009), or "cheating" (Atria 2013a) constitution: a model that has allowed only those constitutional and legal changes that the right-wing parties were willing (or up to the point they were willing) to concede.

Furthermore, resting exclusively on a negative conception of the constitution, that same design configured an institutional model aimed to decouple institutional responses from the most heartfelt demands by the people, thus triggering political (and more recently democratic) alienation. Unsurprisingly, Courts — and most importantly for our purposes here, the Constitutional Court — were designed to play their share in this model. No wonder its jurisprudence has unproblematically assumed the constituent power of the Military Junta (Ruiz-Tagle 2021, 152).

As one of us has shown, an extensive (probably the longest of its kind in the world), very specific and detailed property rights clause (Ruiz-Tagle speaks of an "hypertrophied" clause, 2021, 217), coupled with a preemptive constitutional review of legislation, has been used to moderate regulatory bills, since the threat of resorting to the constitutional justice system is latent (Viera 2021, 27-33). And congress members have not hesitated to invoke it (Guiloff 2021, 311-312). When the threat has not worked, it has been the Constitutional Court itself that has declared unconstitutional bills that *affect*[16] (on more than one occasion, minimally) property rights.[17]

[16] We explicitly use the expression "affect" here to allude any form of impact (from deprivation to rising transaction costs) a proposed legal regulation may have on property rights. Property rights, on the other hand, have been both vaguely and amply defined to encompass any entitlement avaluable in money. No wonder property rights rank among the preferred legal codes of capital (Pistor 2019, 2-3).

[17] In 1994 the Constitutional Court ruled that a provision authoring the appointment of a delegated administrator, in case a pension funds administration company was causing harm to the funds under its administration, was unconstitutional. Some months later, in 1995, it declared unconstitutional a law bill that sought to eliminate a legal scheme that was established during the exceptional conditions of the 1982 Chilean banking crisis, which by 1995 had long served its purpose of allowing the Central Bank to rescue private banks from their imminent bankruptcy. Similarly, in 2001, the Court declared unconstitutional a bill that sought to introduce more competition to the private pension scheme (Guiloff 2018, 282-284). All of these rulings were grounded on violations to the constitution's property clause, evidencing the embracement by the Court of an absolute conception of property (Guiloff 2021, 305-11). That is, a conception grounded on the inviolability of property, notwithstanding the fact that the constitution itself establishes that property might be subject to those limits that its social function may require. For a comprehensive account of the issues raised by the Constitutional Court's actions within our model, see Ponce de León and Soto 2021.

These, among other reasons, explain why Chilean society discussed whether to embark on a constituent replacement. Many flags were raised to justify the constitutional replacement.[18] These range from the measures of social justice that the constitution has prevented (to be sure, it is not that the constitution and the legal system can promote much social justice, but it is another thing if it blocks the attempts that are developed at the legislative level), to the malfunctioning of the political system.

On the other hand, those who opposed constitutional replacement, besides claiming the dictatorship's chart has yielded years and years of both political and economic stability, contend the claims people expose to replace the constitution were not, properly speaking, constitutional matters. Those claims (better pensions, labor conditions, a more solidary health system or better education) are, at best — this is what opponents to constitutional replacement have contended — legal issues or public policy complains.

Are they? In the abstract, we could say yes. Constitutions, or a certain model of them, certainly have better prospects of satisfying different visions of society the broader and thinner — from a theoretical point of view, as Sunstein has pointed out — their commitments and principles are. The specification or detailing of those principles would be left for ordinary politics, which can always try, prove and (certainly) err in fleshing those principles out.[19]

Chilean constitutional practice,[20] however, shows a different path. It shows that, when minor legal changes were attempted, precisely by means of the legislative process, the constitutional model — most for the satisfaction of their engineers — worked as a clockwork. Let us explain this with just one example. During socialist President Michelle Bachelet's second term, her government sought to upgrade unions. Then (as now), Chile was one of the OECD countries with the lowest levels of labor unionization. To improve these indicators — as in other parts, OECD standards have become quasi authoritative policy orientations —, her government proposed a way of encouraging unionization. This was the so-called collective bargaining entitlement. In a nutshell: only unions could bargain collectively, although the benefits could be extended to all other workers.

A group of right-wing senators and deputies filed preemptive requirements before the Constitutional Court.[21] In their view, the proposed entitlement was contrary to the constitution, as the right to collectively bargain was an individual right (!). Therefore, each worker, and not organizations, let alone unions, was the right-bearer. The Court

[18] Which, as we said at the beginning, triggered not only two consecutive, but also another in 2015, constituent processes.

[19] Of course, this is just one model of constitution. One that assumes the more room is left opened for Congress and the political process, the better in democratic terms. There is some empirical research that show that constitutions tend over time to be more specific, although these studies seldom address the concept of the constitution they are dealing with. Rather, they assume the constitution is the written document titled 'the Constitution' (Versteeg and Zackin 2016).

[20] With Sager (2004, 12), we aim at showing an "articulate understanding of the dominants features of that practice".

[21] In addition to the fact that the injunctions in this case were preventive, that is, injunctions presented to the court while the bill was being discussed in Congress and before it saw the light of day, the group of senators and deputies who presented it were the minority that had lost (proper of a political vote) the debates in Congress.

sided with the claim and struck the bargaining entitlement down. In so doing, it offered a peculiar, although very tellingly, approach to the Chilean constitutional scheme:

> The current Constitution has particularities. It is not a totally neutral Constitution. None is. And, with respect to the matters under consideration, it certainly is not.
>
> If a Constitution were neutral, it could hardly constitute a frame of reference to which to adjust given its flexibility to be always interpreted in a way that coincides with the majority legislative positions of the day ('living constitution'). (Tribunal Constitucional de Chile, Rol. Nº 3016(3026)-16-CPT)

This was the panorama different constituents found once they were elected to the constituent bodies. A political practice that shows debates that may have been had in the political, congressional, or administrative arena, but that were eventually settled in the constitution and before the Constitutional Court. Was it rational form them to embrace a different path? It was not. And they, actually, did not.

Consider, for instance, the regulation of the right to social security in the text proposed by the Constitutional Council in the December 2023 plebiscite, that was ultimately rejected by the Chilean people. For a better understanding of the nature of such regulation, it is useful to briefly detour before and revisit an old debate of constitutional theory. During the drafting of the Weimar constitution there was a serious debate when drafting the property clause, or the clause which established the right to private property (Maier 2024). Such clause established that property could be regulated only through statutes. Consequently, if Congress could regulate private property as it saw fit, then the entrenchment of a fundamental right to private property did nothing more than reiterating the legality principle concerning property -that is, that that administrative agencies lacked powers to regulate this subject matter, as they were vested on the Congress- (Wolff 1923). Hence, in order to avoid arriving at such an interpretation, the Weimar constitution established a limit to Congressional discretion when regulating property, by stating that property is warranted. In other words, when doing such a regulation the Congress was forbidden to abolish the institution of property (Cordero 2007).

Such provisions, that establish a minimum content which the congress cannot undo, are termed by Constitutional theory institutional warrants (Schmitt 1928/2011). The opposite of these provisions are those that far from establishing such minimum contents, entrench very specific ones, which on many times concern specific policy choices. Those provisions have been termed regulation warrants (Schmitt 1932 as cited by Atria).[22]

Now, and turning back to the example of the regulation of the right of social security, a brief recount of resent events concerning pension funds in Chile is necessary to have a better understanding of this regulation (Guiloff and Mellado 2023, 1378-81). For the last 20 years, the improvement of pensions has been one of the most heartfelt demands of the Chilean citizens. Yet, these demand clashes with that of stability of the private pension funds management companies (*Administradoras de Fondos de Pensiones*). The position of the later was eroded after, in between 2020 and 2021, the Chilean Congress

[22] As stated in Atria, F., [no date]. *La configuración constitucional del regimen de las cosas* [Unpublished manuscript]. The document is in the authors' possession.

approved three bills authorizing citizens to withdraw the 10% of their funds from these companies.

Therefore, and not surprisingly, considering that the right wing had an overwhelming majority at the Constitutional Council, the provision in the proposed text that established the right to social security attempted to avoid not only withdrawals but any major change to the existing private pension scheme.[23] Indeed, this provision stated that all persons have a property right over their social security contributions and savings derived from their accumulation. Moreover, said provision also stated that *in no case*, and *by no mechanism whatsoever*, the aforementioned savings shall be taken or appropriated by the government.

Thus, as illustrated by the preceding paragraphs, the regulation of the right to social security, as that of expropriation in the 1980 Chilean constitution, are examples of regulation warrants. Their effect is to impede that, when implementing the constitution, Congress makes a choice different to the favored policies of the constitution's drafters. As can be inferred, such drafting choice enhances the predictability of the constitution's implementation and therefore comfortably fits the requirements of neoliberal legality. Neoliberalism's profound influence on the constitutional configuration of states and its shaping of economic power relations must be considered. Indeed, to comprehend this idea it is essential to conceive capitalism as a legally structured economic system (Chadwick 2022, 17, Moudud 2025, 111) Lastly, it must be underscored that the main actors for the implementation of constitutional rules that encompass regulation warrants are the courts. We deal more detailedly with this subject on the next section.

6. Weaponizing courts: the perils of judicial review

There is a well-established literature in the field showing that, behind possible theoretical justifications,[24] judicial review of legislation has a rather realpolitik explanation. Instead of securing a forum of principle to address a polity's most salient and significant debates — as to the contours of its form of State —, judicial review of legislation has transferred enormous amounts of power decisions to courts so that those decisions are isolated from the political process. And therefore, from democracy (Waldron 1999, 2006).

Judicial review of legislation, thus, conceives courts as insurance devices. As Hirschl (2004, 40-3) has shown, possible electoral losers may prefer to lose political power at the expense of transferring it to courts, as long as courts will prevent their interests to be severely affected once they are out of power. Consequently, if political parties perceive they will score better in future politics, they should — as Ginsburg and Huq have argued — "prefer weaker or more subservient courts" (Ginsburg and Huq 2018, 189), so that they won't obstruct their political program.

Hirschl has made a similar point: other than for prudential reasons,[25] judicial empowerment may occur if a ruling party has low expectations of staying in power. By

[23] See article 28 section B of the text that the Constitutional Council proposed for the 2022 plebiscite.

[24] The most salient being that of Ronald Dworkin (1996).

[25] As the literature has emphasized, having the reviewing court around the corner may well function as an incentive not to worry about the constitutionality of a bill (Sinclair 2005, 293).

empowering courts — the insurance —, that party may shield its core interests from being altered. On the contrary, if it expects to "win elections repeatedly, the likelihood of and independent and powerful judiciary is low" (Hirschl 2014, 99).

Winners, thus, prefer weak courts.

Do they?

As both Ginsburg and Huq (2018, 189) have convincingly claimed, "the very power of constitutional courts makes them attractive targets for the forces of erosion". So what if you don't need to depend (not totally, at least) on future elections, but you have already won a constituent one and are in charge — or in any case, largely in control — of a process designed to draft a new constitution?[26] What if you, precisely relying on the tremendous amount of power we have (somewhat unreflectively) transferred to courts, can weaponize them? What if, rather than thinking in courts as containment (insurance) dikes, you use them as public policy implementing institutions?[27] Not only this, in devising such a role for Courts, drafters of constitutional provisions can control the numerous transition processes than the drafting and implementation of a new constitution always entails.

The Chilean experiences of the second constituent process shows precisely this path. It shows winners and possible winners, establishing very specific, detailed, and code-like provisions on matters of economic liberties and policies, but at the same time configuring strong courts as policy-implementing devices.[28] When courts, these insurance devices, are coupled with specific or detailed constitutional provisions — this is what we claim here — courts are not only defensive structures against congressional and administrative powers, but rather attacking (weaponized) policy tools.

Constituent drafters who resort to courts' structurally-secured independence — as Komesar (1994, 124-5) puts it — in favor of parochial causes, rather than revive the classic counter-majoritarian objection, present that objection in a new light. Because it is one thing to enshrine constitutional provision that may prevent future legislative change. It is quite another to conceive the constitution as a policy program and weaponizing courts to both, prevent and implement, that specific order. As described before, this is precisely what the constitution text proposed by the Chilean Constitutional Council did with the regulation of the right to social security. Indeed, in explicitly stating that in no case and by no mechanism whatsoever pension funds shall be appropriated by the government, the provision at issue left no other alternative for the constitutional Court that to declare unconstitutional any bill which modifies the existing scheme based on individual capitalization.

How does the counter-majoritarian objection look like now?

[26] Hirschl (2014, 100) considers this possibility when adding that, during constituent times, other strategic considerations should be included. For instance, he writes, "constitutionalization may allow governments to impose a centralizing, 'one-rule-fits-all' policy upon enormous and diverse polities."

[27] To be sure, we are not thinking here too much on courts being used to undemocratically (i.e., suppressing freedom of speech or encroaching upon freedom of assembly rights) attack enemies, but as devices to implement specific — and only those specific — policy-oriented, but now constitutionalized, provisions.

[28] The social security regulation identified above, which effectively rendered any shift to a pay-as-you-go pension system or with significant state regulatory intervention unconstitutional, provides evidence of this.

First, it shows a clear policy preference for a specific constitutional implementation mechanism[29]. As we have said, it is, moreover, a preference adopted by those who see themselves as groups with high chances of political success.

If a comparative analysis is made, as Komesar proposed, between courts, on the one hand, and the Congress and the administration, on the other, it appears that — as a policy implementing device — one (courts) is much less participatory than the latter two and in which those who can participate are a specific sector (economic power).

Second, and perhaps more paradoxical — this is something that, for now, we will only state in general terms —, the bet on a specific mechanism of constitutional implementation, that is courts and their power of judicial review, brings as a counterpart the impossibility of having a constitution at all. As those who control the constituent body are thinking of a detailed government program and strong courts, at the same time, they do not want to leave margins for those courts to become creative. Remember that these are courts conceived — relying, as we have said, on their independent structure and the tremendous decision-making power we have transferred to them — as mechanisms of political implementation.

How is this goal achieved? With highly detailed constitutional norms, which by that very fact cease to be constitutional norms. Of course, we are not referring here to the level of specificity that certain norms must have, such as the age required to be President of the Republic — the example is from Ronald Dworkin (1996, 8), to show, precisely, the kind of clauses that do not require and cannot be read morally.[30] But to those moral and political principles around which a (properly called) constitution should be built. One that conveys political legitimacy, on the one hand, and that is open to be fulfilled, in its specificity, by the political process.

7. Conclusions

Chile's 2023 constitutional process exemplifies a distinct model of constitutional design, which can be framed in the Law and Political Economy (LPE) theoretical framework. Contrary to traditional theory favoring broad principles to empower future majorities, the drafters employed high specificity to entrench a particular neoliberal economic politic. This was achieved through two strategies: first, by drafting detailed, code-like provisions that removed fundamental economic policies from the realm of ordinary democratic politics; and second, by simultaneously empowering the judiciary, particularly the Constitutional Court, to act as the primary enforcer of this petrified agenda.

[29] These examples, however, are not limited to the right to social security. The same phenomenon appears in the design of other rights, such as freedom of association, the right to strike, and collective bargaining, which inherit the problems of the 1980 constitution. Likewise, economic freedom is structured to exclude certain interpretations from the outset ("under no circumstances may state-owned companies regulate, oversee, or supervise the economic activities encompassed within their corporate purpose").

[30] "Of course the moral reading is not appropriate to everything a constitution contains. The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle. Article Il specifies, for example, that the President must be at least thirty-five years old, and the Third Amendment insists that government may not quarter soldiers in citizens' houses in peacetime".

The central implication is that such constitutional specificity functions not as a guarantor of stability, but as a mechanism of political exclusion. By shifting key decisions from the legislative to the judicial arena, this model deliberately circumscribes democratic agency. It seeks to insulate contentious economic arrangements — like the private pension system — from future contestation and reform, thereby protecting them from the "vicissitudes of ordinary political discourse."

The Chilean case demonstrates that this approach carries profound risks for democratic legitimacy. The rejection of the 2023 proposal by voters underscores a fundamental tension: constitutions perceived as vehicles for advancing a specific, exclusionary political project, rather than as frameworks for pluralistic coexistence, struggle to achieve legitimacy. Ultimately, the study argues that this intentional fusion of specificity and judicial empowerment reveals a strategic use of constitutional law to limit democracy itself, challenging optimistic assumptions about constitutionalism's relationship with democratic governance.

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