

Making Presidential and Semi-presidential Constitutions Work

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I. Introduction

For many years, comparative scholarship about forms of government in general, and presidentialism in particular, has been dominated by Juan Linz's analysis of the perils of presidentialism. As we know, Juan Linz made a forceful argument that presidential institutions are not conducive to the survival of democracy.¹ As a consequence, much of what has been written about forms of government from a comparative perspective has been shaped by an overwhelming preoccupation with the survival of democratic systems, particularly the new ones of Latin America (all of which were resuscitated as presidential in the 1980s and 1990s),² Eastern Europe (where many countries chose to combine a government responsible to a legislative majority with a president who was popularly elected for a fixed term in office),³ and Africa (where presidential constitutions prevail).⁴ This view was boosted by

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1. Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *THE FAILURE OF PRESIDENTIAL DEMOCRACY: COMPARATIVE PERSPECTIVES* 3, 5–44 (Juan J. Linz & Arturo Valenzuela eds., 1994).

2. *E.g.*, Alfred Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation*, 46 *WORLD POL.* 1 (1993) (gathering data to contrast pure presidentialism with pure parliamentarism in Latin American and Eastern European countries); Arturo Valenzuela, *Latin American Presidencies Interrupted*, *J. DEMOCRACY*, Oct. 2004, at 5 (comparing the survival of a variety of presidential systems in Latin America from 1985–2004 despite interruptions occurring during presidential rule); Leiv Marsteintredet & Einar Berntzen, *Latin American Presidentialism: Reducing the Perils of Presidentialism Through Presidential Interruptions* (Apr. 25–30, 2006) (unpublished European Consortium for Political Research workshop paper), available at <http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/nicosia/ws20/Marsteintredet.pdf> (using a comparative study of twenty cases of interrupted presidencies in Latin American to illustrate the potential consequences to presidentialism).

3. *E.g.*, ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET* 82–83 (1991) (discussing the potential for success of a new constitution in Poland based on prior constitutional history); ROBERT ZUZOWSKI, *POLITICAL CHANGE IN EASTERN EUROPE SINCE 1989*, at 141–47 (1998) (comparing and predicting the likelihood of survival of the new democratic governments in Eastern European countries).

4. *E.g.*, MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA* 63–65 (1997) (discussing the forms of presidentialism that have been used in African political regimes); Gerard Conac, *Semi-presidentialism in a Francophone Context*, in *SEMI-PRESIDENTIALISM OUTSIDE EUROPE* 84–87 (Robert Elgie & Sophia Moestrup eds., 2007) (describing the transitions to democracy in the African francophone countries); Nicolas van de Walle, *Presidentialism and Clientelism in Africa's Emerging Party Systems*, 41 *J. MOD. AFR. STUD.* 297, 309–11 (2003) (examining the types of presidential systems that are emerging in African political systems).

empirical analyses that noted the fact that, on average, parliamentary democracies had much longer lives than presidential ones.⁵

Given the preoccupation with democratic survival and what was considered to be undeniable evidence that parliamentary institutions extended it, reflection on how to reform presidential systems has been characterized by one of two approaches: either the system should be abandoned and replaced with what was proved to work well, that is, parliamentarism;⁶ or, given that presidentialism would remain the form of government, specific features of the political system should be reformed in such a way as to circumvent the system's basic flaws, namely its propensity for conflict, legislative paralysis, and eventual breakdown.⁷ Those who adopted the first approach saw it as their main task to compile the problems with presidential systems and the numerous ways in which they malfunctioned in order to build a case that the solution to the problems posed by presidential institutions was the abandonment of presidentialism itself.⁸ Those who adopted the second approach considered the ways in which specific reforms would help minimize the dangers of presidentialism.⁹

Thus, for example, a constitution that granted the president strong constitutional powers would be undesirable since such powers would allow the president to usurp legislative powers and, in this way, would increase the

5. See ADAM PRZEWORSKI, MICHAEL E. ALVAREZ, JOSÉ ANTONIO CHEIBUB & FERNANDO LIMONGI, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 50–51 (2000) (finding that presidential democracies were almost three times more likely to experience a regime change than parliamentary democracies); Stepan & Skach, *supra* note 2, at 7 (finding that “presidential systems had a democratic underachiever rate 3.4 times greater than did the parliamentary systems”); Michael E. Alvarez, *Presidentialism and Parliamentarism: Which Works? Which Lasts?* 300 (June 1998) (unpublished Ph.D. dissertation, University of Chicago) (on file with the University of Chicago Library) (finding that presidentialism's correlation to unrest is higher than parliamentarism's correlation to unrest).

6. E.g., PAUL D'ANIERI, *UNDERSTANDING UKRAINIAN POLITICS* 37–40 (2007) (recommending the establishment of a “well-functioning parliament” in response to issues with the presidential system in Ukraine).

7. E.g., Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA* 161, 168–69 (Arend Lijphart & Carlos H. Waisman eds., 1996) (suggesting a variety of reforms to Argentina's presidential system for the following reasons: first, presidents elected by less than a majority cause “the formation of governments that lack strong popular support”; second, where the president and the legislature represent opposing parties, the legislature has a “strong incentive to savagely oppose the president to increase the opposition's likelihood of winning the next election”; and finally, the president can acquire additional power through the submission of the legislature and the judiciary, which undermines the rule of law).

8. See Juan J. Linz, *The Perils of Presidentialism*, *J. DEMOCRACY*, Winter 1990, at 51, 52, 56, 55–56 (arguing that presidentialism is “ineluctably problematic” and that parliamentarism “offers a better hope of preserving democracy” in nations with “deep political cleavages and numerous political parties”).

9. E.g., MICHAEL COPPEDGE, *STRONG PARTIES AND LAME DUCKS: PRESIDENTIAL PARTYARCHY AND FACTIONALISM IN VENEZUELA* 169–70 (1994) (discussing modifications to the presidential system in order to gain some of the benefits of parliamentarism while also avoiding the issue of stalemate that can occur in a parliamentary system).

potential for conflict with the legislature, which is inherent to presidentialism. Concurrent presidential and legislative elections, two-round presidential elections, or a combination of both would be positive features of presidential constitutions because they would reduce the number of political parties competing and obtaining representation, make legislative majorities more likely, and, allegedly, provide a more consistent base of legislative support for the president. Legislative elections organized on the basis of proportional representation, on the contrary, should not be adopted in presidential systems since they would lead to multipartism, legislative fragmentation, paralysis, and possibly regime breakdown. Finally, constitutional limits to presidential reelection would be necessary to improve presidentialism since they would prevent an all-too-powerful actor from using his institutional position to perpetuate himself in power.

This, however, no longer describes the scholarly landscape concerning comparative studies of democratic forms of government. First, perhaps due to the very scarcity of democratic breakdowns in the most recent period, there are many factors beyond democratic survival that have become the object of scholarly interest. These include work on the impact of democratic forms of government on, among other outcomes, economic policy,¹⁰ budget deficits,¹¹ economic performance,¹² cleavage management,¹³ ethnic conflict,¹⁴ international peace,¹⁵ international cooperation,¹⁶ the “quality” of democratic governance,¹⁷ accountability,¹⁸ and the type of public policies generated by

10. E.g., TORSTEN PERSSON & GUIDO TABELINNI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 2–5 (2003); Kent Eaton, *Parliamentarism Versus Presidentialism in the Policy Arena*, 32 COMP. POL. 355, 356 (2000); R. Kent Weaver & Bert A. Rockman, *Assessing the Effects of Institutions*, in *DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD* 1, 16–19 (R. Kent Weaver & Bert A. Rockman eds., 1993).

11. E.g., José Antonio Cheibub, *Presidentialism, Electoral Identifiability, and Budget Balances in Democratic Systems*, 100 AM. POL. SCI. REV. 353, 354–56 (2006).

12. E.g., Alvarez, *supra* note 5 (manuscript at 162–65).

13. E.g., Arend Lijphart, Ronald Rogowski & R. Kent Weaver, *Separation of Powers and Cleavage Management*, in *DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD*, *supra* note 10, at 302.

14. E.g., Stephen M. Saideman et al., *Democratization, Political Institutions, and Ethnic Conflict: A Pooled Time-Series Analysis, 1985–1998*, 35 COMP. POL. STUD. 103 (2002).

15. E.g., Miriam Fendius Elman, *Unpacking Democracy: Presidentialism, Parliamentarism, and Theories of Democratic Peace*, SECURITY STUD., Summer 2000, at 91.

16. E.g., Daniel J. Minnich, *Veto Players, Electoral Incentives and International Commitments: The Impact of Domestic Institutions on Intergovernmental Organization Membership*, 44 EUR. J. POL. RES. 295 (2005).

17. E.g., Alicia Adeserà et al., *Are You Being Served? Political Accountability and Quality of Government*, 19 J.L. ECON. & ORG. 445 (2003); Joe Foweraker & Todd Landman, *Constitutional Design and Democratic Performance*, DEMOCRATIZATION, Summer 2002, at 43; John Gerring et al., *Centripetal Democratic Governance: A Theory and Global Inquiry*, 99 AM. POL. SCI. REV. 567, 569–70, 575–80 (2005).

18. E.g., David Samuels & Timothy Hellwig, *Electoral Accountability and the Variety of Democratic Regimes*, 38 BRIT. J. POL. SCI. 65 (2008).

the political system.¹⁹ A similar plethora of studies focuses on semi-presidential constitutions and the different ways in which constitutional powers are more or less concentrated in the hands of the president.²⁰ One aspect of these analyses, when they are taken collectively, is that presidentialism or presidential institutions do not necessarily emerge as the harbinger of negative outcomes. The record is mixed, and there are some features of presidential systems that may actually have a positive impact on some of the outcomes of interest.

Second, the evidence is no longer undeniable that a change of system is likely to be consequential for the survival of democracy and, from this perspective, desirable. It remains true that the historical record favors parliamentary democracies: they do tend to last longer than presidential ones.²¹ However, as I sought to demonstrate in some of my previous work, the consequences that, in the Linzian account, would lead to democratic breakdown—low levels of cooperation among legislators, parties, and the government; legislative paralysis; lack of governing capacity—did not follow from the structure of presidential institutions.²² Furthermore, the evidence suggested that what killed presidential regimes was the fact that they tended to follow dictatorships led by the military much more often than parliamentary democracies.²³ The connection between militarism and presidentialism, I argued, was not due to any intrinsic feature of presidentialism or of the military (e.g., the military demonstrating a preference for presidential institutions and hence conditioning democratization to the establishment of presidentialism). Rather, it was due to a historical accident: the connection existed because the countries where militarism remained strong at the middle of the twentieth century were also those that had adopted presidential institutions in the nineteenth century.²⁴ Thus, the problem of presidential democracies, I argued, is not that they are “institutionally flawed.”²⁵ Rather, the problem is that they tend to exist in societies where democracies of any type are likely to be unstable.²⁶

Finally, broad constitutional frameworks are hard to change. On the one hand, they structure the expectations of the actors who operate under them, and changing them implies that these actors must be willing to leap

19. E.g., Matthew Sober Shugart, *Presidentialism, Parliamentarism, and the Provision of Collective Goods in Less-Developed Countries*, 10 CONST. POL. ECON. 53 (1999).

20. E.g., Cindy Skach, *The “Newest” Separation of Powers: Semipresidentialism*, 5 INT’L J. CONST. L. 93, 98 (2007).

21. Eugene D. Mazo, *Constitutional Roulette: The Russian Parliament’s Battles with the President over Appointing a Prime Minister*, 41 STAN. J. INT’L L. 123, 131 (2005).

22. JOSÉ ANTONIO CHEIBUB, PRESIDENTIALISM, PARLIAMENTARISM, AND DEMOCRACY 2–3 (2007).

23. *Id.* at 140–45.

24. *Id.* at 145–48.

25. *Id.* at 148.

26. *Id.*

into the unknown. On the other hand, broad constitutional frameworks serve as focal points: all of the transitions to democracy that took place in Argentina since the 1930s resulted in the restoration, without much discussion, of the 1853 Constitution, which had ushered in probably the longest period of political stability in that country's history.²⁷ To my knowledge, no democratic regime that was based on the principle of assembly confidence has ever abandoned it; similarly, no democratic regime based on the principle of separation between the executive and the legislature has ever adopted the assembly-confidence principle. Some democracies have created an independently elected presidency²⁸ or significantly weakened the constitutional powers of the president.²⁹ But they never crossed the line on the essential feature of the system—whether the government exists independently of the legislature or whether it requires its support in order to exist.

It is time, therefore, that we look differently at ways in which we can reform the democratic systems that are characterized by the presence of a president who is popularly elected for a fixed term in office. Given that presidential institutions, *per se*, do not kill democracy, and given that countries that now adopt such institutions are likely to keep them, provisions regarding presidential powers, electoral systems, and presidential term limits can be seen not so much as instruments for mitigating the system's allegedly inherent defects but as devices for enhancing goals that have been so far neglected due to the overwhelming concern with the imminent failure of the regime. No longer must we allow preoccupation with governability and the survival of democracy to be the overriding concern of reforms in presidential systems; other goals can, and should, be taken into consideration in thinking of ways to improve existing presidential democracies.

27. *Id.* at 152.

28. For example, France created an independently elected presidency in 1958. LA CONSTITUTION [1958 CONST.] art. 6 (Fr.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009). Another example is the Slovak Republic, which amended its Constitution in 1999 to allow direct election of its President by secret ballot for a five-year term. ÚSTAVA SLOVENSKEJ REPUBLIKY [ÚSTAVA] [Constitution] art. 101, § 2 (Slovk.), *translated in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra*.

29. *E.g.*, SUOMEN PERUSTUSLAKI [PERUSTUSLAKI] [Constitution] §§ 58, 60–61 (Fin.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (subjecting most of the President's decisions to the approval of the Government, which consists of ministers selected through a negotiated appointment process between the President and Parliament); KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [KONST. RP] [Constitution] arts. 126–127, 146, 154–162 (Pol.), *translated in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (creating an independently elected President who has limited domestic executive and administrative powers but who can select the Council of Ministers to perform those functions, subject to the approval and ongoing support of the Sejm (the lower parliamentary house)); *see also* HOWARD J. WIARDA, POLITICS IN IBERIA: THE POLITICAL SYSTEMS OF SPAIN AND PORTUGAL 192–93 (1993) (describing the reduction of the institutional power of the President in Portugal); Lucan A. Way, *Pluralism by Default in Moldova*, J. DEMOCRACY, Oct. 2002, at 127, 130 (describing the elimination of the popularly elected President in Moldova in 2000).

II. Presidential Constitutions

A. *Limits on Presidential Reelection*

Most presidential constitutions set a limit to the number of times that a president can be reelected.³⁰ Between 1946 and 1996, only 18% of the presidents in pure presidential regimes were in systems where no restrictions for reelection existed (these included the Philippines prior to 1971 and the Dominican Republic between the mid-1960s and early 1990s);³¹ another 18% were in systems, such as the United States, where they could be reelected once.³² If we exclude from this group the presidents who were already serving their second term and hence could not face elections anymore, we find that, during the 1946–1996 period, the proportion of presidents that could be reelected was only 28.3%.³³ Up until the early 1990s, the most common constitutional limit on presidential reelection was the “one term out” rule, according to which a president had to wait for a full term out of office before standing for election again.³⁴ Since then, countries such as Argentina and Brazil have changed their constitutions and adopted the two-term limit³⁵ that has existed in the United States since the 1950s.³⁶

Presidential term limits are important because they affect the link between the president and voters. Elections are normally considered to be one of the most important instruments to induce governments to act in the interest of voters. This is how it is supposed to work: because they anticipate voters’ future judgment of their past performance, politicians are induced to pursue the interests of voters in order to be reelected.³⁷ Whether elections are actually sufficient to induce this kind of behavior on the part of politicians is a controversial matter.³⁸ It is clear, however, that if elections are to affect the behavior of politicians at all, voters must be able to punish incumbents who perform badly by throwing them out of office *and* they must be able to reward incumbents who perform well by giving them another term in office. Both are necessary if elections are to induce governments to act in the

30. The following discussion borrows heavily from CHEIBUB, *supra* note 22, at 166–68.

31. *Id.* at 166.

32. *Id.*

33. *Id.*

34. *Id.*

35. CONSTITUCIÓN ARGENTINA [CONST. ARG.] § 90, *translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28; CONSTITUIÇÃO FEDERAL [C.F.] art. 14, para. 5 (Braz.), *translated in* 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28.

36. U.S. CONST. amend. XXII, § 1.

37. BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 175–77 (1996).

38. See José Antonio Cheibub & Adam Przeworski, *Democracy, Elections, and Accountability for Economic Outcomes*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION* 222, 230–32, 234–37 (Adam Przeworski et al. eds., 1999) (questioning the link between accountability and democracy); Adam Przeworski, *A Better Democracy, A Better Economy*, *BOSTON REV.*, Apr./May 1996, at 11 (positing that politicians may recognize, but may not act in, the best interests of the citizens, even at the risk of losing an election).

interest of voters. But constitutional term limits break this link by preventing voters from rewarding good incumbents.

The rationale for instituting term limits for presidents in the first place may seem reasonable. They are meant to prevent incumbents from taking advantage of their position in order to remain in power.³⁹ The little evidence that is available suggests that presidents do indeed have a large advantage when they are legally permitted to run for reelection. There were twenty-two presidents who faced reelection without impending term limits between 1950 and 1990; of these, only six were defeated (although eight others chose, for reasons that may include the anticipation of defeat, not to stand for reelection).⁴⁰ Given that incumbents won in eight and lost in six elections, their odds of being reelected between 1950 and 1990 were 1.33 to 1, while those of prime ministers in parliamentary systems were 0.66 to 1.⁴¹ Thus, while incumbent presidents seem to have a clear advantage when they are legally permitted to run for reelection, most presidential systems prevent the incumbents from exploiting this advantage by requiring them to leave office whether or not voters want them to stay. In this way, “excessively” strong presidents are prevented from emerging, and the risks to presidential democracies are allegedly reduced.

The bar for what constitutes “excessive,” however, may be set at a point that is too low. Given the suppositions that presidents are bound to clash with the legislature and that unresolvable impasse between the two is inevitable, any president who is capable of securing power for multiple terms “must” be abusing her or his powers and exerting undue domination over the legislature and other political actors.

However, if such a conflict is not presupposed and we accept that the relationship between the president and the congress can be conceived not as a vertical conflict but as a situation of horizontal cooperation,⁴² we can then realize that, even if effective, constitutional limits for presidents may be too blunt an instrument for limiting the powers of presidents. For, at the same time that it limits the president’s ability to accumulate power over time, it fundamentally interferes with the relationship between voters and presidents, and preempts the possibility that elections may operate as mechanisms of accountability.

I do not mean to imply that incumbent presidents are to be let loose in pursuing reelection from their positions of strength. However, the concern should not exclusively be with preventing presidents from becoming too powerful. The goal is more general in the sense that what needs to be done is to regulate and limit the advantages that incumbents inevitably possess in electoral contests. Constitutional limits to reelection deprive *all* incumbents

39. Linz, *supra* note 1, at 17.

40. Cheibub & Przeworski, *supra* note 38, at 234.

41. *Id.* at 235.

42. *See infra* subpart II(B).

of the possibility of being rewarded by voters because of the possibility of excesses by *some* incumbents.⁴³ It eliminates incumbency advantage by acting on the “incumbency” rather than on the “advantage” portion of the phrase. The goal is not to get rid of the advantage incumbents may or may not have—which originates in the fact that voters may have more information about them than they have about challengers—but to prevent that advantage from becoming excessive. With this in mind, we can start to search for institutions that achieve the goal of limiting incumbency advantage without exacting the high price of severing the possibility of electoral accountability. Some of them include strict regulation of campaign finance and procedures, equal distribution of public political-campaign funds in order to reduce barriers to entry into political competition, free access to media, and the strengthening of agencies that oversee campaigns. These are devices that will limit the ability of presidents to use the office for undue electoral advantage yet will not remove their incentives to perform well with an eye to being reelected.

B. Legislative and Presidential Electoral Systems

The operation of presidentialism may be affected by the ways both congress and the president are elected. One common view about presidentialism, as we know, is that it must avoid high levels of partisan fragmentation in the assembly.⁴⁴ Legislative fragmentation increases the chances that the party of the president will not control a majority of seats in the congress, thus increasing the probability that a minority presidential government will emerge.⁴⁵ Given the alleged lack of incentives for cooperation inherent to presidentialism, a coalition government will be unlikely or, if one emerges, ephemeral.⁴⁶ Government will be ineffective, unable to secure legislative support for proposals.⁴⁷ Legislative paralysis—or worse—will then follow.⁴⁸

Given the problems generated by legislative fragmentation, limiting the number of political parties has become one of the most important guiding

43. There is a large body of literature on legislator term limits in American states, which is relevant for thinking about limits on presidential reelection. For an excellent review of this literature and for an argument about how it can be used to develop and test hypotheses about legislative theories, see Christopher Z. Mooney, Univ. of Ill. at Springfield, Thank You, Paul Jacob: Term Limits as a Boon to Legislative Scholarship, Presentation at the Annual Meeting of the American Political Science Association (Aug. 30, 2007), available at <http://www.igpa.uillinois.edu/system/files/WP152-Mooney%20TermLimits.pdf>.

44. See, e.g., Scott Mainwaring, *Presidentialism, Multipartism, and Democracy: The Difficult Combination*, 26 COMP. POL. STUD. 198, 215, 215–16 (1994) (arguing that the multiparty system can be the “Achilles’ heel” of a president’s effectiveness).

45. *Id.*

46. *Id.* at 220–22.

47. *Id.* at 217–18.

48. *Id.*

principles in discussions of electoral systems in presidential democracies.⁴⁹ Specifically, it has been argued that presidential democracies would work better with a restrictive electoral system—that is, one that adopts, for example, single-member districts,⁵⁰ relatively high thresholds for legislative representation,⁵¹ stronger legal requirements for the establishment of political parties,⁵² or a combination of these features.⁵³ Electoral systems with these features would tend to generate party systems characterized by a small number of parties and presidents supported by a legislative majority.⁵⁴ These presidents would be effective in the sense that they would be able to have their legislative initiatives approved in congress, conflict would be less likely, and the possibility of democratic breakdown reduced.⁵⁵

However, there is evidence demonstrating that the facts that underlie this reasoning are questionable. The relationship between risk of democratic breakdown and legislative fragmentation is not linear for presidential democracies, and thus reducing the number of parties will not necessarily reduce the risk of democratic breakdown.⁵⁶ Empirical studies have shown that it is not harder for presidents to form coalitions when party fragmentation is high,⁵⁷ the risk of death is not higher for a presidential democracy when no coalitions are formed,⁵⁸ and single-party minority presidential governments are not less legislatively effective than (majority or minority) coalition governments.⁵⁹ Thus, it seems that presidential democracies that adopt “permissive” electoral systems, such as those based on proportional

49. See, e.g., Matt Golder, *Presidential Coattails and Legislative Fragmentation*, 50 AM. J. POL. SCI. 34, 41–43 (2006) (concluding from empirical data that the number of presidential candidates influences legislative fragmentation). The following discussion borrows heavily from CHEIBUB, *supra* note 22, at 168–69.

50. See Yen-Tu Su, *Beyond Nightmare and Hope: Engineering Electoral Proportionality in Presidential Democracies*, 30 J. LEGIS. 205, 240–41 (2004) (observing that the use of single-member districts promotes accountability and strong ties between voters and representatives).

51. See *id.* at 228 (“[T]o restrict the fragmentation of party system, we can decrease the electoral proportionality of legislative elections by imposing a higher electoral threshold.”).

52. See *id.* at 223 (arguing that imposing a higher threshold of exclusion on the party system can prevent fragmentation).

53. See Mainwaring, *supra* note 44, at 225 (arguing that countries could make presidential democracy more viable “by introducing a higher threshold, by reducing district magnitude in proportional systems, or by having concurrent congressional and presidential elections”).

54. *Id.* at 224–25.

55. See *id.* at 215–16 (noting that presidents in systems with fewer parties are more likely to enjoy legislative support, which decreases the potential for ideological conflict or immobility of the government).

56. CHEIBUB, *supra* note 22, at 95–98; José Antonio Cheibub, *Minority Governments, Deadlock Situations, and the Survival of Presidential Democracies*, 35 COMP. POL. STUD. 284, 298–302 (2002); see also PRZEWORSKI, ALVAREZ, CHEIBUB & LIMONGI, *supra* note 5, at 134 (showing that “[p]residential democracies appear particularly vulnerable” when “the largest legislative party controls more than one-third but less than one-half of seats”).

57. CHEIBUB, *supra* note 22, at 81–83.

58. *Id.* at 86–94.

59. *Id.* at 87–92.

representation with low barriers to entry, do not really have to pay a price in terms of the government's ability to govern. They can keep electoral rules that allow for a high degree of representativeness without increasing the probability of democratic breakdown.

As for the way presidents are elected, there are two aspects to be emphasized. The first has to do with the rules for the election of presidents. The second has to do with the timing of presidential elections relative to legislative elections.

One of the advantages of presidentialism is that it provides for one office with a national constituency. This may become particularly advantageous in situations of high political volatility and heterogeneity since the presidency may operate as a force toward unity and integration. Yet, for this to occur, the rules for electing the president have to be carefully crafted so that they provide an incentive for integration rather than a reinforcement of existing political, ethnic, geographic, or religious cleavages. There is no one formula that may be generally applied in designing a presidential electoral system in a context of heterogeneity. This is so because, as Donald Horowitz has shown, the best system depends on the specific distribution of cleavages across the national territory.⁶⁰ One mechanism, for instance, requires that contestants seek votes outside of their narrowly defined constituencies in order to be successful. This was the system used in Nigeria under the 1979 Constitution, where the winner of the presidential elections had to obtain a plurality of the national vote and at least 25% of the vote in at least two-thirds of the states.⁶¹ Another mechanism is the alternative vote used in Sri Lanka's presidential elections.⁶² In this system, voters are asked to order all contestants minus one. If no candidate wins an outright majority of the votes, all but the top two candidates are eliminated and the second, third, and so on preferences in the ballots are counted until one candidate reaches more than 50% of the vote.⁶³ Thus, to the extent that no candidate can expect to obtain a majority in the initial balloting, each will have an incentive to reach beyond their own constituencies in order to be ranked relatively high on other groups' preferences.⁶⁴

A functionally similar procedure is now adopted in most Latin American countries, namely the two-round presidential election.⁶⁵ In this case, regular elections are held, and if no candidate obtains more than 50% of the votes a second round of elections takes place with the participation of the

60. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 36–41 (2d ed. 2000).

61. *Id.* at 637.

62. *Id.* at 639–41.

63. *Id.* at 639–40.

64. *Id.* at 650.

65. Robert Richie, *Instant Runoff Voting: What Mexico (and Others) Could Learn*, 3 *ELECTION L.J.* 501, 502 (2004); see also DAVID M. FARRELL, *ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION* 51–52 (2001) (identifying Chile, Columbia, and Ecuador as Latin American nations that use a two-round election system).

two candidates with the highest number of votes. The difference with respect to the alternative vote is that voters are asked to rank only up to their second choice, and the ranking occurs at different points in time.⁶⁶ These are just some examples of a menu of choices that may, in fact, be quite large. What they have in common is that they all use the presidential election as way to mitigate some potentially problematic cleavages and serve as a force that generates incentives for integration. A two-round system for presidential elections, however, is associated with the multiplication of political parties because voters in the first round will have no incentive to vote strategically. Since this would prevent the reduction in the number of parties, two-round presidential elections have been considered inadequate for presidential democracies.⁶⁷ To the extent that the electoral system is not evaluated primarily on its ability to mitigate alleged problems with presidentialism, it can be used in the pursuit of a more varied set of goals.

Presidential and legislative elections can happen always at the same time (like in Costa Rica),⁶⁸ always at different times (like in Brazil during the 1946–1964 democratic period),⁶⁹ or they may alternate (like in the United States where, with legislative elections every two years and presidential elections every four years, elections coincide every four years).⁷⁰ There is some evidence that when they occur together, presidential elections operate to reduce the number of political parties.⁷¹ Presidents generate large coattail effects, thus aiding the election of copartisan legislators.⁷² This provides a strong incentive for individual legislators to join parties with a real chance of generating a viable presidential candidate and may, ultimately, help produce presidents from parties controlling a relatively large share of seats in the legislature. Thus, if the fragmentation of the party system is a concern, the stipulation of concurrent presidential and legislative elections may help reduce the number of political parties in competition without the implementation of a restrictive electoral system for legislative elections. The price, however, is that a system of concurrent presidential and legislative elections deprives voters of the opportunity to signal their approval or

66. FARRELL, *supra* note 65, at 168.

67. See Linz, *supra* note 1, at 21, 21–22 (arguing that two-round elections produce the “dysfunctional consequence[]” of reinforcing party fragmentation rather than encouraging a reduction in the number of parties).

68. Matthew Soberg Shugart, *The Electoral Cycle and Institutional Sources of Divided Presidential Government*, 89 AM. POL. SCI. REV. 327, 339 tbl.A–1 (1995).

69. *Id.*

70. See U.S. CONST. art. I, § 2, cl. 1 (requiring a two-year term for representatives); *id.* art. I, § 3, cl. 2 (dividing the Senate into thirds, each of which is elected every two years); *id.* art. II, § 1, cl. 1 (providing for a four-year presidential term).

71. Golder, *supra* note 49, at 40; see also Shugart, *supra* note 68, at 330, 330–31 (showing that “the incidence of divided government will be greater” when presidential and legislative elections are nonconcurrent).

72. See Golder, *supra* note 49, at 40 (showing this strong coattails effect in concurrent presidential and legislative elections).

disapproval of government performance in the middle of the presidential term.

C. *Presidents' Legislative and Agenda Powers*

Almost all presidential constitutions give some legislative powers to the presidency.⁷³ The most important powers include veto, decree, and urgency powers, as well as the government's exclusive power to introduce legislation in some specified areas.⁷⁴

Veto powers stem from provisions that both require legislative acts to be signed by the president to become law and grant the president the ability to refuse to sign them. When the president can only refuse the bill in its entirety, the president has only complete- or total-veto power. When the president may object to portions of the bill, the president has partial-veto power. The language here may be misleading. Because presidents with partial-veto power are not presented with an all-or-nothing choice, they have more ways to influence legislation and hence are more powerful. When the president vetoes a bill (either partially or completely), the bill is often sent back to the legislature, which is then given the opportunity to reaffirm its will and override the presidential veto.⁷⁵ The legislative majority required for veto override is usually larger than the majority required for the approval of the bill in the first place—most presidential constitutions require a two-thirds majority of the legislature in order to override a presidential veto.⁷⁶ If such a majority exists, then the president is required to sign the bill, and it becomes law.⁷⁷

Decree power, which exists in a variety of constitutions both presidential and parliamentary, refers to the executive's ability to issue new laws. Decree power varies widely.⁷⁸ First, it varies with respect to the areas in which it may be used: Some constitutions only allow for presidential "executive orders"—that is, purely administrative proclamations pertaining

73. See, e.g., MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 19 (1992) ("Powers are never entirely separate under presidentialism—nor were they intended to be. . . . [P]residentialism seeks to protect mutual checks, which in turn requires that powers overlap considerably.").

74. The following discussion borrows heavily from CHEIBUB, *supra* note 22, at 170–73.

75. E.g., U.S. CONST. art. I, § 7.

76. E.g., *id.* The majority of Latin American presidential constitutions also mandate a two-thirds majority to override a veto. See Eduardo Alemán & Thomas Schwartz, *Presidential Vetoes in Latin American Constitutions*, 18 J. THEORETICAL POL. 98, 101 tbl.1 (2006) (examining the override rule in eighteen Latin American countries).

77. E.g., U.S. CONST. art. I, § 7; CONST. ARG. § 83.

78. See generally John M. Carey & Matthew Soberg Shugart, *Calling Out the Tanks or Filling Out the Forms?*, in *EXECUTIVE DECREE AUTHORITY 1* (John M. Carey & Matthew Soberg Shugart eds., 1998) (defining, analyzing, and classifying different forms of decree power found in various countries).

to the implementation of laws already approved by the legislature.⁷⁹ Others allow for presidential decrees under special circumstances that are, nonetheless, sufficiently vague so that presidential action is possible in virtually any area.⁸⁰ Second, presidential decree power varies with respect to its time frame: Typically, presidential decrees enter into effect as soon as they are issued.⁸¹ In a few cases, some time elapses before they enter into effect, during which the legislature is given the opportunity to reject them.⁸² Third, in some cases executive decrees automatically become permanent laws,⁸³ whereas in other cases they expire if not approved by the legislature within some time frame.⁸⁴

In many presidential constitutions, presidents are allowed to declare a bill “urgent.”⁸⁵ When this is done, the assembly is required to vote on the bill in a relatively short time period (e.g., 30 or 45 days), and legislative work

79. Brian R. Sala, *In Search of the Administrative President: Presidential “Decree” Powers and Policy Implementation in the United States*, in EXECUTIVE DECREE AUTHORITY, *supra* note 78, at 254, 260–61.

80. Such vague special circumstances include “relevance,” “urgency,” and “economic or financial matters, when so required by the national interest.” *See, e.g.*, Timothy J. Power, *The Pen Is Mightier than the Congress: Presidential Decree Power in Brazil*, in EXECUTIVE DECREE AUTHORITY, *supra* note 78, at 197, 202 (discussing consideration of “relevance” and “urgency” in Brazil); Gregory Schmidt, *Presidential Usurpation or Congressional Preference?: The Evolution of Executive Decree Authority in Peru*, in EXECUTIVE DECREE AUTHORITY, *supra* note 78, at 104, 116 (discussing consideration of “economic or financial matters, when so required by the national interest” in Peru). But decree powers under “special” circumstances are not to be confused with constitutional emergency powers, which allow for the temporary suspension of some constitutional provisions in specified circumstances. *See* Delia Ferreira Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina, 1989–93*, in EXECUTIVE DECREE AUTHORITY, *supra* note 78, at 33, 34 (distinguishing “delegated decree authority” from “emergency powers”).

81. *See* Carey & Shugart, *supra* note 78, at 9–12, 10 tbl.1.1 (reporting that of the eleven constitutions examined, Argentina, Brazil, Chile, Columbia, Italy, Peru, and Russia have constitutional provisions allowing certain presidential decrees to go into effect immediately).

82. *See id.* (reporting that of the eleven constitutions examined, Ecuador and France have constitutional provisions providing for a time lapse after issuance of certain presidential decrees so that the legislature may take action if desired).

83. *See id.* (reporting that of the eleven constitutions examined, Chile, Columbia, Ecuador, France, Peru, and Russia have constitutional provisions allowing certain presidential decrees to automatically become law without action on the part of the legislature).

84. *See id.* (reporting that of the eleven constitutions examined, Argentina, Brazil, Columbia, France, and Italy have constitutional provisions providing that certain presidential decrees will lapse without action on the part of the legislature).

85. *E.g.*, C.F. art. 62 (Braz.) (“In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law; such measures shall be submitted immediately to the National Congress.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [CONST. CHILE] art. 74, *translated in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (allowing the President to invoke “the urgency of a project” and thus speed the legislative process); BUNREACT NA HÉIREANN, 1937 [IR. CONST.], art. 24 *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (allowing the President the opportunity to determine whether a bill is “urgent and immediately necessary for the preservation of the public peace and security”).

is paralyzed until such a vote takes place.⁸⁶ The president thus is empowered to directly affect the order of business of the legislative body.

Finally, many constitutions grant the government the exclusive power to introduce certain legislation. U.S. presidentialism is virtually unique among presidential democracies in that it requires that all legislation be initiated from within the legislature.⁸⁷ In most other presidential democracies, however, the role of the assembly in initiating legislation is limited in some areas, such as the size of the armed forces, the creation of jobs, the structure of public administration, and, most importantly, the budget.⁸⁸ Normally, the assembly is allowed to amend these bills, even if constrained by provisions stipulating, for example, that it can only propose amendments that do not increase the deficit or the overall level of spending.⁸⁹ But even if granted the power to amend freely, the assembly is faced with an agenda that is set by the president and not by itself. And, as we know, the party that sets the agenda is always in an advantageous position.

All these features of presidential agenda powers are rather consequential, and they combine into institutionally weaker or stronger presidencies. Although there are many who believe that strong presidents are problematic in that they will clash with congress and eventually generate government and even regime crises, there are those who argue that strong presidents are not necessarily bad for the operation of presidential constitutions.⁹⁰ For instance, the strong presidential agenda powers

86. *E.g.*, C.F. art. 62 (requiring congressional action within sixty days of the President's adoption of provisional measures); CONST. CHILE art. 74 (mandating that the National Congress respond within thirty days to any bill which the President has deemed urgent); IR. CONST., 1937, art. 24 (permitting the time frame for considering an urgent bill to be abridged but allowing the specific length of time to be determined by resolution).

87. *See* U.S. CONST. art. I, § 1 (granting all legislative powers to the Senate and House of Representatives).

88. *See* Carey & Shugart, *supra* note 78, at 6 (describing legislative-agenda powers of presidents in various regimes).

89. *See id.* (describing the response of Chile's legislature to the executive's submission of appropriations legislation).

90. *See, e.g.*, PETER SIAVELIS, THE PRESIDENT AND CONGRESS IN POSTAUTHORITARIAN CHILE: INSTITUTIONAL CONSTRAINTS TO DEMOCRATIC CONSOLIDATION 191 (2000) (concluding that despite an "exaggerated" Chilean presidency, "the success of the Aylwin and Frei administrations demonstrates that presidentialism can, given certain circumstances, work well in Chile"); Argelina Cheibub Figueiredo & Fernando Limongi, *Mudança constitucional, desempenho do legislativo e consolidação institucional* [*Constitutional Change, Legislative Performance and Institutional Consolidation*], 29 REVISTA BRASILEIRA DE CIÊNCIAS SOCIAIS 175 (1995) (Braz.), translated in 2000 BRAZILIAN REV. SOC. SCI. (SPECIAL ISSUE) 71, 91–92 [hereinafter Figueiredo & Limongi, *Constitutional Change*] (concluding that the 1988 Brazilian Constitution's maintenance of the President's broad legislative powers are justified because of an otherwise obstructive legislature); Argelina Cheibub Figueiredo & Fernando Limongi, *Presidential Power, Legislative Organization, and Party Behavior in Brazil*, 32 COMP. POL. 151, 155, 158 (2000) [hereinafter Figueiredo & Limongi, *Presidential Power*] (finding that between 1989 and 1997, bills introduced by Brazilian presidents were successfully enacted 86% of the time largely through presidential engagement with the legislature); Octavio Amorim Neto, Gary W. Cox & Mathew D. McCubbins, *Agenda Power in Brazil's Câmara dos Deputados, 1989–98*, 55 WORLD POL. 550, 574 (2003)

established by the postauthoritarian constitutions of countries such as Brazil and Chile are considered to be largely responsible for the high level of legislative success of their governments.⁹¹

The case of Brazil seems to be highly relevant here given the large number of centrifugal elements built into the system, which in combination with presidentialism would suggest high volatility and ungovernability: a federally structured country⁹² with economically diverse regions,⁹³ political parties with weak popular penetration,⁹⁴ an electoral system for the assembly (open-list proportional representation) with low barriers to entry,⁹⁵ and features that make state governors influential over party decisions.⁹⁶ Yet, legislative behavior in the Brazilian Congress has exhibited remarkably high levels of partisanship, with presidents capable of relying on stable coalitions that supported them on most of their legislative agenda.⁹⁷ This unexpected pattern, in turn, is a function of the President's legislative powers granted by the 1988 Constitution, which include all of the powers discussed above: partial-veto power, decree power, the power to request urgency in the

(contending that President Cardoso's successful creation of an "agenda cartel" in the Brazilian Congress demonstrates that "there is no reason to suppose that he was outside the normal range of success" compared to premiers in foreign parliamentary systems).

91. See SIAVELIS, *supra* note 90, at 23, 151 (observing that the Chilean executive's control of the legislative agenda allows it to be "quite successful in seeing its proposals become laws of the republic" but also lamenting that such agenda control "limits the effectiveness of the legislature as a deliberative body"); Figueiredo & Limongi, *Presidential Power*, *supra* note 90, at 151–52 (arguing that Brazilian presidents' "considerable degree of success in enacting their legislative agenda" is due to "[t]he extensive legislative powers of the president," which "allow the executive both to control the legislative agenda and to restrict the legislature's 'transformative power'").

92. David J. Samuels & Scott Mainwaring, *Strong Federalism, Constraints on the Central Government, and Economic Reform in Brazil*, in *FEDERALISM AND DEMOCRACY IN LATIN AMERICA* 85, 94–95 (Edward L. Gibson ed., 2004).

93. See BEN GOERTZEL & STEPHAN VLADIMIR BUGAJ, *THE PATH TO POSTHUMANITY* 379 (2006) (noting that Brazil's large economy is highly economically diverse "with huge variations in development level across industries").

94. See SCOTT P. MAINWARING, *RETHINKING PARTY SYSTEMS IN THE THIRD WAVE OF DEMOCRATIZATION: THE CASE OF BRAZIL* 5, 4–5 (1999) (noting that Brazil is "an exceptional case of party weakness" where parties have little legitimacy and frequent turnover); RIORDAN ROETT, *BRAZIL: POLITICS IN A PATRIMONIAL SOCIETY* 33 (1999) (discussing the fragility of the Brazilian political party structure and their "weak roots in society").

95. See Samuels & Mainwaring, *supra* note 92, at 98 ("An open-list proportional representation system in which states serve as electoral districts forces politicians to compete against members of their own party as well as candidates from other parties for seats.").

96. See *id.* at 97 ("In the absence of strong national party organizations and of a national legislature that controls the purse strings, federal deputies rely on state governors to provide political sustenance.").

97. See Figueiredo & Limongi, *Presidential Power*, *supra* note 90, at 158 (observing that Brazilian presidents have passed their agendas "by building government coalitions through the distribution of ministries to political parties and thereby securing the votes they needed in congress").

consideration of specific legislation, and the exclusive power to initiate budget legislation.⁹⁸

Figueiredo and Limongi, in their various papers, have convincingly uncovered the mechanism whereby the powers of the presidency positively affect the capacity of presidential governments to act, even in the face of many adverse institutional conditions.⁹⁹ The concentration of legislative powers in the executive (coupled with a highly centralized decision-making structure in the legislative chambers) renders the individual and independent action of legislators futile. For these legislators, the rational course of legislative behavior is to follow their parties' directives in Congress since this is the only way they will be able to influence public policies and obtain the resources that they may use in seeking a renewal of their mandates from voters.¹⁰⁰ It is this centralization of the decision-making process, they argue, that explains the high degree of legislative success of Brazilian presidents¹⁰¹—a success that is not much different from that obtained in parliamentary democracies.¹⁰²

The operation of this mechanism, of course, raises a number of interesting questions. Here I would like to consider the different ways that have been put forward for explaining the actions of a strong president in a democratic system. In particular, I address the issue of accounting for a president's choice to use decrees as an instrument of policy making. I will do so by focusing specifically on the case of Brazil, about which a number of high-quality and sophisticated studies have recently been done.

98. C.F. arts. 66, 84, 64, 61. The legislative success of the government is also aided by the fact that Congress is highly centralized in its organization, with party leaders yielding enough power to bypass the work of permanent committees and set the agenda for the floor. This organization, of course, is not a constitutional feature and resulted from a decision of the assembly itself. However, it is essential for allowing the President to form stable legislative coalitions with a relatively small number of political parties, despite all the forces that conspire against such stability. Octávio Amorim Neto, *The Puzzle of Party Discipline in Brazil*, 44 *LATIN AM. POL. & SOC'Y* 127, 132 (2002) (reviewing ARGELINA CHEIBUB FIGUEIREDO & FERNANDO LIMONGI NETO, *EXECUTIVO E LEGISLATIVO NA NOVA ORDEM CONSTITUCIONAL* [THE EXECUTIVE AND LEGISLATIVE BRANCHES IN THE NEW CONSTITUTIONAL ORDER] 55–67 (1999)); see also Figueiredo & Limongi, *Presidential Power*, *supra* note 90, 159–61 (showing that in Brazil the tight control of party leaders over other legislators allows the President to influence the legislative agenda); cf. Leslie Elliott Armijo et al., *Compared to What? Assessing Brazilian Political Institutions*, 39 *COMP. POL. STUD.* 759, 768 (2006) (concluding that there is “constant negotiation” between the President and the multiparty Congress, which “is of utmost importance for democratic legitimacy”).

99. See generally Figueiredo & Limongi, *Presidential Power*, *supra* note 90 (arguing that presidential legislative powers provide presidents with a mechanism to encourage legislative branch cooperation).

100. See *id.* at 167 (contending that because “the executive–legislative bargaining process is structured along party lines,” it is therefore “rational for each representative to act as a party member and to support the party leaders”).

101. See *id.* at 168 (concluding that the legislature's acceptance of the President's proposals “prevails, because centralized control over the agenda has profound effects on party discipline”).

102. Amorim Neto, Cox & McCubbins, *supra* note 90, at 573–74.

There are two broad types of explanations for the use of decrees by recent Brazilian presidents. The first one, which we could call *political* or *conditional*, sees presidential decrees as one among a set of alternative options in a menu of instruments available to presidents seeking to implement their legislative agenda.¹⁰³ In this view, presidents choose a strategy of legislative action that emphasizes either the use of decrees or ordinary legislation, which systematically depends on the *political context* within which presidents must interact with the legislature and *circumstantial* factors such as the presidents' popularity, the occurrence of elections, or the existence of pressures for speedy executive action.¹⁰⁴ In this view, because it is constant, the institutional structure that shapes executive–legislative relations in Brazil cannot account for variation in the use of decree powers by the five presidents who have governed under the 1988 Constitution.

The political–conditional view of presidential decree usage, in fact, sustains two competing theories, which Pereira, Power, and Rennó call “unilateral action” and “delegation” theories.¹⁰⁵ In the former, presidents use their decree powers when they do not have the necessary support to get ordinary legislation approved in Congress.¹⁰⁶ In this theory, the use of decrees constitutes a way for the President to bypass an unfriendly Congress. Thus, the share of decrees in the President's overall legislative strategy will increase when she cannot count on the reliable and steady support of a legislative majority. This support is often indicated by the share of seats held by the parties also holding cabinet positions,¹⁰⁷ but as some authors suggest, it is more fundamentally dependent on the President's ability to compose a government coalition that secures the proportionality between ministerial posts and the legislative support a party can provide.¹⁰⁸ Delegation theory, in turn, sees presidential decrees as a convenient means at the disposal of the legislative majority, which may prefer to transfer some of its powers to the executive for a variety of reasons.¹⁰⁹ These may include partisan support for

103. See, e.g., Carlos Pereira, Timothy J. Power & Lucio Rennó, *Under What Conditions Do Presidents Resort to Decree Power? Theory and Evidence from the Brazilian Case*, 67 J. POL. 178, 180 (2006) (discussing the reasons presidents may choose to use the “extraordinary” decree power rather than “ordinary mechanisms of legislative initiative”).

104. *Id.*

105. *Id.*

106. See *id.* (stipulating that the unilateral perspective “views executive orders or decrees as instruments that the executive uses to bypass adversarial or noncooperative legislative bodies”).

107. See *id.* at 186 (suggesting that when “the presidential cabinet's political ‘coverage’ in Congress” and the degree of “pro-presidential parties’ share of seats within the government's floor voting coalition” are high, there is likely to be a strong and “satisfied coalition arrayed behind the president”).

108. E.g., OCTAVIO AMORIM NETO, *PRESIDENCIALISMO E GOVERNABILIDADE NAS AMÉRICAS* 41 (2006) (concluding from statistical analysis of Latin American governments that presidents who exchange ministerial posts to gain a cooperative legislature usually disproportionately select partisan members).

109. Pereira, Power & Rennó, *supra* note 103, at 181.

individual governments, collective action problems within the legislature, or electoral incentives of individual legislators.¹¹⁰

Both unilateral-action and delegation theories predict that the reliance on decrees by presidents is a function of the political conditions they face; the only difference is that they predict opposite effects. According to unilateral-action theory, the use of decrees will increase when the President faces unfavorable political conditions; according to delegation theory, the use of decrees will increase when the President faces favorable political conditions. The balance of the evidence provided by the literature is mixed: Pereira, Power, and Rennó found that the results are highly dependent upon the particular starting conditions, but they do show, in some instances, that delegation theory can be supported by the evidence.¹¹¹ On the other hand, Amorim Neto, Cox, and McCubbins suggest that the data best conform with unilateral-action theory.¹¹²

The second explanation of the use of decrees by Brazilian presidents is *institutional* in nature and posits that political and circumstantial factors have little or no influence on the President's choice to use either decrees or ordinary legislation to govern. In fact, according to this view, there is little that can be characterized as a systematic choice by a president regarding whether to use decrees or ordinary legislation.¹¹³ In this view, the post-1988 institutional structure facilitated the shaping and sustaining of a legislative majority by the government.¹¹⁴ Decree power is one of the main instruments for doing this—it is a mechanism whereby through negotiation and bargaining the executive can set the policy status quo and lead the process of shaping the support of a legislative majority for the policies it wishes to implement. In this sense, the use of decrees by the executive is neither delegation nor unilateral action, and attempting to adjudicate among these two perspectives is probably futile. Decrees are, by design, instruments that allow the executive to act unilaterally; through this action, however, the government is able to bring together a legislative majority, which it will need if it wants these

110. John M. Carey & Matthew Soberg Shugart, *Institutional Design and Executive Decree*, in EXECUTIVE DECREE AUTHORITY, *supra* note 78, at 274, 295.

111. See Pereira, Power & Rennó, *supra* note 103, at 195 (showing that the data relating to the first term of Brazilian President Fernando Henrique Cardoso is best explained by a delegation theory).

112. See Amorim Neto, Cox & McCubbins, *supra* note 90, at 560 (arguing that the presidential decrees in Brazil are best thought of as “powerful policy-making instrument[s] . . . [that] allow the executive to unilaterally change the status quo”).

113. See, e.g., JOHN D. HUBER, RATIONALIZING PARLIAMENT 26–27 (1996) (demonstrating that the institutional constraints on the decree power of the President in the French system greatly influence the ultimate legislation channel).

114. See, e.g., Andrés Malamud, *Presidential Diplomacy and the Institutional Underpinnings of MERCOSUR: An Empirical Examination*, LATIN AM. RES. REV. 138, 153 (2005) (pointing out that the intervention of the Brazilian President, via the decree power, in the Brazil–Argentina sugar dispute of 2000 was successful because it was backed by institutional capabilities within the Brazilian system).

policies to become permanent. Thus, the matter is not whether Congress delegates or the President usurps legislative powers. The question is, How does the President use decrees to shape the legislative agenda and to bring about a legislative majority?¹¹⁵

In the institutionalist view, decrees are used both as convenient means to address routine issues and as regular instruments in the negotiation and bargaining that characterize the legislative process.¹¹⁶ Since they are neither usurpation nor delegation, they do not vary systematically with political factors such as the legislative strength of the President, his ability to manage his coalition, or his popularity.¹¹⁷ Some circumstantial factors—such as macroeconomic pressures leading to the implementation of emergency stabilization plans—matter, but they do simply because it is only through decrees that presidents can act with the speed, secrecy, and surprise that are sometimes considered to be essential for the plans' success.¹¹⁸ Even in these cases, however, presidents can be successful in transforming their decrees into regular legislation.¹¹⁹

I recognize that the institutionalist view of decrees has yet to be developed and supported empirically.¹²⁰ Anyone seeking to do so will face a

115. Note that the institutional perspective, which does not necessarily see a conflict between the executive and the legislature in the former's use of decrees, is often interpreted as a variant of delegation theory. See Pereira, Power & Rennó, *supra* note 103, at 181 (espousing a delegation theory in which "[e]xecutive orders also satisfy the preferences of legislators, because legislators are the actors who delegate this power and who have ample opportunity to overturn . . . any undesirable presidential policies"). This, however, is not correct. Delegation theory sees the legislature as the principal and the executive as the agent to whom its powers are transferred. See *id.* (noting that many other authors have grounded the delegation theory in principal-agent doctrines). The institutional perspective does not see the two bodies in such a hierarchical relationship; rather, if there is a hierarchy, it is one that institutionally favors the executive only in that it gives that body the ability to lead the process of policy formation. See HUBER, *supra* note 113, at 184, 184–88 (analyzing why, "in parliamentary democracies, the cabinet plays a more important role than the parliament in crafting the policies of the state").

116. See, e.g., HUBER, *supra* note 113, at 31 (summarizing the French government's authority to implement its budget by decree if the legislature does not vote on a budget within the specified time frame).

117. See *id.* at 29–30 (cataloging these trends and the inability of conventional explanations of executive power to account for them).

118. See Pereira, Power & Rennó, *supra* note 103, at 188 (stating that "a study of executive decree authority [from a political perspective] . . . must provide controls for the very real pressures of macroeconomic management" since presidents regularly use decrees, often by surprise, to deal with "grave socioeconomic crises").

119. See, e.g., John Keeler, *Executive Power and Policy-Making Patterns in France: Gauging the Impact of Fifth Republic Institutions*, 16 W. EUR. POL. 518, 532 (1993) (noting how the French executive has used its emergency powers and decrees to create laws that were never voted on by Parliament).

120. There is, however, a sizeable specific literature on which this perspective is based. I refer to works revolving around the notions of a strong executive and a "rationalized" parliament, which became current in post-WWII Europe and which saw their epitome in the emergence of the French Fifth Republic. These systems sought to create "effective government authority" by structuring executive-legislative relations in such a way as to strengthen the former and to centralize and streamline the latter. See HUBER, *supra* note 113, at 1–2 (illustrating the Fifth Republic's dramatic

tall order since, as the proponents of the political view correctly point out, the Brazilian institutional structure has remained mostly constant since 1988,¹²¹ even though the use of decrees has varied across presidents and even within a president's term.¹²² I believe, however, that one may be able to find strong evidence in support of an institutionalist view of decree power. For instance, in an ongoing project with Argelina Figueiredo, we hope to be able to show, first, that the evidence presented in support of the political view of the use of decree powers by Brazilian presidents is rather weak.¹²³ In this work, we will re-test the political hypothesis using a data set that is more complete and with variables that are operationalized in a way that is, we believe, more appropriate for the question we are seeking to answer. Second, we hope to present new evidence, based on a new data set on executive–legislative relations, which supports the idea that decrees and projects of ordinary legislation are not alternative courses of action that presidents take depending on their ability to work with or against Congress. In fact, we believe that the tests will demonstrate that the bulk of presidential action taken by decrees falls in the domain of what, in countries like the United States, are called “executive orders.” We believe that a large part of the remainder constitutes either a course of legislative action that presidents take parallel to the presentation of ordinary legislation or legislative action that is supported and negotiated by the legislative majority as much as ordinary legislation. We hope to show this by using a substantive classification of ordinary legislation projects and decrees (*medidas provisórias*) and through the analysis of legislative urgency requests for executive bills.

Thus, institutionally strong presidents may not necessarily be detrimental to the functioning of presidential democracies. Attempts to weaken them on the ground that they usurp the power that should be located

restriction of institutional arrangements between the French executive and legislature); Keeler, *supra* note 119, at 520–28 (explaining the Fifth Republic's constitutional articles that allow for the executive to control legislation). As some of the work done on these structures has demonstrated, they did not imply dominance of the executive. See HUBER, *supra* note 113, at 23–24 (dispelling the notion that French institutional arrangements ensure presidential supremacy and parliamentary impotence).

121. See, e.g., Pereira, Power & Rennó, *supra* note 103, at 182 (arguing that the decree power is correlated to the political environment by noting that the constitutional powers in Brazil between 1988 and 1998 were constant, while the degree of presidential political support was quite volatile). Decree rules in Brazil were changed in 2001 in ways that matter for understanding their usage. See Gabriel L. Negretto, *Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina*, 37 COMP. POL. STUD. 531, 544 (2004) (explaining that a 2001 amendment to the Brazilian Constitution prohibits the President from reissuing a provisional measure whose term for approval has expired).

122. See Pereira, Power & Rennó, *supra* note 103, at 188–89 (asserting that certain contextual factors such as presidential popularity and congressional support—factors which vary over time and among administrations—help explain why decrees have been used at such varying rates).

123. We have yet to complete our research so it is not yet available, but the following paragraph reflects what we expect it will show.

in the assembly should, therefore, be reevaluated and considered in light of the benefits they bring about in terms of government performance.¹²⁴

III. Semi-presidential Constitutions

Systems that combine a government dependent on the confidence of a legislative assembly and a popularly elected president—known as semi-presidential or mixed—have become very popular in the past two decades or so. Countries with this kind of constitution represent today about 25% of the democracies in the world.¹²⁵ Naturally, the amount of scholarly work seeking to evaluate these constitutions' performance has grown in tandem with the increase in the number of countries that have adopted them. The vast majority of this work has focused on the presidency and has sought to identify the combination of presidential powers that would mitigate what are considered to be the intrinsic difficulties of a mixed constitution.¹²⁶ It would be fair to say that this concern is the product of the extension of the usual thinking about pure presidentialism to the study of semi-presidentialism. Yet, it may be entirely the case that by focusing on the powers of the president, we are neglecting to ask interesting questions about semi-presidential democracies and are therefore missing some important aspects about the way they actually work. Here I would like to call our attention to four important issues related to semi-presidential democracies, all of which raise interesting questions.

A. *Heterogeneity of Semi-presidential Democracies*

Everyone seems to agree that the form of government in France, Portugal, and Ukraine is different both from the form of government in Italy, Germany, and Denmark on the one hand, and from the form of government in Brazil, the Philippines, and the United States on the other hand.¹²⁷ In Italy, Germany, and Denmark the government is strictly subject to the confidence of a legislative majority, and the head of state exercises mostly ceremonial

124. See Aurel Croissant, *Legislative Powers, Veto Players, and the Emergence of Delegative Democracy: A Comparison of Presidentialism in the Philippines and South Korea*, DEMOCRATIZATION, Autumn 2003, at 68, 93 (urging scholars to analyze the presidentialism of any particular system within the institutional architecture of the constitution and the national party system).

125. José A. Cheibub & Svitlana Chernykh, *Constitutions and Democratic Performance in Semi-presidential Democracies*, 9 JAPANESE J. POL. SCI. 269, 273 (2008).

126. See, e.g., *id.* at 287–91 (conducting statistical analyses aimed at evaluating the correlation between governmental stability and particular combinations of presidential powers).

127. See, e.g., GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 86, 92, 105, 116, 131–32 (1994) (classifying the United States, Brazil, and the Philippines as presidential; classifying Italy, Germany, and Denmark as parliamentary; and classifying France and Portugal (1976–1982) as semi-presidential); Skach, *supra* note 20, at 93 (noting that Ukraine adopted semi-presidentialism as its form of government).

functions.¹²⁸ These countries have a parliamentary form of government. In Brazil, the Philippines, and the United States, the government does not need the confidence of a legislative majority in order to exist; once in place, the legislature plays no role in the survival of the government.¹²⁹ In these countries, the government is only responsible to a popularly elected president.¹³⁰ These are countries with a presidential form of government. In France, Portugal, and Ukraine, the government needs the confidence of a legislative majority in order to exist, and the head of state is a popularly elected president.¹³¹ These systems are considered to be mixed in the sense that they combine the main features of parliamentary and presidential democracies: assembly confidence and a president popularly elected for a fixed term.

Unfortunately, this definition of mixed systems is not sufficient to characterize satisfactorily the way in which they operate. When we qualify a democracy as “presidential,” we know we are talking about systems in which the government is headed by a popularly elected president. Presidential democracies, as we have seen, are different in many respects, including the way the president is elected (by a plurality of voters, by a system of two turns, by an electoral college, or by the congress if no candidate obtains a majority of votes), the time they serve in office (most often four years, but occasionally five or six years), their ability to run for reelection (one reelection allowed, no reelection allowed, reelection allowed after one term out, or, very rarely, unrestricted reelection), and the legislative powers the constitution grants them.¹³² But in all presidential democracies, the president, once chosen, is the head of the government, which, once formed, cannot be dismissed by the assembly. The same can be said of parliamentary democracies. Although in some of them the head of state is a monarch and in others an indirectly elected president or an appointed administrator;¹³³

128. See Tony Burkett, *Germany 1948–1978: Evolution of the Bonn Republic*, 32 PARLIAMENTARY AFF. 176, 185 (1978) (stating that the German presidency is a “largely ceremonial position”); Erik Damgaard, *Denmark: Delegation and Accountability in Minority Situations*, in DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 281 (Kaare Strøm et al. eds., 2006) (characterizing the Danish monarch’s powers as ceremonial not political); Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 323–24 n.237 (2002) (remarking that the Italian presidential office is formalistic with minimal effective power).

129. See SARTORI, *supra* note 127, at 92 (listing Brazil and the Philippines as countries that are both modeled on the U.S. “prototype” with an executive that is neither appointed nor dismissed by parliamentary vote).

130. *Id.*

131. See CHEIBUB, *supra* note 22, at 43 (listing France, Portugal, and Ukraine as having a mixed system); SARTORI, *supra* note 127, at 131–32 (listing France and Portugal (from 1976 to 1982) as mixed, semi-presidential systems).

132. See *supra* subparts II(A)–(B).

133. See, e.g., ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 170 (3d ed. 2008) (noting that Germany’s Federal President is “head of state and moral leader,” elected by “a federal convention consisting of the members of the upper house of the legislature and an equal number of

although in some the legislature must be renewed every four years and in others every three or five years;¹³⁴ although in some the government needs to be formally invested by the parliament and in others such an act is unnecessary;¹³⁵ although in some the government can itself invoke a motion of confidence and in others it cannot;¹³⁶ in all of them the government is subject to the confidence of a legislative majority, which, if lost, implies the dismissal of the government as a whole.¹³⁷

Mixed systems do not share such common features. On the one hand we have systems like France, where the President has effective power in the process of government formation and dismissal, actively participates in governing, and is regarded as being at least partially responsible for policies and outcomes.¹³⁸ The French presidency is a desirable post, and increasingly so, as attested to by the competitiveness of recent presidential elections in that country.¹³⁹ On the other hand, we have systems such as Iceland, where presidential elections are often uncontested and the directly elected President is commonly perceived as “a figurehead and symbol of unity rather than a

members elected by the state legislatures”); *id.* at 317 (noting that New Zealand recognizes England’s monarch as “the sovereign in right of New Zealand” but also noting that she “acts through an appointed representative, the governor-general,” who is “commander in chief of the armed forces, but in title only”).

134. *See, e.g.*, AUSTL. CONST. §§ 7, 13 (providing for direct election of the Australian Senate, for six-year terms, to be elected on a staggered schedule every three years); DANMARKS RIGES GRUNDLOV [DR GRUNDLOV] [Constitution] §§ 29, 32 (Den.), *translated in* 5 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (ordaining that any Danish citizen may vote for Members of Parliament, whose terms expire after four years); COSTITUZIONE [COST.] arts. 55–58, 60–61 (Italy), *translated in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (dividing Italy’s Parliament into two houses, permitting direct elections of both, and setting terms for both at five years).

135. *See* ALAN SIAROFF, *COMPARATIVE EUROPEAN PARTY SYSTEMS* 105 (2000) (noting that the “vast majority of European governments use the system of positive parliamentarianism,” which requires a vote of investiture by parliament before a new government can assume power but also noting that such a vote is not required in the United Kingdom, the Nordic countries, the French Fifth Republic, Austria, Malta, and Portugal).

136. *See, e.g.*, DR GRUNDLOV § 15 (Den.) (providing only for a parliamentary vote of no confidence); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 68 (F.R.G.), *translated in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28 (permitting a vote of confidence to be brought by the Federal Chancellor); *see also* Michael Laver & Kenneth A. Shepsle, *Government Accountability in Parliamentary Democracy*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 38, at 279, 280–81 (noting that a confidence motion is brought by a government, as opposed to a no-confidence motion, which is brought by its opposition in the legislature).

137. *See* Laver & Shepsle, *supra* note 136, at 285–86 (exploring how governments in parliamentary democracies are subject to maintaining the confidence of parliament).

138. *See* HUBER, *supra* note 113, at 25 (calling the French President’s power of dissolution his “most important one”).

139. *See* Elaine Sciolino, *Sarkozy, Elected in France, Vows Break with Past*, N.Y. TIMES, May 7, 2007, at A1 (reporting that Sarkozy defeated his opponent by 6.2% of the vote, with 84% of the French electorate voting); Craig S. Smith, *Violent Protests Greet Sarkozy’s Election in France*, N.Y. TIMES, May 8, 2007, at A8 (reporting that in the wake of Sarkozy’s election protestors set fire to 730 cars across France).

political leader,”¹⁴⁰ and Finland, where even before the 2000 Constitution that codified a more ceremonial role for the President the system had functioned like a parliamentary democracy.¹⁴¹ Thus, identifying a democratic constitution as semi-presidential does not really convey the way the system actually operates. We need more information to know if it is a system in which the president really matters—that is, whether the government is effectively dependent on the president in order to exist—or if, although constitutionally allowed to influence the existence of the government, the president plays a more ceremonial, symbolic role. Although all semi-presidential systems have constitutions that combine a directly elected president with a government that needs the confidence of the parliament in order to exist, not all of them have presidents who effectively participate in the political process and share governing responsibilities with the prime minister.¹⁴² Yet, the presumption is that mixed or semi-presidential constitutions matter for the way politics unfolds, for the government’s capacity to govern, for the accountability of the government to its citizens, and even for the consolidation of democracy.

B. The Relative Unimportance of Constitutional Presidential Powers for Describing the Actual Role of the President in Politics

Although mixed systems vary considerably regarding the political importance of the president, it is unlikely that this variation is due to the way their constitutions allocate powers between the president and the prime minister. Constitutions that allow for equally strong presidents may have very different patterns of interaction between the head of state and the head of government. Consider the Constitutions of Iceland (1944),¹⁴³ Weimar Germany (1919),¹⁴⁴ and France (1958).¹⁴⁵ Regarding government formation and assembly dissolution, the German and French Constitutions read, in many ways, very much like the Icelandic Constitution.¹⁴⁶ Yet, Iceland’s

140. Gunnar Helgi Kristinsson, *Iceland*, in SEMI-PRESIDENTIALISM IN EUROPE 86, 87 (Robert Elgie ed., 1999).

141. See Tapio Raunio, *The Changing Finnish Democracy: Stronger Parliamentary Accountability, Coalescing Political Parties and Weaker External Constraints*, 27 SCANDINAVIAN POL. STUD. 133, 133, 149 (2004) (describing how the Finnish government has become more parliamentarized, and the President less powerful, since the new Constitution came into force in 2000).

142. SARTORI, *supra* note 127, at 131–32.

143. STJÓRNARSKRÁ LÝÐVELDISINS ÍSLANDS [STJÓRNARSKRÁ] [Constitution] (Ice.), translated in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, *supra* note 28.

144. DIE VERFASSUNG DES DEUTSCHEN REICHS OF 1919 [WEIMARER VERFASSUNG] [Constitution], translated in THE DEMOCRATIC TRADITION: FOUR GERMAN CONSTITUTIONS 147–90 (Elmar M. Hucko ed., 1923).

145. 1958 CONST.

146. See Maurice Duverger, *A New Political System Model: Semi-presidential Government*, 8 EUR. J. POL. RES. 165, 177 (1980) (analyzing the constitutions and political practices of several European countries, including Iceland, France, and Germany under the Weimar Republic, to explain why “relatively homogeneous constitutions are applied in radically different ways”).

political system is considered to function like a parliamentary democracy;¹⁴⁷ Weimar Germany is considered to be the epitome of presidential-parliamentary systems,¹⁴⁸ which are characterized not only by the government's assembly responsibility but also by the primacy of the president;¹⁴⁹ and France is considered to be the prototypical mixed, semi-presidential, or premier-parliamentary system.¹⁵⁰ Thus, according to the Weimar Constitution, the Prime Minister is appointed and dismissed by the President;¹⁵¹ the same is true, however, of the Prime Minister, in France¹⁵² and Iceland.¹⁵³ In Iceland, Article 24 allows the President to dissolve the assembly with no limitations to this power;¹⁵⁴ in France, according to Article 12 the President must consult the Prime Minister and the presidents of the assemblies before dissolving the assembly, and must wait a year in order to be able to do it again;¹⁵⁵ in Weimar, Article 25 allowed the President to dissolve the assembly, but only once for the same reason.¹⁵⁶

There are other presidential powers in these constitutions that do not really distinguish these countries or that grant more constitutional powers to the president who is, in practice, the weakest. For example, France and Weimar give their Presidents broadly similar and strong emergency powers¹⁵⁷ (although the Weimar Constitution explicitly states that whatever measures were taken by the President must be suspended if the parliament demands so).¹⁵⁸ The Icelandic President, in turn, has limited emergency powers, being able to act under such powers only when the parliament is not in session.¹⁵⁹ The Icelandic and the Weimar Presidents may reject a bill and cause it to be subject to a popular referendum,¹⁶⁰ something the President of France cannot do unless requested by the government or by a joint motion of the lower and upper houses.¹⁶¹ The only thing the French President can do unilaterally is to ask Parliament to reconsider a law within fifteen days of its

147. SARTORI, *supra* note 127, at 126–27; SHUGART & CAREY, *supra* note 73, at 71–72; Duverger, *supra* note 146, at 167.

148. SARTORI, *supra* note 127, at 128; SHUGART & CAREY, *supra* note 73, at 68; Duverger, *supra* note 146, at 173.

149. SHUGART & CAREY, *supra* note 73, at 24.

150. SARTORI, *supra* note 127, at 122; SHUGART & CAREY, *supra* note 73, at 23; Duverger, *supra* note 146, at 165.

151. WEIMARER VERFASSUNG, art. 53.

152. 1958 CONST. art. 8.

153. STJÓRNARSKRÁ art. 15.

154. *Id.* art. 24.

155. 1958 CONST. art. 12.

156. WEIMARER VERFASSUNG, art. 25.

157. 1958 CONST. art. 16; WEIMARER VERFASSUNG, art. 48.

158. WEIMARER VERFASSUNG, art. 48.

159. STJÓRNARSKRÁ art. 28.

160. *Id.*; WEIMARER VERFASSUNG, art. 73.

161. 1958 CONST. art. 11.

approval.¹⁶² The French Constitution is silent about the President's ability to initiate laws; the Weimar Constitution explicitly denies the President the ability to initiate laws by stating that laws are to be proposed by members of parliament and members of the government,¹⁶³ which consists of the prime minister (the Chancellor) and the ministers.¹⁶⁴ Article 25 of the Icelandic Constitution, in contrast, states that the President may have bills and draft resolutions submitted to the parliament—despite the fact that in practice this is the most ceremonial executive of the three.¹⁶⁵

Finally, while Article 2 of the Icelandic Constitution states that the President and “other governmental authorities referred to in this Constitution and elsewhere in the law” jointly exercise executive power,¹⁶⁶ Article 16 states that the State Council is composed of the President and the government ministers, is presided over by the President, and is the locus where “laws and other important government measures” must be submitted to the President.¹⁶⁷ The French Constitution provides for an ambiguous role for the President in the government: while Article 21 designates the Prime Minister as the one who “directs the operation of the government,”¹⁶⁸ the President presides over the Council of Ministers¹⁶⁹ and must sign “the ordinances and decrees deliberated on in the Council of Ministers.”¹⁷⁰ As for the Weimar Constitution, as seen above, the President is not part of the government at all.¹⁷¹

So, constitutional features are not sufficient to distinguish mixed systems in which the president “really” matters from those in which the president plays no significant role in politics.¹⁷² It is intriguing why similarly

162. *Id.* art. 10.

163. WEIMARER VERFASSUNG, art. 68.

164. *Id.* art. 52.

165. STJÓRNARSKRÁ art. 25.

166. *Id.* art. 2.

167. *Id.* art. 16.

168. 1958 CONST. art. 21.

169. *Id.* art. 9.

170. *Id.* art. 13.

171. WEIMARER VERFASSUNG, art. 52.

172. This is consistent with the lack of consensus in the literature about the effect of presidential powers in semi-presidential democracies. Measures of presidential powers in semi-presidential constitutions are not always important in accounting for variation in the performance of these systems. *See, e.g.*, SHUGART & CAREY, *supra* note 73, at 166, 165–66 (1992) (concluding that granting “great legislative powers” to the president, or “granting shared authority over the composition of the cabinet” are “potentially dangerous arrangement[s]”); Mikhail V. Beliaev, *Presidential Powers and Consolidation of New Post-communist Democracies*, 39 COMP. POL. STUD. 375, 375 (2006) (“[P]olitical regimes with stronger executive powers of presidents exhibit worse contemporaneous democratic performance and are less able to consolidate as democracies.”); Timothy Frye, *A Politics of Institutional Choice: Post-communist Presidencies*, 30 COMP. POL. STUD. 523, 527 (1997) (stating that formal powers of the presidency “are a significant predictor of progress in economic reform in the countries of the former Soviet Union and Eastern Europe”); Lee Kendall Metcalf, *Measuring Presidential Power*, 33 COMP. POL. STUD. 660, 679, 678–79 (2000) (finding that “democratic failure is not very likely in” either parliamentary or semi-presidential

designed constitutions entail practices that are as divergent as the ones we observe in Iceland, France, and Weimar Germany. Indeed, in some cases an analysis focused purely on the constitutional provisions would indicate precisely the opposite outcome in terms of presidential power from that observed in reality.

C. *Adoption of Semi-presidential Constitutions*

The process underlying the interaction between directly elected presidents and prime ministers in contemporary mixed democracies is not unlike the process that characterized the interaction between monarchs and parliaments as the latter asserted their primacy in what are now parliamentary democracies. Both powers try to assert their preeminence and engage in a struggle to do so. Victory, if at all forthcoming, is always political in the sense that one of the powers recognizes that the alternative to giving in and relinquishing power is unsustainable—some kind of deadlock or outright war. Presidents, even under constitutions that give them a lot of powers, will find that they have to appoint governments they would have preferred to avoid because that government needs to obtain the confidence of a legislative majority in order to exist.¹⁷³

Equilibrium may eventually be found and the constitution may or may not be adjusted to reflect it. In Finland, for example, it was adjusted: the 2000 Constitution introduced subtle changes in language to reflect a practice that was, according to most observers, already essentially parliamentary, with the President playing no more than a formal role in the government formation process.¹⁷⁴ Thus, its Section 61 preserves a role for the President in government formation, but one that is explicitly subject to the will of Parliament: “The Parliament elects the Prime Minister, who is thereafter appointed to the office by the President of the Republic. The President appoints the other Ministers in accordance with a proposal made by the

regimes); José Antonio Cheibub & Svitlana Chernykh, *Mixed Constitutions and Democratic Performance: Do Popularly Elected Presidents Matter in Parliamentary Systems?*, Paper Presented at Conference on Separation of Powers at the University of Haifa 21 (Dec. 19–21, 2007), available at http://law.haifa.ac.il/events/events_files/Cheibub%20and%20Chernykh%20Haifa.pdf (“[S]ystems which require the government to obtain parliamentary confidence and at the same time institute a directly elected president are not any different from pure parliamentary systems.”).

173. Consider, for example, the fact that Viktor Yushchenko, Ukraine’s constitutionally strong President and the winner of a hotly contested presidential race in March 2005, finally appointed his opponent in that election, Viktor Yanukovich, as the Prime Minister. Andrew E. Kramer, *Ukraine Leader Forced to Name Ex-rival as Prime Minister*, N.Y. TIMES, Aug. 3, 2006, at A3. This followed a series of attempts to form a government that would exclude Yanukovich’s party from the government, which proved politically unviable. *Id.*

174. See Raunio, *supra* note 141, at 133 (“The new unified constitution, in force since March 2000, completed a period of constitutional change that curtailed presidential powers and brought the Finnish political system closer to a standard version of parliamentary democracy.”).

Prime Minister.”¹⁷⁵ The President is similarly restricted with respect to government termination, as stipulated by Section 64:

The President of the Republic grants, upon request, the resignation of the Government or a Minister. The President may also grant the resignation of a Minister on the proposal of the Prime Minister. The President shall, in any event, dismiss the Government or a Minister, if either no longer enjoys the confidence of Parliament, even if no request is made.¹⁷⁶

Thus, in the 2000 Finnish Constitution, the President’s role is to simply ratify a decision that was made by the legislative majority. But such explicit “adjustment” is always necessary, either because the practice may not be written anywhere—such as in England, where there is no written stipulation that the monarch plays only a formal role in government formation and that the government exists only as long as it enjoys the support of a legislative majority¹⁷⁷—or because the written constitution does not reflect political practice—such as in Denmark, where Section 3 of the Constitution states that legislative power is vested in the King and the parliament conjointly, and that executive power is vested in the King;¹⁷⁸ Section 2 states that the King can dissolve the Parliament at any time;¹⁷⁹ and Section 14 states that the King appoints and dismisses the Prime Minister and other Ministers.¹⁸⁰ In all these cases an effective balance was found between the head of state and the head of government (even if tilted in favor of one actor or the other), and in some cases it was made explicit in the written constitution. Thus, it is not surprising that neither the mere presence of a directly elected president nor the specific powers allocated to the head of state in the constitutional document are found to be of great significance in accounting for variation in the way democratic systems operate.

The question remains as to why so many countries that adopt the parliamentary formula—assembly confidence—in their new constitutions also adopt a directly elected president.¹⁸¹ Why do they not adopt a purely

175. PERUSTUSLAKI § 61.

176. *Id.* § 64.

177. See Paul R. Verkuil, *Cross Currents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 691 (1986) (explaining that in England the “Parliament and the executive are one, and parliamentary majorities form the government”).

178. DR GRUNDLOV § 3. The 1953 Constitution allowed for a female head of state by stipulating that the royal power could be inherited by both men and women. *Id.* § 2. Since 1972, the head of state in Denmark has been a Queen. Yet, at least in its English translation, the Constitution refers throughout to the power of the King, not the Queen or the Monarch. *Id. passim.*

179. *Id.* § 2.

180. *Id.* § 14.

181. One of the common themes in the literature on democracy and democratization in Eastern Europe is the fact that so many countries adopted a constitution that called for a directly elected president. *E.g.*, Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-presidentialism*, 12 PACE INT’L L. REV. 253, 259–62 (2000) (observing that the semi-presidential model is used in much of Eastern Europe);

parliamentary constitution by designing a symbolic or ceremonial presidency? The need for a directly elected president has been justified in two basic ways. In the Weimar Constitution, the President was conceived as a counter to the power of the parliament; the fact that presidential power originated directly in the people would allow it to balance the parliamentary characteristics of the system.¹⁸² The thinking underlying the Gaullist 1958 Constitution, in contrast, was more of a president who would stand above politics and, in this way, serve as the adjudicator of political conflicts.¹⁸³ An additional justification, I believe, is the widespread belief among both constitution makers and constitution analysts that the leadership of the state must not be subject to the whims of a majority. Whereas the government can, and must, reflect the preferences of the majority at the time, the state, it is believed, must have an existence that transcends this majority.¹⁸⁴ What matters, thus, is the “fixed” aspect of the head-of-state office, i.e., it is immune to temporary majorities. The use of some kind of elections to choose who will occupy it is peripheral; it merely follows from the fact that such choice can no longer be justified on hereditary grounds.

Yet, I am not sure whether there exist solid arguments justifying the notion that the head of state must be fixed. This notion—that the state must endure beyond the government—may very well be just an assumption held by both practitioners and analysts. That this must be the case, however, is not true. Note that there are at least three democratic countries in the

Stepan & Skach, *supra* note 2, at 4 n.10 (noting that in Eastern Europe the “norm is a directly elected president”). It is worth noting, however, that the truly remarkable fact about the constitutions these countries adopted is that they all called for a government based on assembly confidence. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 624 (1991) (“[M]any Poles (along with other Eastern Europeans) . . . view the government as in need of constant parliamentary authorization. Typically, this yields a significant constituency for such arrangements as . . . the parliament's power to vote no confidence for the government or any particular minister at any time . . .”). As a matter of fact, many countries adopted an effective parliamentary formula even before they wrote a new constitution. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 459–64 (1991) (describing the constitution-making process in a number of Eastern European countries where the constitution had to be approved by two-thirds of parliament).

182. See WEIMARER VERFASSUNG, art. 41 (providing for the election of the President by the whole German people); see also Max Weber, *Parliament and Government in a Reconstructed Germany*, translated and reprinted in 2 MAX WEBER: ECONOMY AND SOCIETY app. 2 at 1461 (Guenther Roth & Claus Wittich eds., 1978) (calling for “democratization of the suffrage” in post-WWI Germany).

183. See John C. Reitz, *Political Economy and Separation of Powers*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 603 (2006) (“Under the leadership of Charles DeGaulle, France attempted to create a President who would be above the political fray that inevitably surrounds the Parliament, the Prime Minister, and the Prime Minister's Cabinet.”).

184. See, e.g., THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 1961) (arguing that a “pure democracy,” in which there is no check on the will of the majority, is characterized by “turbulence and contention” and is “incompatible with personal security or the rights of property”); Su, *supra* note 50, at 234 (“Doubtless, a central objective of traditional constitutionalism is to prevent the tyranny of the majority . . .”).

contemporary world with constitutions that require the government to be responsible to a legislative majority and that do not provide for a head of state with a fixed term: South Africa, Kiribati, and the Marshall Islands.¹⁸⁵ In South Africa, the head of state and government are one and the same person, who is named the “President.”¹⁸⁶ However, according to the 1996 Constitution (as well as the interim 1994 Constitution), this President is subject to a vote of no confidence by a majority of the National Assembly, which, if approved, requires the President’s resignation and the formation of a new government.¹⁸⁷ The fact that votes of no confidence have been far from likely in South Africa has nothing to do with what the Constitution says and everything to do with the fact that its parliament has been dominated by a single party that has held about two-thirds of the seats since competitive elections were held in 1994.¹⁸⁸ Had such a large majority not existed, the relation between the government and the parliament in South Africa would have been considerably different, with issues of government survival due to legislative action probably occupying the forefront of political life.

Thus, although they have become very popular in the recent past, it is doubtful that mixed constitutions have been adopted with the explicit goal of dividing authority between a directly elected president and a government responsible to the parliament. It is more likely that the choice was to create an assembly-confidence system and, at the same time, to institute a head of state that, by virtue of its independence from the parliamentary majority, would somehow guarantee the continuity of the state. That this head of state was to be elected by popular vote is almost the default option due to the lack of legitimate alternatives.

D. The Government, Not Necessarily the President

What distinguishes contemporary forms of democratic governments is whether they have assembly-confidence systems or not. Given assembly confidence, whether the president is directly elected seems to be of little relevance. It is possible that governance in assembly-confidence systems is guaranteed not by the way the president is elected but by other institutional

185. See CONST. KIRIBATI art. 33 (creating a head of state, the Beretitenti, who has no specific term limits and may be removed by a no-confidence vote from the legislature); CONST. MARSH. IS. art. 5, §§ 3, 7 (creating a President without term limits who is subject to a no-confidence vote from the legislature); S. AFR. CONST. 1996 §§ 83, 102 (creating a unified head of state and government who is also subject to a no-confidence vote).

186. S. AFR. CONST. 1996 § 83.

187. *Id.* § 102; S. AFR. (Interim) CONST. 1993 § 87.

188. Michael Wines, *A Stormy Test for Democracy in South Africa*, N.Y. TIMES, Sept. 23, 2006, at A1 (recording the beginning of now-President Jacob Zuma’s campaign for the leadership of the ANC and documenting the party’s complete stranglehold on political power since Nelson Mandela and the end of apartheid in 1994). *But see World Briefing South Africa: ANC Claims Win with 66% of Vote*, L.A. TIMES, Apr. 25, 2009, at A28 (recording the ANC’s latest electoral victory in 2009, which, while resounding, was significantly less than its 70% margin in 2004 and left the party just short of the threshold required to amend the Constitution at will).

features that strengthen the *government*—that is, that component of the political structure that needs to obtain the confidence of the legislature. These features include mechanisms that allow the government to shape the legislative agenda, to organize a legislative majority, and to keep it reasonably together in the face of the multiplicity of often-contradictory interests that legislators must reconcile over the course of their careers.

There is general agreement that France under the Fifth Republic became a more stable and governable system than it was under the Fourth Republic.¹⁸⁹ One of the most notable features of the new 1958 Constitution was the introduction of a strong presidency—shaped, it is often said, to fit the personality of the man who was the force behind it.¹⁹⁰ As a matter of fact, the oft-repeated phrase “French-style constitution” refers to precisely the combination of such a presidency with an assembly-confidence mechanism. Yet, to say that France became governable as it moved from the Fourth to the Fifth Republic because of the constitutional provisions regarding the presidency is to disregard other, probably more significant, constitutional changes also introduced with the 1958 Constitution. Two of these changes were the package vote, which allows the government to close debate on a bill and force an up-or-down vote on a proposal that contains only the amendments accepted by the government,¹⁹¹ and the confidence-vote procedure, which, when invoked by the government, stops debate on a bill and, if no motion of censure is introduced and adopted, implies approval of the bill shaped by the government.¹⁹² As John Huber states,

The rules included in the [1958] Constitution to strengthen the French government against the legislature seem formidable. The Constitution contains provisions that grant control of the legislative agenda to the government, that limit the right of deputies to submit and vote amendments, that limit opportunities for deputies to gain information and expertise, and that even limit opportunities for members of parliament to vote on bills themselves. Since these rules of legislative

189. See, e.g., CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS* 93 & n.1 (2005) (referring to the Fifth Republic as “de Gaulle’s Republic” and calling its democracy a comparative improvement); Rett R. Ludwikowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT’L L.J. 29, 59–60 (2003) (“The stability [of the Fifth Republic] results . . . from bringing the French model closer to a well-tested parliamentary-cabinet system purged of ‘spasmodic’ features of quasi-presidentialism or excesses of ‘pure’ parliamentarism of the Third and Fourth Republic.”); Shiva Eftekhari, Note, *France and the Algerian War: From a Policy of “Forgetting” to a Framework for Accountability*, 34 COLUM. HUM. RTS. L. REV. 413, 416 (2003) (“By granting the Executive preponderant power, the Fifth Republic ended the institutional instability that had resulted from parliamentary dominance.”).

190. SKACH, *supra* note 189, at 93 & n.1.

191. 1958 CONST. art. 43.

192. *Id.* art. 49. These procedures, which have been often used by all governments since 1959, have made the French government highly successful; its rate of legislative success, as defined above, was 69.23% between 1946 and 1958 and 84.8% between 1959 and 1983. Cheibub & Chernykh, *supra* note 125, at 295 n.17. Unfortunately, I do not have the information on the years of cohabitation of left and right.

procedure were actually placed in the Constitution, the members of parliament cannot easily change or get rid of them. The National Assembly under the Fifth Republic is therefore often regarded as one of the weakest legislatures in any modern democracy.¹⁹³

Features such as these are not rare in mixed constitutions. In a previous work, which is based on data on all such constitutions since 1919, I found that 59% of the constitutions allowed the government to request a confidence vote on specific legislation, 48% granted the government control over the budget process, 35% placed restrictions on the assembly's ability to pass a vote of no confidence in the government, 37% forbade legislators from serving in the government, and 23% contained provisions allowing the government to request urgency in the treatment of legislative proposals.¹⁹⁴ Thus, maybe what matters for the performance of democratic systems is not the mere presence or absence of a directly elected president, but the ways in which those with executive powers are able to exert control over the legislative process. We have evidence from both case studies and statistical analysis suggesting that this is what matters for both presidential and parliamentary democracies;¹⁹⁵ there is no reason to believe that semi-presidential constitutions will be any different.

IV. Conclusion

We thus come full circle. We started by discussing a new way to think about reforms in presidential democracies. Starting from the premises that there is nothing intrinsically wrong with presidential constitutions and that presidential constitutions are unlikely to be replaced through democratic means, it was suggested that we could look at possible reforms with a new perspective—one that seeks to promote goals other than governability and that sees executive–legislative powers as mechanisms the government can use to negotiate, bargain, and therefore shape a legislative majority in support of its initiatives.

193. HUBER, *supra* note 113, at 2.

194. Cheibub & Chernykh, *supra* note 125, at 296. The number of countries with these provisions ranges from eight to over twenty. *Id.* at n.18. Prior to 1919 there were no democracies that combined a system of assembly confidence with a directly elected president. *Id.* at 288 n.11. In 1919 both Germany and Finland adopted a mixed constitution, although in Germany the first President was elected by the Parliament and in Finland the President was elected indirectly (although popularly) until 2000. *Id.*

195. See SIAVELIS, *supra* note 90 (recognizing empirically the efficacy of Chile's strong presidential authority); Cheibub & Chernykh, *supra* note 125, at 295 (emphasizing the importance of government-strengthening institutional features); Herbert Döring, *Time as a Scarce Resource: Government Control of the Agenda*, in *PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE* 223, 224–26 (Herbert Döring ed., 1996) (discussing the balance of power between government and parliament in setting the legislative agenda); Figueiredo and Limongi, *Constitutional Change*, *supra* note 90, at 74–77 (describing the powers of the President over the legislative process in Brazil, even after the 1988 Constitution).

The message about semi-presidential democracies is similar. Much of the scholarship about these systems has been shaped by concerns with the presidency and the conflict with the government that it might entail. Consideration of the institutional instruments available to the government has been, so far, nonexistent; it is as if there was no variation in the instruments available to the government to elicit the support of a legislative majority. There is much to be done in this area, but given what we know about the importance of the mechanisms available to the government in both presidential and parliamentary democracies, it is likely that research in this area will generate new insights about mixed systems. Perhaps the excessive preoccupation with the powers of the president in these systems has simply prevented us from looking where it might matter the most.