

The “newest” separation of powers: Semipresidentialism

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In a recent issue of the *Harvard Law Review*, Bruce Ackerman argues against the export of an American-style separation of powers to the rest of the world, preferring the model of “constrained parliamentarism” that operates in countries such as Germany and South Africa.¹ Ackerman comments that, “since 1989, American jurists have become big boosters of the American Way at constitutional conventions everywhere.”² Steven Calabresi agrees, claiming that “Bruce Ackerman is absolutely right to say that presidentialism is now the toast of the world.”³ But reviewing the new democracies around the world today, the constitutional model rapidly being imported by these newly democratic states is neither the American-style presidentialism, so vigorously defended by Calabresi, nor the constrained parliamentary model advocated by Ackerman. Rather, semipresidentialism—an undertheorized constitutional type that is most often associated with the French Fifth Republic—has rapidly gained ground. This constitutional type combines a popularly elected head of state with a head of government who is responsible to a popularly elected legislature, thus making the model conceptually and analytically distinct from the other two principal constitutional types existing in the world today.

Consider, in this context, that after the collapse of communism, when some thirty countries crafted democratic constitutions, the most common constitution chosen was semipresidentialism. Belarus, Croatia, Poland, Romania, Russia, and Ukraine, among many other countries in the post-Soviet space, adopted semipresidentialism, contradicting the predictions of

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¹ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

² *Id.* at 636.

³ Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 53 (2001).

both Ackerman and Calabresi.⁴ Throughout the 1990s, semipresidentialism was also evaluated for import by countries in Africa and Asia, and even in Latin America—the onetime bastion of U.S. presidentialism. In more than fifty countries across the European, Asian, and African continents, semipresidentialism has become the “newest” separation of powers.

In spite of its recent and rapidly growing popularity across the globe, however, semipresidentialism has been absent from scholarship in both constitutional law and political science. Semipresidentialism has been dismissed by leading scholars either as a “type of one” or on the ground that it is not a third type at all but, rather, “an alternation of parliamentary and presidential phases” of government.⁵

This article introduces semipresidentialism to constitutional law. The article first distinguishes this undertheorized type from both presidentialism and parliamentarism; it then suggests the problems associated with its hasty adoption by new democracies, drawing on insights from constitutional

⁴ On the Russian case, in particular, see Timothy J. Colton & Cindy Skach, *The Russian Predicament: A Fresh Look at Semipresidentialism*, 16 J. DEMOCRACY 113 (July 2005).

⁵ Arend Lijphart, *Introduction to PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 1, 8 (Arend Lijphart ed., Oxford Univ. Press 1992). See also Armel Le Divellec, *Die dualistische Variante des Parlamentarismus: Eine französische Ansicht zur wissenschaftlichen Fata Morgana des semi-präsidentiellen Systems* [*The Dual Variant of Parliamentarism: A French Perspective on the Illusory Scholarship Concerning Semipresidential Systems*], 27 ZEITSCHRIFT FÜR PARLAMENTSFragen [JOURNAL OF PARLIAMENTARY QUESTIONS] 145 (1996); and Arend Lijphart, *Trichotomy or Dichotomy?*, 31 EUR. J. POL. RES. 125 (1997). There is to date no English-language monograph on semipresidentialism. The existing treatments of semipresidentialism include two chapters of WERNER KALTEFLEITER, *DIE FUNKTIONEN DES STAATSOBERHAUPTES IN DER PARLAMENTARISCHEN DEMOKRATIE* [THE FUNCTIONS OF HEADS OF STATE IN PARLIAMENTARY DEMOCRACIES] (Westdeutscher 1970); MAURICE DUVERGER, *ÉCHEC AU ROI* [THE KING IN CHECK] (Albin Michel 1978); LES RÉGIMES SEMI-PRÉSIDENTIELS [SEMPRESIDENTIAL REGIMES] (Maurice Duverger ed., Presses Univ. de France 1986), which was written before the French experiences with cohabitation; and Chapter 4 of MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES* (Cambridge Univ. Press 1992). Newer works include two chapters in GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* (NYU Press 1994); Winfried Steffani, *Semi-Präsidentalismus: ein eigenständiger Systemtyp? Zur Unterscheidung von Legislative und Parlament* [*Semipresidentialism: A Distinct System Type? Toward a Distinction of Legislature and Parliament*], 26 ZEITSCHRIFT FÜR PARLAMENTSFragen [JOURNAL OF PARLIAMENTARY QUESTIONS] 621 (1995); STEFANO CECCANTI, ORESTE MASSARI & GIANFRANCO PASQUINO, *SEMPRESIDENTIALISMO: ANALISI DELLE ESPERIENZE EUROPEE* [SEMPRESIDENTIALISM: AN ANALYSIS OF THE EUROPEAN EXPERIENCE] (Mulino 1996); Horst Bahro, Bernhard H. Bayerlein & Ernst Vesper, *Duverger's Concept: Semi-presidential Government Revisited*, 34 EUR. J. POL. RES. 201 (Oct. 1998); and the useful conceptual cleaning and empirical contributions in *SEMI-PRESIDENTIALISM IN EUROPE* (Robert Elgie ed., Oxford Univ. Press 1999). Indeed, some authors have hastily generalized from France's rather exceptional experience with semipresidentialism. Jonathan Zasloff, for example, remarks that “[s]emipresidentialism's record, to the extent that it can be determined, is promising, or at least not unpromising.” See Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795, 820 (1997). See also Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT'L L. 86, 95 (2001).

theory and constitutional history.⁶ More specifically, the article details when, and why, semipresidentialism can be problematic from the standpoint of democracy, constitutionalism, and the protection of fundamental civil liberties and political rights. The article is also programmatic: it urges constitutional scholars to bring comparative historical analysis back to the study of constitutional law. For, as J. M. Balkin and Sanford Levinson note, “the current study of constitutional law is too much centered on the opinions of the Supreme Court and lacks comparative and historical perspective.”⁷

After establishing an analytical framework that synthesizes insights from various disciplines, the article then traces and compares constitutional and political developments in three important historical cases of semipresidentialism. These constitutional narratives are drawn from three of the most influential countries in Europe in the twentieth century: the French Fifth Republic, Weimar Germany, and postcommunist Russia.

1. Separations of power

The two constitutional frameworks most common in the democratic world are parliamentarism and presidentialism. With regard to how these constitutional models set out rules for the formation and termination of governments, they are structural opposites. Parliamentarism is characterized by a fusion of powers and a mutual *dependence* between the executive and the legislative powers. This is due to the fact that the chief executive (usually a prime minister or chancellor) emanates from the legislature after elections and needs the confidence of the legislature in order for his government to survive the duration of the legislature’s term.⁸ Presidentialism is the

⁶ This article is adapted from the more extensive treatment of semipresidentialism found in CINDY SKACH, *BORROWING CONSTITUTIONAL DESIGNS* (Princeton Univ. Press 2005).

⁷ J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 963 (1998).

⁸ Governments can be single party or coalitional and have majority or minority status. Majority governments seem to be the most viable, whereas the least viable seem to be minority governments. See MICHAEL LAVER & NORMAN SCHOFIELD, *MULTIPARTY GOVERNMENT: THE POLITICS OF COALITION IN EUROPE* 142 (Oxford Univ. Press 1990); and PAUL V. WARWICK, *GOVERNMENT SURVIVAL IN PARLIAMENTARY DEMOCRACIES* 97 (Cambridge Univ. Press 1994). See also John D. Huber, *How Does Cabinet Instability Affect Political Performance? Portfolio Volatility and Health Care Cost Containment in Parliamentary Democracies*, 92 AM. POL. SCI. REV. 577 (1998), for the argument that minority governments have increased portfolio changes across parties, limiting governmental effectiveness. And although Michael Laver, in *Government Formation and Public Policy*, 33 PS: POL. SCI. & POL. 21 (2000), argues that neither coalition governments, nor minority governments, need be weak and unstable, the literature on coalition and minority governments has almost exclusively concerned itself with consolidated democratic systems and has ignored their impact in transitional democracies.

opposite: it is a system characterized by the separation of powers and a mutual *independence* of the executive and legislative powers. This is because the chief executive (a popularly elected president) and the legislature are elected independently of each other, for fixed terms of office, and both can survive for their respective terms without the other's approval.⁹ Until the early 1990s, most democracies fit neatly into one of these two constitutional types.

Yet, by the mid-1990s, numerous new democracies, such as Poland and Russia, met one of the defining criteria for presidentialism (a popularly elected president with a fixed term of office) while also fulfilling one of the essential criteria for parliamentarism (a prime minister who is subject to a vote of no confidence in parliament).¹⁰ No purely presidential constitution combines both of these characteristics and the incentive structures they embody, nor does any purely parliamentary constitution. Thus, we have before us a different analytical category and constitutional type, as well as what may be considered the newest and least understood separation-of-powers system in the world: semipresidentialism.¹¹

The most critical feature of semipresidentialism is the additional separation of powers that comes with the division of the executive into two independently legitimized and constitutionally powerful institutions: an indirectly selected head of government (prime minister) and a popularly elected head of state (president). Interestingly, executive power in most semipresidential constitutions, including the power to preside over cabinet meetings and to direct national policy, is shared between these two executives. Problematically, such power sharing precludes a neat division or clear separation of powers, often leading to constitutional ambiguity.¹² As

⁹ These tensions are maximized under divided government, when the president does not enjoy a majority in the legislature, and minimized under unified government. See THE POLITICS OF DIVIDED GOVERNMENT (Gary W. Cox & Samuel Kernell eds., Westview Press 1991); Morris Fiorina, *Coalition Governments, Divided Governments, and Electoral Theory*, 4 GOVERNANCE 236 (1991); MORRIS FIORINA, *DIVIDED GOVERNMENT* (Macmillan 1992); CHARLES O. JONES, *THE PRESIDENCY IN A SEPARATED SYSTEM* (Brookings Institution 1994); and John. J. Coleman, *Unified Government, Divided Government, and Party Responsiveness*, 93 AM. POL. SCI. REV. 821 (1999).

¹⁰ See SEMI-PRESIDENTIALISM IN EUROPE, *supra* note 5, for a recent count of semipresidential countries.

¹¹ MAURICE DUVERGER, *LE SYSTÈME POLITIQUE FRANÇAIS: DROIT CONSTITUTIONNEL ET SCIENCE POLITIQUE* [THE FRENCH POLITICAL SYSTEM: CONSTITUTIONAL LAW AND POLITICAL SCIENCE] 500–501 (Presses Univ. de France 1996), claims to be the first to use this term. In later works, Duverger goes on to suggest that semipresidentialism was in fact an alternation between presidential and parliamentary phases of government.

¹² See YVES MÉNY, *LE SYSTÈME POLITIQUE FRANÇAIS* [THE FRENCH POLITICAL SYSTEM] 98 (Montchrestien 1996) (commenting that, in the French Constitution, “[t]he powers of Head of State are indefinable, literally indefinite, without end... [w]ho could in fact resist such a temptation?”).

a consequence, in times of disagreement between the president and the prime minister, it is often not quite clear from the constitution which executive has final decision authority, even in such critical areas as national defense. For example, in the Constitution of the French Fifth Republic, the president is commander in chief of the armed forces (article 15) and, as such, presides over “higher national defense councils and committees.” Yet the Constitution also states that the prime minister is “responsible for national defense” (article 21). During periods of domestic social unrest or a perceived international threat to the domestic political order, it is possible that the president and the prime minister could issue conflicting orders to the military or the intelligence community, and that the military might decide against the government and in favor of its commander in chief—the president. One consequence, if we consider the new and fragile democracies, may be extended military involvement in politics and the suspension of political rights and civil liberties. Countries that have had a history of military intervention in domestic political affairs are particularly vulnerable to this pattern.

The second critical feature of this newest separation-of-powers system is the unequal legitimacy, accountability, and responsibility of these two executives vis-à-vis citizens and their elected representatives. In all semipresidential constitutions, the prime minister emerges from the legislature after legislative elections. He remains responsible to it and dependent on it for support throughout the legislature’s term. The president, however, is popularly elected by the voters for a fixed term, often for longer than that of the legislature. The president is, therefore, autonomous relative to the legislature in that she has an independent and popular mandate and can survive without the legislature’s approval. This results in a constitutionalized autonomy for one of the executives—the president—as it enables the president to formulate her own independent agenda, as well as her own time frame for these agendas, even if they contradict those of the prime minister. Of course, rules matter here, and there are variations: the greater the president’s scope of constitutional powers—particularly with regard to decree, veto, and emergency powers—and the lower the constitutional limitations on these powers, the greater the possibility of the president directing government and legislating without the prime minister or the legislature, even over an extended period.

Because of this additional separation of powers in semipresidentialism, with the division of the executive into two unequal components, the constitutional tensions are structural and, given this, there is always the potential for warring executives. For example, something as simple as personality differences between the president and the prime minister may lead to disagreements over policy and over who should direct government, even if the president and prime minister share the same policy program. Or, perhaps, a president’s particular beliefs about his leadership role and his

own popular, direct electoral legitimacy, as opposed to the prime minister's indirect legitimacy, may lead him to completely dominate his prime minister, who, in turn, might resist this domination, setting off a spiral of backbiting and mutual recriminations. Alternatively, as happened in France, a president may even decide to dominate politics at the expense of his prime minister simply because this president doubts the prime minister's capacity to govern effectively and does not want to incur the costs of replacing him.¹³ After forty years of experience with semipresidentialism, even French constitutional scholars admit that the constitutionalized-autonomy problem is a fact of life with this new separation-of-powers system, so much so that "it's difficult to know who makes the decisions, and things don't always work out that well."¹⁴

Semipresidentialism, as a constitutional model, is not new. What makes it the newest separation of powers system now is the fact that once a rare type, it has been rapidly gaining in importance since the fall of the Berlin Wall. Looking to emulate the French experience, many new democracies adopted semipresidentialism in the 1990s. What is often forgotten is that the first historical example was not France but, rather, Weimar Germany in 1919, and the supplemental separation of powers in this constitution was a deliberate design strategy meant to enable popularly elected presidents to exercise strong powers in order to protect the polity from factional fighting. The "cult of personality" problem of the popularly elected president, as Ackerman calls it,¹⁵ was in some ways exactly what the Germans wanted, albeit without the "problem." The idea at the time was not to encourage citizens to engage in a politics of principle but, instead, to offer their divided society, one in need of rejuvenation, the opportunity to elect its own powerful national symbol, a symbol standing above politics when politics became too messy. The Weimar constitution, therefore, enabled the president to exercise power without much control by other institutions. Most semipresidential constitutions, today, have kept this design feature, and they constitutionalize presidential autonomy by enabling presidents to put decisions to popular referenda, to dissolve democratically elected assemblies, and to legislate by emergency decree, all without ex ante approval by the prime minister, the legislature, the courts, or, if it exists, the upper house. Problematically, at least from the perspective of democracy, presidents who take advantage of this constitutionalized autonomy for an extended period

¹³ This was the case with Georges Pompidou and his prime ministers. This was also the case in Poland during the first two periods of consolidated majority government.

¹⁴ Didier Maus, Comment at round table discussion of the 40th Anniversary Colloquium, *Lectures et Relectures de la Constitution de la V^e République [Readings and Rereadings of the Constitution of the Fifth Republic]* (Paris, Oct. 7, 1998).

¹⁵ Ackerman, *supra* note 1, at 663.

transform their countries from semipresidential democracies into constitutional dictatorships.¹⁶

Constitutional dictatorship describes a situation in which executives make extended use of emergency and decree powers to legislate in hard times.¹⁷ This extended use differs from any fairly brief, conservative use of such tools intended to protect the nation when under threat from an immediate, clear and present danger. This situation, typically extended in both time and scope, was first described by Clinton Rossiter. Such a state of affairs violates the most basic, fundamental requirements of democratic governance: public inclusion in, and the possibility of public contestation of, government.¹⁸ In bypassing the citizens' elected representatives for an extended period and legislating exclusively through decree or emergency powers, executives—through their constitutional dictatorships—concentrate decision making in a small group of individuals whom the president appoints as members of the presidential administration. This group is often under the complete control of the president, rather than being responsible to the legislature, thereby violating critical institutional guarantees for democratic governance, as outlined by the scholar Robert Dahl, particularly “institutions for making government policies depend on votes and other expressions of preference.”¹⁹

One clearly observable symptom of constitutional dictatorship, if we think about the early years of the French Fifth Republic or the last years of the Weimar Republic, is the president's packing the cabinet with nonparty colleagues rather than with representatives from the political parties. In the best of cases, these nonparty appointees are technocrats, appointed for their expertise. In the worst of cases, these figures are allies of the president, with little expertise in areas critical to the nation. This technocratization of the cabinet is often quite legal, as most presidents are constitutionally empowered to appoint and even to dismiss individual ministers. However, this process, while legal, nevertheless distances the cabinet from the parties in the legislature. And this is problematic, since parties, not individual nonparty experts, normally provide the main link between citizens and government in stable democracy.

In some semipresidential countries, such as France, a specialized court may be constitutionally empowered to intervene during periods of

¹⁶ CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (Princeton Univ. Press 1948). On the relationship between semipresidentialism and constitutional dictatorship, see SKACH, *supra* note 6, at 12–30 and 49–70.

¹⁷ See also Cindy Skach, *Constitutional Origins of Dictatorship and Democracy*, 16 *CONST. POL. ECON.* 347 (2005).

¹⁸ The “conservative” use of emergency powers is discussed in John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 *INT'L J. CONST. L. (I-CON)* 210 (2004).

¹⁹ ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 3 (Yale Univ. Press 1971).

constitutional dictatorship by questioning presidential actions, such as ministerial appointments or emergency decrees, and declaring them invalid. Alternatively, as in Weimar Germany, the legislature may have the power to revoke constitutional dictatorship by vetoing executive decrees. However, when it comes time for actually using their constitutionally designated controlling mechanisms, the other governmental powers find themselves constrained, practically speaking. The reality is that the president usually possesses some degree of influence over the membership of the specialized courts and has, as well, the power to dissolve the lower house, with which she can threaten a noncooperative legislature, thereby forcing others to tolerate presidential domination. Over time, constitutional dictatorship creates its own constituencies. If presidents, during these times, dislike criticisms of their regimes as semiauthoritarian, they nonetheless remain fiercely attached to their presidential offices and the aggrandizement of executive power. Constitutional dictatorship becomes path dependent; it provides concentrated and direct benefits for those in power, and it imposes diffuse costs on citizens and on democracy's development more generally.²⁰

Constitutional dictatorship is, clearly, a worst-case scenario, and this is not to suggest that all semipresidential constitutions encourage or even lead to the undemocratic politics that are characteristic of constitutional dictatorship. But the possibility begs several questions: Under what specific starting conditions will the constitutional tensions inherent in semipresidentialism likely impede democratic governance? Are new democracies that search for constitutional models likely to exhibit these initial conditions, thus making them poor candidates for this model? What general conclusions may we draw, therefore, about the limitations and advantages of this newest separation-of-powers system?

2. Configurations of power

Few scholars within the field of constitutional law concern themselves with the performance of law under different political party configurations. However, as I will show below, examining such configurations is critical, for the presence of a majority political party in the national legislature with an amicable relationship between the president and that legislative majority can minimize the probability that semipresidentialism's built-in constitutional tensions will lead to serious conflict and will interrupt democracy. Why?

Here it is useful to introduce the idea of constitutional subtypes. Constitutional subtypes help us to move away from the metalevel of constitutional analysis and better understand when well-intentioned constitutional designs are likely to be turned from virtue to vice, distorted through political battles across ideological lines. Semipresidentialism, as a

²⁰ On path dependence, see PAUL PIERSON, *POLITICS IN TIME* (Princeton Univ. Press 2004).

Table 1. Three Electorally Generated Subtypes within Semipresidentialism

Subtype 1: CONSOLIDATED MAJORITY	Subtype 2: DIVIDED MAJORITY	Subtype 3: DIVIDED MINORITY
President and PM have same majority in legislature.	PM has majority, president does not.	Neither president nor PM has majority.

constitutional framework, displays three such subtypes. These are electorally generated, because they arise from the interaction of constitutional rules and procedures, on the one hand, with voters' choices at elections, on the other hand. Since these subtypes take into account not only constitutional structure but also a country's social and political characteristics (which condition constitutional performance), they offer improved explanatory power for theorizing about the relative advantages and limitations of separation-of-power systems.

2.1. Consolidated political majorities and the constitution

The constitutional subtype most likely to minimize the tensions inherent in semipresidentialism is one in which the prime minister has a legislative majority, and the president is a member of a party belonging to that same majority. I call this consolidated majority government (see table 1). We might also use Ackerman's term “full authority.”²¹ A legislative majority increases the chances that governments will be more durable and stable, which, in turn, offers governments a greater time horizon for accomplishing their political agendas through ordinary legislation (as opposed to executive decrees). With the president and prime minister being supported by the *same majority* in the legislature, the likelihood that these two executives will have the same policy agenda and will cooperate to accomplish their joint agenda is maximized.

This constitutional subtype is not immune to conflict between or within the branches of government; if the president and prime minister are from different parties or from factions within the same majority, or if they experience the kind of personality disagreements discussed earlier, conflict may still arise.²² Nonetheless, this institutional conflict between executives is logically more likely to emerge and have greater consequences for democratic constitutionalism when there is no legislative majority, or where the presidential and legislative majorities do not coincide. The consolidated majority subtype is thus the least risk-prone subtype of

²¹ Ackerman, *supra* note 1, at 648.

²² That is why François Mitterrand altered the structure of his Socialist Party in an attempt to eliminate various factions within it. See Philip Cerny, *Democratic Socialism and the Tests of Power*, 6 W. EUR. POL. 188 (1983).

semipresidentialism—from the point of view of democracy—because the potential for institutional conflict is minimized, as is the blame heaped on the system proper. Similarly minimized is the probability of excessive recourse to emergency powers that could accompany such conflict.²³

2.2. Divided political majorities and the constitution

A second constitutional subtype in semipresidentialism is divided majority government. In this subtype, one finds, again, a stable and coherent party majority in the legislature, comprising either a single party or a coalition; however, the president is from a party that *opposes* the majority or is from no political party at all.²⁴ The divided majority in semipresidentialism is often referred to, in the French literature, as *cohabitation*, conveying the idea that two incompatible individuals are forced to live together.²⁵ This subtype is more prone to institutional conflict than consolidated majority government, particularly if the president has her own agenda for domestic policy and is not willing to yield this arena to the prime minister. Such conflict is likely to materialize when the ideological cleavage separating the prime minister and the president is deep; or, alternatively, when the prime minister is

²³ SHUGART & CAREY, *supra* note 5, miss this point. Their emphasis on de jure presidential power as a contributing factor to democratic breakdown obscures the fact that political conflict within semipresidentialism varies over time, although the de jure presidential powers remain constant.

²⁴ A majority is stable when it lasts for the entire duration of the legislature, and coherent when “the parties, groups and individuals which compose [the majority] are in agreement concerning essential political trends,” DUVERGER, *ÉCHEC AU ROI*, *supra* note 5, at 91. Theoretically, either the prime minister or the president can enjoy the legislative majority during cohabitation. Empirically, it is usually the prime minister, due to constitutional stipulations or convention, which ensure that the president chooses a prime minister from the largest party or coalition in the legislature.

²⁵ DUVERGER, *ÉCHEC AU ROI*, *supra* note 5; MARIE-ANNE COHENDET, *LA COHABITATION: LEÇONS D’UNE EXPÉRIENCE* [COHABITATION: LESSONS FROM AN EXPERIENCE] (Presses Univ. de France 1993). Interestingly, MICHAEL LAVER & KENNETH A. SHEPSLE, *MAKING AND BREAKING GOVERNMENTS: CABINETS AND LEGISLATURES IN PARLIAMENTARY DEMOCRACIES* 269 (Cambridge Univ. Press 1996) argue that “... when the executive does not control a legislative majority in a parliamentary democracy, minority government is, in effect, divided government.” Similarly, ALBERTO ALESINA & HOWARD ROSENTHAL, *PARTISAN POLITICS, DIVIDED GOVERNMENT, AND THE ECONOMY* 257 (Cambridge Univ. Press 1995) state, “... the similarities between the French and the American cases of divided government are more striking than the differences.” However, there are crucial conceptual and analytical distinctions between the divided government, minority government, and what I call divided majority government. For example, presidentialism’s divided government is for a fixed term, whereas parliamentarism’s minority government can be for a variable term. This crucial difference creates different incentives, and one of the complications with semipresidentialism’s divided minority government is that these different incentives are combined. These distinctions become acute in democratizing countries where political institutions tend to be weaker, and party systems more polarized, than in consolidated settings. See also Michael Laver & Kenneth Shepsle, *Divided Government: America is Not “Exceptional,”* 4 GOVERNANCE 250 (1991), and FIORINA, *DIVIDED GOVERNMENT*, *supra* note 9.

determined to exercise his powers and to direct government policy without consulting the president. Problematically, for democratic constitutionalism, the president, frustrated by her lack of a majority, may try to use emergency or decree powers as a counterbalance to, and substitute for, the prime minister’s legislative majority. In such a political party context, the design flaw of semipresidentialism, this latest and popular separation-of-powers scheme, becomes apparent.

2.3. Divided political minorities and the constitution

The third constitutional subtype of semipresidentialism is also the most conflict-prone subtype and, potentially, is the most dangerous for constitutionalism and fundamental rights. Nothing in the existing literature on constitutional law or on constitutional design distinguishes this subtype, yet it has been the most prevalent, and most problematic, in many places including the postcommunist world. It was also the most common subtype of the Weimar Republic. In this subtype, neither the president nor the prime minister nor any party or coalition enjoys a substantive party majority in the legislature.²⁶ In Ackerman’s terms, there is no full authority. Rather, the legislature in this subtype is filled with multiple, competing party factions; authority is fragmented. The absence of any stable legislative majority can then lead, predictably enough, to an unstable state of affairs, characterized by shifting party coalitions as leaders attempt to form governments and survive confidence votes. If no viable government can be formed because the legislature is so fragmented, or if governments are so short-lived because they cannot count on majority support for confidence votes, presidents may resort to legislating without government, through emergency or decree powers.²⁷ It can become a vicious cycle: the greater the instability in the legislature, the more pressure a president may feel to use emergency and decree powers as a substitute for a legislative majority. This is particularly true when a country’s economy demands rapid reform legislation, as in the cases of both Weimar Germany and postcommunist Russia, where failed

²⁶ KAARE STRØM, *MINORITY GOVERNMENT AND MAJORITY RULE* (Cambridge Univ. Press 1990), suggests a useful conceptual differentiation between formal minority governments, which receive external legislative support and approach majority status, and substantive minority governments, which remain minority governments even when external support is counted. I follow Strøm’s distinction, counting formal minority governments as the functional equivalent of majority governments.

²⁷ The arguments in *id.*, and LAVER & SCHOFIELD, *supra* note 8, that minority government “need not be feared” with respect to democracy are not applicable here. First, their analyses concern parliamentary and not semipresidential systems. Second, they assume (among other things) stable political institutions and well-organized and resourceful political parties, whereas I am interested in how minority governments fare in situations of uncertainty when political institutions are neither stable nor well developed (i.e., in democratic transition and reequilibration).

legislative majorities meant that important economic reform legislation was never drafted and passed through the normal legislative channels. As a result, presidents resorted to executive decrees and to extended periods of emergency rule in order to have any of this legislation enacted.²⁸ In doing so, however, the law of the exception became the norm, and democratically elected legislatures became passive, meaningless institutions.²⁹

In this context—one proving a great challenge to democracy—the president may be locked into this conflict-ridden scenario for his full term, or until a majority in the legislature can be formed. The president is usually constitutionally empowered to call early elections in an attempt to obtain a majority, but there is no guarantee that a majority can be formed if the party system is highly fragmented and, especially, if the citizens have lost faith in the ability of political parties to govern. Again, the situation is path dependent; as the legislative branch and the political parties abdicate their controlling function over the executive branch, the citizenry, over time, finds these institutions to be less legitimate, leading to and even encouraging more popularly elected presidential behavior. In addition, in many semipresidential constitutions presidents' emergency, dissolution, and referenda powers do not require ministerial countersignatures. Moreover, while impeachment of the president may be constitutionally possible, for impeachment proceedings even to begin against presidents, in these constitutions, an absolute or even two-thirds majority vote in the legislature is often necessary, as in Poland and Portugal, for example.³⁰ Finding this required majority in a fragmented legislature can be extremely difficult, if not impossible. Moreover, the president can often use constitutional powers to discourage impeachment proceedings by threatening deputies with legislative dissolution and early elections.

All of this, taken together, is what makes semipresidentialism uniquely problematic as a separation-of-powers system. In pure presidentialism, a similarly powerful, popularly legitimized president also exists but does not have the option of dissolving the legislature (or of threatening to do so). And in pure parliamentarism, such a powerful executive with a fixed term of office, who remains independent from, and rather unaccountable to, the legislature, simply does not exist. That is why semipresidentialism, as a constitutional framework, is in critical ways more vulnerable to democratic breakdown than either the purely presidential or purely parliamentary models. And divided minority government, in particular, is the most volatile subtype of the semipresidential constitution. Divided minority government is, in effect, the combination of the potentially most problematic kind of

²⁸ Scott Parrish, *Presidential Decree Authority in Russia, 1991–95*, in *EXECUTIVE DECREE AUTHORITY* 62 (John M. Carey & Matthew Soberg Shugart eds., Cambridge Univ. Press 1998).

²⁹ Ferejohn & Pasquino, *supra* note 18.

³⁰ POLAND CONST., art. 145(2); PORTUGAL CONST., art. 130(2).

presidentialism—divided government—with the potentially most problematic kind of parliamentarism—minority government.

One can imagine that in new democracies, when international funding agencies pressure governments to restructure their economies, the tensions in the semipresidential construction begin to matter. Civil societies fear and resist economic austerity plans, as do their representatives in the legislature, but presidents must choose between civil society and the international constraints on the economy. Siding with external constraints and pressures, presidents may resort to emergency powers and decrees to pass economic reform laws, which pacify international demands, and bypass the legislature in order to do so. If the president victimizes political parties in the process by publicly blaming them for the fragile state of the economy, the parties and, eventually, the citizens may begin to question the validity of the institutions in place and even that of the democratic regime. When the regime is questioned by a significant part of the political system, as Juan Linz reminds us, democracy is at risk for a full breakdown.³¹

3. Balancing powers

All this suggests that if democratic elections within a country produce clear and stable legislative majorities, and if presidents are integrated into the country's party system, semipresidentialism can avoid divided minority government. But what is the probability that a new democracy actually will be able to avoid this troubled constitutional subtype? Three important characteristics seem to matter here: the nature of a country's party system, the majority-building capacity of a country's electoral system, and the extent to which presidents are “party men.”

The most critical aspect of a country's party system—that is, the set of political parties that actually mean something to the electorate—is its institutionalization. Institutionalization is indicated by the degree of regularity and consistency in elections over time, such that when a party system is so organized the political formations do not come and go with each successive election.³² Institutionalization might be rare in new democracies, but it is critical, because “where the party system is more institutionalized, parties are key actors that structure the political process; where it is less institutionalized, parties are not so dominant, they do not structure the

³¹ Juan J. Linz, *Crisis, Breakdown, & Reequilibration*, in *THE BREAKDOWN OF DEMOCRATIC REGIMES* 3, 27–38 (Juan J. Linz & Alfred Stepan eds., Johns Hopkins Univ. Press 1978). *See id.* at 27: “[c]hanges in regime occur with the transfer of legitimacy from one set of political institutions to another. They are brought on by the action of one or more disloyal oppositions that question the existence of the regime and aim at changing it.”

³² Giovanni Sartori, *Political Development and Political Engineering*, 17 *PUB. POL'Y* 261, 293 (1968); *see also*, *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA* 20 (Scott Mainwaring & Timothy R. Scully eds., Stanford Univ. Press 1995).

political process as much, and politics tends to be less institutionalized and therefore more unpredictable.”³³

In addition to institutionalization, the electoral system matters. The electoral formulas used in today’s democracies vary, but there are two basic forms and two rather basic (and often competing) normative objectives guiding their respective designs. The first objective is governability, and this objective is associated with majoritarian electoral designs. Variations on the majoritarian electoral design include the absolute majority system, with a second round limited to the top two candidates (*ballottage*); the absolute majority system, with a plurality rule in the second round; the alternative vote; and first-past-the-post (or plurality) vote.

The second, competing objective guiding electoral system design is representation. This objective is associated with the nonmajoritarian electoral designs, which include a variety of proportional representation (PR) systems, semi-PR systems, and intermediary or hybrid systems. PR designs, unlike majoritarian designs, aim at mirroring the diverse interests in a polity, not at encouraging large parties and legislative majorities. And PR designs vary in their degree of proportionality, depending on the mathematical method used to distribute seats.³⁴

Herein lies another important paradox peculiar to our newest separation-of-powers system. Majoritarian electoral designs are not, in the abstract, a better choice for a polity than are forms of PR.³⁵ In fact, the exclusion of a political party through, for example, the restrictive first-past-the-post design may lead to a small party’s frustration with the institutions of democracy and push excluded parties to adopt more extreme positions. This, in turn, may threaten democracy. Moreover, we know from many of the new democracies that a polity’s choice of electoral design is often a negotiated decision, or the deal maker of a postauthoritarian negotiation, and some countries prefer to give more equal representation to different political groups through PR. For example, countries emerging from periods of no-party or one-party nondemocratic rule are often under pressure to choose versions of proportional representation, or do so in order to encourage the development of a multiparty system and to demonstrate a commitment to

³³ SARTORI, *supra* note 32, at 22.

³⁴ DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 114–125 (Yale Univ. Press 1967); SHUGART & CAREY, *supra* note 5, at 226–229; and AREND LIJPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990* 21–46 (Oxford Univ. Press 1994).

³⁵ Majority formation is only one possible goal of electoral system design. Accurate reflection of minority parties in the legislature is another—often opposite—goal. See DIETER NOHLEN, *WAHLSYSTEME DER WELT: DATEN UND ANALYSEN, EIN HANDBUCH* [ELECTORAL SYSTEMS OF THE WORLD: DATA AND ANALYSES, A HANDBOOK] 13–18, 48–56 (Piper 1978); and LIJPHART, *supra* note 34, at 10–56.

party pluralism. In other cases, proportional representation may be the bargained outcome of negotiations during—to use Ackerman’s term—“constitutional moments.”³⁶ The crucial point is that majority electoral designs seem to be necessary if the semipresidential constitution is to work in a way that is supportive of democracy, because these electoral designs are more likely to produce legislative majorities and give a country a consolidated majority government. And yet, paradoxically, these majority electoral designs may be incompatible with the goals and norms of a particular polity and its citizens.³⁷

A final condition vital to preserving semipresidentialism’s democratic credentials concerns the partisanship of individual presidents. To avoid the problematic subtype of divided minority government, a “party man” president—one who is integrated into the party system and is both supported *by* and supportive *of* political parties—is necessary. Presidential candidates who act as independent, nonparty personalities are more likely to take advantage of their constitutionalized autonomy in this system. Such cult-of-personality presidents are likely to emerge in young democracies, where political society is new and fragile. Since parties do not usually play an important channeling role between citizens and government in new democracies, the presidential door is open for independent candidates who may even employ an antiparty rhetoric and campaign on an antiparty and even antidemocratic platform. There is almost no safeguard to ensure that independents, or even antiparty candidates, do not run for presidential office, and independent presidential candidates do emerge in long-standing democracies as well (as did H. Ross Perot in the United States in 1992). Neither semipresidentialism nor pure presidentialism has any institutional mechanism to ensure that chief executives are party men.³⁸ This lack of

³⁶ BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (Yale Univ. Press 1992).

³⁷ Another factor within electoral system design is the relative timing of presidential and legislative elections. Evidence to date indicates that presidential and legislative elections held simultaneously are more likely to give a president a majority in the legislature, other things being equal. In semipresidentialism, constitutional prerogatives often allow presidents to call early legislative elections shortly after taking office (or during the term) to try to reequilibrate the presidential and legislative majorities, as Mitterrand did after his election in 1981. But as SARTORI, *supra* note 5, at 179, notes, “[c]oncurrent elections cannot fabricate undivided majorities that are not potentially in the works; but staggered elections do facilitate divided majority outcomes.” That said, it does seem to be the case that the electorate is encouraged to vote for the same party in concurrent elections. See also SHUGART & CAREY, *supra* note 5, at 229–258 and Appendix B.

³⁸ Only parliamentarism has such incentives, via executive responsibility to the legislature. At the legislative level, closed party lists give parties more control over candidates, reducing the personalization of campaigns, enhancing the value of the party label in local elections, and enabling the party to reward the most loyal rank-and-file members by placing them on the list. See SHUGART & CAREY, *supra* note 5, at 171.

party control at the presidential level may lead to a so-called outsider phenomenon, in which presidential candidates who present themselves as having no connection with existing political parties are perceived as the more viable candidates by the electorate.³⁹ When an outsider or antiparty president is actually elected, he must then face a legislature in which, predictably, he will have no initial party support and may find it difficult to build this necessary support, particularly if his presidential campaign rested on antiparty discourse. Without party backing, such a president immediately finds himself trapped in one of the more conflictual subtypes of the semipresidential constitution.

In sum, the nature of political parties, of electoral design, and of presidential leadership are all critical to understanding and analyzing the comparative performance of this latest separation of powers system. Constitutional subtypes help us to ferret out these issues in a more systematic way. What the constitutional subtypes of semipresidentialism suggest is that when constitutionally powerful presidents are not party affiliated, when party systems are nascent and weakly institutionalized, and when electoral designs fail to produce legislative majorities a country is very likely to spend much of its time with a divided minority government. The dynamics of this constitutional subtype—legislative immobilism, presidential-legislative deadlock or impasse, and the resulting use of presidential decrees to counteract immobilism and deadlock—gradually erode the legitimacy of the legislature, remove incentives for responsible party behavior, and result in the abdication of political parties to extended presidential rule. These constitutional dynamics work against constitutionalism, and they can quickly lead to constitutional breakdown. It is to demonstrating these dynamics empirically, and their consequences, that I now turn.

4. Empirical discussions

So far, this article has tried to describe the conditions under which a semipresidential constitution may not be self-enforcing but, rather, may provide possibilities and even incentives for actors, particularly presidents, to

³⁹ Actual outsiders have included the aforementioned Perot in the United States, Alberto Fujimori in Peru, and Stanislaw Tyminski in Poland's 1990 presidential race. Tyminski, described as an "unknown Polish expatriate businessman," running on an antiparty campaign, was able to surpass the previous Solidarity prime minister, Tadeusz Mazowiecki, in the first round election by a 3.1 per cent margin and advance to the second round against Lech Walesa. See FRANCES MILLARD, *THE ANATOMY OF THE NEW POLAND: POSTCOMMUNIST POLITICS IN ITS FIRST PHASE* 128 (Edward Elgar 1994).

transgress democratic boundaries.⁴⁰ In trying to decipher when this happens and when it does not, I have suggested that we examine something I termed constitutional subtypes. This finer-grained level of constitutional analysis provides greater explanatory power for understanding the merits and drawbacks of constitutions in specific country contexts. In this section, I now present evidence from some important cases of semipresidentialism and discuss how democratic development in each country was affected by the adoption of a semipresidential constitution.⁴¹

4.1. The French Fifth Republic

The French Fifth Republic was born in 1958. Political parties were in a state of flux, having been partly to blame for the failure of the Fourth Republic.⁴² The parties that attempted to reconfigure themselves after this failure remained poorly institutionalized for the first few years of the Fifth Republic. A majoritarian electoral design, which helped bolster majorities, was used for the first time in 1958, but political actors were still adjusting to its rather complicated incentives well into the early 1960s. The first president of the republic, Charles de Gaulle, for his part, was committed to building a democratic Fifth Republic. He was less committed, in the first years, to doing so via political parties, as he refused to join any existing party. As a consequence of these combined factors, coherent and stable legislative majorities did not exist in the first years of the republic. The pro-de Gaulle party, *Union pour la nouvelle République* (UNR), governed with support from the *Algérie française* legislative faction for the first few years under the new institutions. But this alliance soon dissolved, leaving

⁴⁰ In this sense, the semipresidential constitution may not be an effective coordination device, which constitutions must be if they are to contribute to democratic consolidation. On coordination devices, see Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INST'L & THEOR. ECON. 286 (1993); and Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AMER. POL. SCI. REV. 245 (1997). On constitutions and commitment, see Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992); and Russell Hardin, *Why a Constitution?* in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 100 (Bernard Grofman & Donald Wittman eds., Agathon Press 1989).

⁴¹ These cases were either reequilibrating democracy (France) or were undergoing a process of democratization (Weimar, Russia). Democratization is, at a procedural minimum, the "... process whereby the rules and procedures of citizenship are either applied to political institutions previously governed by other principles..., or expanded to include persons not previously enjoying such rights and obligations..., or extended to cover issues and institutions not previously subject to citizen participation." GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 8 (Johns Hopkins Univ. Press 1986). Here I am concerned not only with democratization, so defined, but also with the consolidation and stability of democracy, which has attitudinal and behavioral dimensions in addition to procedural ones. JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* (Johns Hopkins Univ. Press 1996).

⁴² The discussions of France draw on SKACH, *supra* note 6, and Skach, *supra* note 17.

President de Gaulle and his then–prime minister, Michel Debré, in divided minority government in 1959.

Relations between the government and the legislature in this period were turbulent. At least three important antidemocratic developments bordering on constitutional dictatorship occurred. First, de Gaulle and Debré relied heavily on restrictive legislative procedures, such as articles 44(3) and 49(3) of the Fifth Republic Constitution, to limit parliamentary debate and pass legislation without interparty compromise. In response to the use of article 49(3), to constrain the legislature, deputies often walked out of parliament.⁴³ This institutional conflict raised questions about the legitimacy of the new republic, as important policy issues were often overshadowed and overtaken by questions about the viability of the new constitution. Second, in 1961, in response to a coup attempt in Algeria known as the “crisis of the generals,” de Gaulle instituted a period of presidential rule under the auspices of article 16. Although the crisis in Algeria lasted only four days, de Gaulle extended his use of emergency powers under article 16 for five months, during which period he issued sixteen substantive decrees.⁴⁴ Third, in 1962, de Gaulle used referenda power in what was seen as a controversial, unconstitutional way of bypassing the divided legislature to change the Constitution.⁴⁵ De Gaulle, who was originally selected by the legislature as president in 1958, proposed a constitutional amendment for the direct election of the president, an amendment that made de Gaulle and successive presidents directly accountable to the electorate rather than the National Assembly, and accountable only once every seven years.⁴⁶ In response to de Gaulle’s attempt to alter the Constitution by means of a popular referendum, rather than by way of the legislature, the National Assembly passed a motion of censure against the government, noting, “the President of the Republic is violating the Constitution of which he is the guardian.”⁴⁷ De Gaulle, utilizing his constitutional power to respond to the motion of censure, then dissolved the Assembly. During this conflict-ridden period of divided minority government from 1959 to 1962, which often bordered on constitutional dictatorship, the French remained skeptical of their new institutions. When

⁴³ DOROTHY PICKLES, *THE FIFTH FRENCH REPUBLIC* 209–210 (Methuen 1966).

⁴⁴ JOHN D. HUBER, *RATIONALIZING PARLIAMENT: LEGISLATIVE INSTITUTIONS AND PARTY POLITICS IN FRANCE* 26 (Cambridge Univ. Press 1996).

⁴⁵ PICKLES, *supra* note 43, at 143–144; BERNARD CHANTEBOUT, *DROIT CONSTITUTIONNEL ET SCIENCE POLITIQUE [CONSTITUTIONAL LAW AND POLITICAL SCIENCE]* 493 (Armand Colin 1988); JEAN GICQUEL, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES [CONSTITUTIONAL LAW AND POLITICAL INSTITUTIONS]* 590 (Montchrestien 1997); VINCENT WRIGHT, *THE GOVERNMENT AND POLITICS OF FRANCE* 16 (Routledge, 3d ed. 1996); and John D. Huber, *Executive Decree Authority in France*, in *EXECUTIVE DECREE AUTHORITY* 233 (John M. Carey & Matthew Soberg Shugart eds., Cambridge Univ. Press 1998).

⁴⁶ The presidential mandate was changed, by referendum, to five years in September 2000.

⁴⁷ 9 KEESING’S CONTEMPORARY ARCHIVES 19159 (1963).

asked in 1962 whether they agreed with the statement that, “in France, democracy is in danger,” a substantial 35 per cent agreed. Of this 35 per cent, 11 per cent felt that the threat was emanating from de Gaulle.⁴⁸

Fortunately, France gradually began to develop a set of political parties that became more stable and entrenched with the electorate over time, as evidenced, in part, by a steady decline in volatility between elections.⁴⁹ Moreover, the majoritarian electoral design used for the legislature since 1958 eventually began to encourage two center-leaning party groups in the political system.⁵⁰ President de Gaulle, for his part, also gradually became more integrated into the party system, progressively relying on support from the UNR party, and appointed an ever-increasing number of UNR members to his cabinets.⁵¹ The successive presidents of the Fifth Republic followed suit and went further by joining parties and campaigning on party platforms in presidential elections. These developments encouraged the concurrent presidential and legislative majorities that kept France operating in the least-conflictual subtype of semi-presidentialism, consolidated majority government, for much of its history to date.⁵²

Importantly, the election of 1962 gave President de Gaulle and his prime minister at the time, Georges Pompidou, a 60 per cent majority in the National Assembly, and France spent the crucial years between 1962 and 1969 with a consolidated majority government.⁵³ With the president and prime minister enjoying the same majority in this period, there were fewer divided alliances within ministerial

⁴⁸ SONDAGES: REVUE FRANÇAISE DE L'OPINION PUBLIQUE [FRENCH REVIEW OF PUBLIC OPINION] 85 (1963).

⁴⁹ On the development of the party system, see COLETTE YSMAL, *LES PARTIS POLITIQUES SOUS LA V^e RÉPUBLIQUE* [THE POLITICAL PARTIES OF THE FIFTH REPUBLIC] (Montchrestien 1998).

⁵⁰ From 1958 to 1986, and then from 1988 to the present, a majority–plurality formula has been used for the National Assembly. This system requires an absolute majority for victory in the first round, or a plurality for victory in the second round. The second round is limited to parties having passed a threshold, which has increased from 5 per cent of the registered electorate in 1958, to 10 per cent in 1966, and 12.5 per cent in 1976. See DUVERGER, *supra* note 11, at 495–500; and PIERRE MARTIN, *LES SYSTÈMES ÉLECTORAUX ET LES MODES DE SCRUTIN* [ELECTORAL SYSTEMS AND VOTING METHODS] 121–133 (Montchrestien 1994).

⁵¹ Over de Gaulle’s tenure, the percentage of ministers and secretaries of state from the UNR increased steadily: 31 per cent under Debré, 34 per cent under Pompidou I, 54 per cent under Pompidou II, 55 per cent under Pompidou III, and 84 per cent under Couve de Murville in 1968. Data from 5–15 KEESING’S CONTEMPORARY ARCHIVES (1959–1969). After 1967, the UNR was transformed into the *Union des démocrates pour la République* (UDR).

⁵² There were divided minority governments from 1988 to 1993. On these years, see Robert Elgie & Moshe Maor, *Accounting for the Survival of Minority Governments: An Examination of the French Case, 1988–1991*, 15 W. EUR. POL. 57 (1992); and HUBER, *supra* note 44.

⁵³ Calculated from data in *Assemblée Nationale, LES GOUVERNEMENTS ET LES ASSEMBLÉES PARLEMENTAIRES SOUS LA V^e RÉPUBLIQUE* [GOVERNMENTS AND ASSEMBLIES OF THE FIFTH REPUBLIC] (1996); and 8–15 KEESING’S CONTEMPORARY ARCHIVES (1962–1969).

departments.⁵⁴ This aided in the coordination, rather than confrontation, of government policies. Due to the consolidated majorities in these years, the National Assembly “ran its full term—in itself an unprecedented occurrence—with no change of Prime Minister.”⁵⁵ Moreover, de Gaulle had little incentive during this period to use presidential power and prerogatives against the legislature, since he enjoyed majority legislative support. The conflict that had beset the 1959–1962 period was eased, strengthening the role and public perception of political parties and increasing governmental efficacy and legitimacy. Prime Minister Pompidou and his center-right majority in the legislature concentrated their efforts on legislation for regional development and on long-term policy plans to encourage investment and technological change.⁵⁶ President de Gaulle, while still concerned with domestic affairs, focused on his role as head of state, devoting himself to the international decisions facing the French, including the veto of England’s entry into the Common Market, France’s relationship to NATO, and France’s open criticism of the American intervention in VietNam. De Gaulle’s public image during these years was strong, as poll data show that “General de Gaulle had satisfied the absolute majority of French people, both sexes, all ages, of all educational backgrounds and of all professions, without exception.”⁵⁷

After enjoying uninterrupted, consolidated majorities for the next two decades, France slipped backward to divided majorities in the 1980s. Since 1986, France has had three periods of divided majority or divided minority government. During the most recent period of divided majorities from 1997 to 2002, tensions emerged between center-right president Jacques Chirac and center-left prime minister Lionel Jospin delaying important legislation, particularly in the area of judicial reform.⁵⁸ These recent years of constitutional frustration with semipresidentialism led,

⁵⁴ JEAN CHARLOT, *THE GAULLIST PHENOMENON* 146 (Monica Charlot & Marianne Neighbour trans., Praeger 1971).

⁵⁵ DOROTHY PICKLES, *THE GOVERNMENT AND POLITICS OF FRANCE: VOLUME II, POLITICS* 70 (Methuen 1973).

⁵⁶ On economic planning in this period, see PETER HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* 146–149 (Oxford Univ. Press 1986). In 1963, the Pompidou government created the *Délégation à l’Aménagement du Territoire et à l’Action Régionale* [Regional Development Agency] (DATAR), which was meant as a center of knowledge for regional planning. See PETER ALEXIS GOUREVITCH, *PARIS AND THE PROVINCES: THE POLITICS OF LOCAL GOVERNMENT REFORM IN FRANCE* 102 (Univ. of California Press 1980); and JONAH D. LEVY, *TOCQUEVILLE’S REVENGE: STATE, SOCIETY, AND ECONOMY IN CONTEMPORARY FRANCE* 32, 39–41 (Harvard Univ. Press 1999).

⁵⁷ JEAN CHARLOT, *LES FRANÇAIS ET DE GAULLE* [THE FRENCH AND DE GAULLE] 46 (Plon 1971).

⁵⁸ See Jean-Marc reproche à Jacques Chirac de bloquer la réforme du CSM [Jean-Marc Reproaches Jacques Chirac for Blocking CSM Reforms], *LE MONDE*, Dec. 29, 1998, at 7; and Thierry Breheir, *La V^e République menacée par la cohabitation* [The Fifth Republic Threatened by Cohabitation], *LE MONDE*, Jan. 1, 1999, at 1.

eventually, to a constitutional amendment in 2002 reducing the presidential term from seven to five years—but keeping intact all of the president’s powers.⁵⁹ Currently, the French are debating a more profound constitutional reform of their separation-of-powers system.

4.2. The Weimar Republic

When the Weimar Republic was founded in 1919, Germany had just emerged from four years of demoralizing war. Members of the three main parties committed to democracy in 1919—the Social Democratic Party (SPD), the *Zentrum* Party, and the German Democratic Party—seized the constitutional moment and embarked on the challenge of constructing a democratic order by crafting a liberal constitution. This constitution was one of the first experiments with semipresidentialism.

Weimar’s political parties formed around a complicated set of social cleavages, with deep divisions along class and religious lines and with a further division of parties into groups that were either loyal, semiloyal, or disloyal to Weimar’s institutions.⁶⁰ The electoral design used at all levels of the Weimar federation was the proportional representation system, which allowed Germany’s social fragmentation at that difficult historical period to be reflected in the *Reichstag* (the national legislature) and *Landtage* (the state legislatures). This made it difficult to build and sustain legislative majorities at any level of government.⁶¹

And yet, in the first few years of the republic, several parties were able to broker majority coalitions. Such cooperative behavior among the parties was reinforced and encouraged by Friedrich Ebert, the first president of the Weimar Republic. Ebert had been selected by the *Reichstag* in 1919 to be president and, as a member of the SPD, was an established party man who governed with, and through, political parties. He was committed, therefore,

⁵⁹ Roy Pierce, *The Executive Divided Against Itself: Cohabitation in France, 1986–1988*, 4 GOVERNANCE 270 (1991); and Jean V. Poulard, *The French Double Executive and the Experience of Cohabitation*, 105 POL. SCI. Q. 243 (1990).

⁶⁰ WALTER TORMIN, GESCHICHTE DER DEUTSCHEN PARTEIEN SEIT 1848 [HISTORY OF GERMAN POLITICAL PARTIES SINCE 1848] 23–45 (Kohlhammer 1968); M. Rainer Lepsius, *Parteiensystem und Sozialstruktur [Party System and Social Structure]*, in DEUTSCHE PARTEIEN VOR 1918 [GERMAN POLITICAL PARTIES BEFORE 1918] 40 (Gerhard A. Ritter ed., Kienpenheuer u. Witsch 1973); and M. Rainer Lepsius, *From Fragmented Party Democracy to Government by Emergency Decree and National Socialist Takeover: Germany*, in THE BREAKDOWN OF DEMOCRATIC REGIMES: EUROPE 34 (Juan J. Linz & Alfred Stepan eds., Johns Hopkins Univ. Press 1978).

⁶¹ FERDINAND A. HERMENS, DEMOCRACY OR ANARCHY?: A STUDY OF PROPORTIONAL REPRESENTATION (Univ. of Notre Dame 1941); Friedrich Schafer, *Zur Frage des Wahlrechts in der Weimarer Republik [The Question of Voting Rights in the Weimar Republic]*, in STAAT, WIRTSCHAFT UND POLITIK IN DER WEIMARER REPUBLIK: FESTSCHRIFT FÜR HEINRICH BRÜNING [THE STATE, ECONOMICS AND POLITICS IN THE WEIMAR REPUBLIC: ANNIVERSARY FOR HEINRICH BRÜNING] 119 (Ferdinand A. Hermens & Theodor Schieder eds., Duncker u. Humblot 1967); and NOHLEN, *supra* note 35, at 209–213.

in these early years to supporting the SPD during his presidency. For example, the first three chancellors under Ebert, Philipp Scheidemann, Gustav Bauer, and Hermann Müller, were members of Ebert's own SPD party. Over the course of Ebert's tenure as president, a plurality of cabinet ministers were SPD men.

The first directly elected president of the Weimar Republic, following Ebert's death in 1925 and the direct presidential elections later that year, was the antiparty Paul von Hindenburg.⁶² Unlike de Gaulle, Hindenburg never came to appreciate the necessity of working through political parties, and he showed, instead, a clear preference for nonparty ministers in his cabinets. Without Ebert at its helm, the SPD, for its part, gradually began to refuse coalitions with the center parties. This refusal became terribly problematic for constitutionalism, because the SPD's position in Weimar, as a center-left and democratic party, made it one of the most important and one of the only viable coalition partners for other centrist, democratic parties in the republic. Moreover, in terms of both votes in elections and seats in the legislature, the SPD remained the strongest party until 1932.⁶³ During the early years of the republic under Ebert, the SPD participated in coalitions with the *Zentrum*, the *Deutsche Demokratische Partei* (DDP), and, occasionally, the *Deutsche Volkspartei* (DVP). But from November 1923 onward, especially after Ebert's death in 1925, the SPD began a practice of tolerating unpopular governments and allowing the president to govern by decree.⁶⁴ The SPD preferred to remain in the opposition and let other parties risk electoral defeat by governing in hard times. Because the SPD preferred to remain in the opposition, in spite of the fact that it remained the largest and the most centrally located party in Weimar until 1932, other "middle-of-the-road parties tended to bring the right wing into their governments."⁶⁵ This problematic dynamic exacerbated extremism among the political parties; it also widened the divide between the executive and legislative branches. Finally, without the SPD's participation in government coalitions, divided

⁶² JOHN W. WHEELER-BENNETT, *HINDENBURG: THE WOODEN TITAN* (William Morrow 1936); ERICH MARCKS, *HINDENBURG: FELDMARSCHALL UND REICHSPRÄSIDENT* [HINDENBURG: FIELD MARSHAL AND STATE PRESIDENT] (Musterschmidt 1963); and ANDREAS DORPALEN, *HINDENBURG AND THE WEIMAR REPUBLIC* (Princeton Univ. Press 1964).

⁶³ See the data collected in 109/110 *INFORMATIONEN ZUR POLITISCHEN BILDUNG: DIE WEIMARER REPUBLIK* [INFORMATION FOR POLITICAL EDUCATION: THE WEIMAR REPUBLIC] (Franzis 1988).

⁶⁴ Hans Mommsen, *Die Sozialdemokratie in der Defensive: Der Immobilismus der SPD und der Aufstieg des Nationalsozialismus* [Social Democracy on the Defensive: The Immobilism of the Social Democratic Party and the Rise of National Socialism], in *SOZIALDEMOKRATIE ZWISCHEN KLASSENBEWEGUNG UND VOLKSPARTEI* [SOCIAL DEMOCRACY BETWEEN CLASS MOVEMENT AND PEOPLE'S PARTY] 106–133 (Hans Mommsen ed., Cornelsen 1974).

⁶⁵ KARL DIETRICH BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE AND CONSEQUENCES OF NATIONAL SOCIALISM* 77 (Weidenfeld & Nicolson 1971).

minority governments became more common over the course of the republic’s life. In fact, Weimar, contrary to France, operated in the most difficult subtype of semipresidentialism—divided minority government—for nearly 50 per cent of its existence.⁶⁶

As these constitutional dynamics of divided minority government ensued, an ever-greater number of Weimar’s parties began to abdicate their legislative responsibilities by remaining in the opposition and tolerating executive decrees. Constitutionally, a majority in the Reichstag could have questioned these decrees, but deputies resisted in order to avoid legislative dissolution. The strange incentives of constitutionalized autonomy, which I discussed earlier, played themselves out: parties in the legislature continuously abdicated their constitutional rights and responsibilities vis-à-vis the executive, contributing to the erosion of democratic legitimacy in the political system at large.

In this context of increased polarization and eroded democratic legitimacy, economic pressures presented yet another challenge. In 1930, unemployment reached critical levels in Germany, and the world economic crisis pushed German revenues well below budget projections.⁶⁷ There was no clear consensus among the parties for a strategy to balance the budget, and an acute conflict emerged between the DVP and the SPD over the unemployment scheme. President Hindenburg, facing once again the paralysis of divided minority government and frustrated with legislative impasse over the budget, appointed the *Zentrum* Party’s Heinrich Brüning chancellor of the republic and asked him to form a cabinet “without any fixed ties to parties.”⁶⁸ The SPD agreed to tolerate this nonparty cabinet, fearful of dissolution and new elections during economic hardship. Through this toleration, the SPD allowed—even encouraged—Hindenburg and Brüning to legislate by decree. In June 1932, Hindenburg removed Brüning and appointed the extreme right-wing general Franz von Papen chancellor.⁶⁹ Papen formed a government that contained four unaffiliated

⁶⁶ Calculated from data in *DIE WEIMARER REPUBLIK, 1918–1933* [THE WEIMAR REPUBLIC, 1918–1933] (Karl Dietrich Bracher, Manfred Funke & Hans-Adolf Jacobsen eds., Bundeszentrale für politische Bildung 1988). See also KARL DIETRICH BRACHER, *DIE AUFLÖSUNG DER WEIMARER REPUBLIK: EINE STUDIE ZUM PROBLEM DES MACHTVERFALLS IN DER DEMOKRATIE* [DISSOLUTION OF THE WEIMAR REPUBLIC: A STUDY OF THE PROBLEM OF THE DETERIORATION OF POWER IN DEMOCRACY] (Ring 1955).

⁶⁷ HORST MÖLLER, *WEIMAR: DIE UNVOLLLENDETE DEMOKRATIE* [THE UNFINISHED DEMOCRACY] 288 (Deutscher Taschenbuch 1997).

⁶⁸ WILLIAM L. PATCH, JR., *HEINRICH BRÜNING AND THE DISSOLUTION OF THE WEIMAR REPUBLIC* 72 (Cambridge Univ. Press 1998).

⁶⁹ On Brüning’s dismissal, see *id.*; and Hans Mommsen, *Heinrich Brüning’s Politik als Reichskanzler: Das Scheitern eines politischen Alleinganges* [*Heinrich Brüning’s Politics as Chancellor of the Reich: The Failure of a Political Loner*], in *WIRTSCHAFTSKRISE UND LIBERALE DEMOKRATIE: DAS ENDE DER WEIMARER REPUBLIK UND DIE GEGENWÄRTIGE SITUATION* [ECONOMIC CRISIS AND LIBERAL DEMOCRACY: THE END OF THE WEIMAR REPUBLIC AND THE CURRENT SITUATION] 16 (Karl Holl ed., Vandenhoeck und Ruprecht 1978).

technocrats (Konstantin Freiherr von Neurath, Kurt von Schleicher, Hermann Warmbold, and Lutz Graf Schwerin von Krosigk..) and two members of the antisystem *Deutschnationale Volkspartei* (DNVP) (Wilhelm Freiherr von Gayl, Franz Gürtner). Because of the legislature's toleration of these nonparty cabinets, or *Fachkabinette*, the governments during these last years of Weimar (from 1930 to 1933) were accountable exclusively to the president, and Weimar moved toward constitutional dictatorship.

One important result of this move toward constitutional dictatorship in Weimar was the coup by the *Reich* government against the state of Prussia in 1932. Hindenburg and Papen forcibly displaced the SPD caretaker government of Prussia in a move that was judged by the German state court in Leipzig to be partly unconstitutional.⁷⁰ With the Social Democrats removed from the Prussian government, the ban on the Nazi paramilitary group, the *Sturm-Abteilung* (SA), was lifted in this strategically important state, paving the way for a full democratic breakdown and the subsequent takeover by the National Socialist government in 1933.⁷¹ The path dependent, causal mechanisms of divided minority government, constitutional dictatorship, and democratic breakdown had run their full course.

Had governments in Weimar managed to build and retain consolidated majorities, with the Social Democrats as the main partner in centrist coalitions, these constitutional dynamics might well have been avoided. By incorporating the middle-of-the-road parties into these coalitions, the influence of the extreme parties in government might have been delayed, if not completely pre-empted. The president would then have had less justification for bypassing the legislature and ruling by decree, via the infamous article 48 of the Weimar constitution. Without the presidential decrees, in turn, the parties—and especially the crucial SPD—would have had greater incentives to accept parliamentary responsibility and to cooperate

⁷⁰ Carl Schmitt defended the Reich government before the court. His defense is found in Carl Schmitt, *Die Verfassungsmässigkeit der Bestellung eines Reichskommissars für das Land Preussen* [*The Constitutionality of a Reich Commisar for the State of Prussia*], 15 DEUTSCHE JURISTEN ZEITUNG [GERMAN LAW JOURNAL] 954 (1932). The court's decision is found in PREUSSEN CONTRA REICH VOR DEM STAATSGERICHTSHOF: STENOGRAMMBERICHT DER VERHANDLUNGEN VOR DEM STAATSGERICHTSHOF IN LEIPZIG [PRUSSIA VERSUS THE REICH: TRANSCRIPT OF PROCEEDINGS BEFORE THE STATE COURT IN LEIPZIG] (Oct. 10–14 and 17, 1932). See also David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121 (1997); PETER C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM* (Duke Univ. Press 1997); and JOHN P. McCORMICK, *CARL SCHMITT'S CRITIQUE OF LIBERALISM: AGAINST POLITICS AS TECHNOLOGY* (Cambridge Univ. Press 1997).

⁷¹ BRACHER, *supra* note 65; and HENRY ASHBY TURNER, JR., *HITLER'S THIRTY DAYS TO POWER: JANUARY 1933* (Addison-Wesley 1996).

in government coalitions or else to turn unpopular and abusive governments out of office, rather than tolerating *Fachkabinette* and remaining in an irresponsible opposition. This, ultimately, might have strengthened democratic constitutionalism in Weimar, even under this complex separation-of-powers system.

4.3. Postcommunist Russia

With the collapse of the Soviet Union, a specialized commission in Russia began drafting a new constitution to replace the outdated communist structure, and it came up with a working document by late 1990.⁷² The commission failed, however, to produce a coherent and comprehensive constitution, as progress was slowed by growing tensions in the Russian Federation over the complicated tasks of political and economic transition.⁷³ The Congress of People’s Deputies and the Supreme Soviet, therefore, continued to function, albeit in a revised manner. Constitutionally, either the Congress or the Supreme Soviet (whose chairman was the functional equivalent of a prime minister) could force a government resignation through a vote of no confidence. At the time, Communist Party member Boris Yeltsin concentrated his efforts on the creation of a powerful presidency in Russia. A referendum approved his innovation in March 1991, and Yeltsin was subsequently inaugurated president shortly after his June 1991 election. With the introduction of this popularly elected president into the system, running parallel with the existing office of chairman of the Supreme Soviet, semipresidentialism became the *de facto* constitutional type in Russia in 1991.

When we think about the political context in Russia in the early 1990s—the degree to which first Russian president Boris Yeltsin was, or was not, a party man; the majority-building capacity of Russia’s new electoral design; and the stability of Russia’s political parties—we cannot but conclude that Russia was in poor shape. Yeltsin, having what one of his former aides called an “allergy to parties,” never created a political party to support him in the legislature, nor did he join any of the parties that came into existence after 1991.⁷⁴ The mixed electoral design, with its fragmented election schedule and a strong dose of proportional representation, was unable to encourage stable party majorities.⁷⁵ During the first decade of postcommunism, Russia’s entire political system remained highly volatile, with parties

⁷² For a longer discussion, see Colton & Skach, *supra* note 4.

⁷³ See *id.* for a longer, more detailed discussion of the Russian case.

⁷⁴ Interview with Galina Starovoytova, former adviser to Yeltsin on ethnopolitical issues (1991–92) and member of the State Duma until her assassination in 1998, in Moscow (Mar. 26, 1998).

⁷⁵ Peter C. Ordeshook, *Russia’s Party System: Is Russian Federalism Viable?*, 12 *POST-SOVIET AFFAIRS* 195 (July–Sept. 1996).

frequently changing names from one election to the next and deputies switching parties once elected to office.⁷⁶ Moreover, Russia's social fabric was torn between a complicated past and unknown future, and Russians remained skeptical that democracy was preferable, as a governing system, to what they had known for generations. These factors made it difficult for democratic parties to take root, much less to form coalitions with other parties.⁷⁷ Consequently, stable and coherent legislative majorities were mostly nonexistent for the first decade of postcommunist Russia, and this meant that Russia operated under the most complicated subtype of the semipresidential constitution—divided minority government.⁷⁸

Within the first critical years of Russian semipresidentialism, neither Yeltsin, as president, nor Ruslan Khasbulatov, as chairman of the Supreme Soviet, had a legislative majority. Complicating the situation, both had substantial decree powers for bypassing the other branches of government. As one Russian constitutional scholar put it, "the stage was set for a collision."⁷⁹ Both the president and the chairman of the Supreme Soviet attempted to control and direct government policy in these first few years, issuing direct orders to various government agencies. Both executives were entitled to initiate legislation. The president had a limited veto power over bills passed by the legislature, although he had no power to dissolve parliament and force new elections.

The ensuing conflict eventually led to Yeltsin's domination of Russian politics and to a technocratization of government similar to Weimar's last years.⁸⁰ The political frustration of divided minority government also encouraged Yeltsin's belligerent prestige-strategies against his opponents, which included the 1994–1995 and 1999–2000, wars with Chechnya.⁸¹ Dramatically, in 1993, Russia moved to a constitutional dictatorship, when Yeltsin forcibly closed the legislature, censored the press, unilaterally

⁷⁶ See STEPHEN WHITE, RICHARD ROSE & IAN McALLISTER, *HOW RUSSIA VOTES* 237–239 (Chatham House 1997).

⁷⁷ Stephen Whitefield & Geoffrey Evans, *Support for Democracy and Political Opposition in Russia, 1993–1995*, 12 *POST-SOVIET AFFAIRS* 218 (July–Sept. 1996).

⁷⁸ Calculated from data in John Barber, *Opposition in Russia*, 32 *GOV'T & OPPOSITION* 598 (1997); and 37–47 *KEESING'S RECORD OF WORLD EVENTS* (1991–2001).

⁷⁹ ALEXANDER M. YAKOVLEV, *STRIVING FOR LAW IN A LAWLESS LAND: MEMOIRS OF A RUSSIAN REFORMER* 130 (M.E. Sharpe 1996). Yakovlev, a legal scholar and former legislator, was a key adviser to the committee that drafted the 1993 constitution. He later served as presidential plenipotentiary to the Federal Assembly.

⁸⁰ EUGENE HUSKEY, *PRESIDENTIAL POWER IN RUSSIA* (M.E. Sharpe 1999), especially ch. 4.

⁸¹ Interview with Sergey Kovalev, Russian Commissioner for Human Rights in 1994, in Moscow (Mar. 26, 1998).

curtailed the power of the Constitutional Court, and publicly “victimized” political society.⁸² In the wake of the presidential attack on these institutions, Yeltsin had tailor-made and put to popular referendum a new constitution in 1993. This constitution was also semipresidential, but Yeltsin and his close advisers deliberately enhanced presidential powers, enabling the president, for example, to issue decrees (*ukaz*; article 90) unilaterally. This constitution, with all its potential traps, currently structures politics throughout the Russian Federation.

Russian democracy did not make much progress in the critical early years of transition under this constitution, as political institutions remained underdeveloped, and government legitimacy was weakened by legislative inefficacy, on the one hand, and by a severe problem of warring executives, on the other.⁸³ Attitudes toward the regime, political institutions, the economy, and the state in this first decade were very negative. In a nationwide survey conducted by VTsIOM (All-Russia Center for the Study of Public Opinion) in January 1999, 63 per cent of respondents characterized the political situation in Russia as the “rise of anarchy.” In March 1999, 58 per cent of respondents, in a similar poll, felt that everything and everyone in the country would have been better off if Russia had remained as it had been prior to 1985.⁸⁴ And by 2005, 51 per cent of respondents felt Russia was heading “to a dead end.”⁸⁵ Unfortunately, President Vladimir Putin, Yeltsin’s successor, has continued and even worsened Russia’s record with regard to both democracy and onstitutionalism. Sadly, “nothing in Putin’s record to date...indicates that he wishes or will ever wish to endow Russia’s political system with greater inclusion and contestation—the two crucial dimensions of democracy.”⁸⁶

⁸² Archie Brown, *The October Crisis of 1993: Context and Implications*, 9 *POST-SOVIET AFFAIRS* 183 (July–Sept. 1993); Michael McFaul, *State Power, Institutional Change, and the Politics of Privatization in Russia*, 47 *WORLD POL.* 210 (Oct. 1994); and Timothy J. Colton, *Boris Yeltsin: Russia’s All Thumbs Democrat*, in *PATTERNS IN POST-SOVIET LEADERSHIP* 49–74 (Timothy J. Colton & Robert C. Tucker eds., Westview Press 1995).

⁸³ In the wake of this arrested transition, there have been an increasing number of articles calling for constitutional reform. See, e.g., the early pieces, *Izmenenie Konstitutsii?* [*Constitutional Changes?*], *NEZAVISIMAYA GAZETA*, Nov. 6, 1998, at 1–3; and *ROSSIYA: DESYAT’ VOPROSOV O SAMOM VAZHNOM*, translated in *RUSSIA: TEN IMPORTANT POLITICAL QUESTIONS* (Liliya Shevtsova ed., Carnegie Center 1997).

⁸⁴ VTsIOM survey available at <http://www.russiavotes.org>, Richard Rose’s data web site. See also RICHARD ROSE, *GETTING THINGS DONE WITH SOCIAL CAPITAL: NEW RUSSIA BAROMETER VII* (Univ. of Strathclyde Centre for the Study of Public Policy 1998).

⁸⁵ Levada Center nationwide survey, May 2005, available at <http://www.russiavotes.org>.

⁸⁶ Colton & Skach, *supra* note 4, at 122.

5. Conclusion

What does the foregoing tell us about the possibilities, and limits, of the newest version of the separation of powers? Stephen Holmes suggests that “constitutions contain various inducement mechanisms, devices for focusing attention, sharpening awareness of options, mobilizing knowledge, involving citizens and guaranteeing that future choices will be made under conditions where alternatives are discussed, facts are marshaled and self-correction is possible.”⁸⁷ What I have tried to do here is caution constitutional borrowers that this newest separation-of-powers system—to ring the changes on Holmes’s words—“contains a set of inducement mechanisms that preclude options, mobilize confusion, involve citizens in battles against democratic institutions, and increases the chances that future choices will be made under conditions where alternatives are not discussed or debated, facts are rearranged, and self-correction is impossible.”⁸⁸ This does seem to characterize the first years of the French Fifth Republic, the last years of the Weimar Republic, and it has certainly characterized postcommunist Russia since 1991. And if we follow Calabresi’s criteria for assessing a good separation-of-powers system—whether it leads to more democracy, more stability, fewer ideological battles, and more judicial review—semipresidentialism’s track record does not look good.⁸⁹ France was able to emerge from divided minority governments in the early 1960s, although not permanently. Weimar succumbed to them. And in postcommunist Russia, semipresidentialism’s path dependent power dynamics have led to a stable but problematic equilibrium, featuring an extreme narrowing of the political arena and of the available sites for political competition, the severe centralization of the state, and the almost constant domination of the political process by the president and his puppet supporters.

Taken in its entirety, this state of affairs suggests that if a new democracy is unable to build legislative majorities and to ensure that presidents are integrated into an institutionalized party system, then the polity will have to struggle to overcome the difficulties inherent in this constitution, rather than having a constitution that encourages and nudges it toward constitutionalism. Given that most new democracies have poorly institutionalized political parties, presidents who (at least initially) present themselves as above parties or partisanship, and PR elections designed to encourage a relatively large number of political formations, semipresidentialism may not be the most prudent constitutional choice, assuming these countries are

⁸⁷ Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 237 (Jon Elster & Rune Slagstad eds., Cambridge Univ. Press 1993).

⁸⁸ SKACH, *supra* note 6, at 126.

⁸⁹ Calabresi, *supra* note 3, at 56. I disagree with Calabresi, however, that these are *the* critical criteria.

intent on consolidating democracy and protecting constitutionalism in the long run.

Altering semipresidentialism, once a country has passed its constitutional moment, could also prove problematic. For example, a country might wish to reduce conflict by limiting the constitutional powers of the president, especially emergency and decree powers, as well as any unilateral presidential control over the armed forces and security services. A country might, at the same time, try to introduce or strengthen other institutions that could serve as constitutional moderators, such as a constitutional court. But this prescription assumes that a country’s constituent assembly (or constitution-amending body) has this option available and is not pressured to maintain a powerful, popularly elected leader for social or historical reasons. This prescription also assumes that there is adequate political will for constitutional change. As Terry Moe notes, “the political process often gives rise to institutions that are good for some people and bad for others depending on who has the power to impose their will.”⁹⁰ Constitutions are no exception, and semipresidentialism seems particularly vulnerable to interbranch power struggles that lead quickly to presidential domination and entrenched interests.

That the semipresidential constitution, particularly in the absence of institutionalized political parties and party-oriented leadership, provides concentrated and direct benefits for those in power and may therefore be difficult to amend is already a problem for constitutional theory. That this constitution also imposes various costs on citizens and on a democracy’s development is less known in constitutional law, and yet the issue is critical to our constitutional understanding. When brought into relief through a comparative historical discussion of specific constitutional structures and empirical practices, as I have tried to present them here, the *raison d’être* of the semipresidential model almost disappears. We are, therefore, left wondering about the actual purpose or relative benefits of this new rendition of the separation of powers. Can we not come up with anything better? As Robert Dahl already warned us decades ago, “surely the invention of new institutions for political reconciliation—institutions consistent with democratic goals—should have a high place on the agenda of social scientists. For the prospect that existing polyarchies can do a better job of satisfying the claims of citizens, and that countries with hegemonic or mixed polities can in time be democratized, depends in no small measure on the creation of institutions for reconciling diversities.”⁹¹

⁹⁰ Terry M. Moe, *Power and Political Institutions*, 3 *PERSP. ON POL.* 215, 215 (2005).

⁹¹ See *REGIMES AND OPPOSITIONS* 25 (Robert A. Dahl ed., Yale Univ. Press 1973).