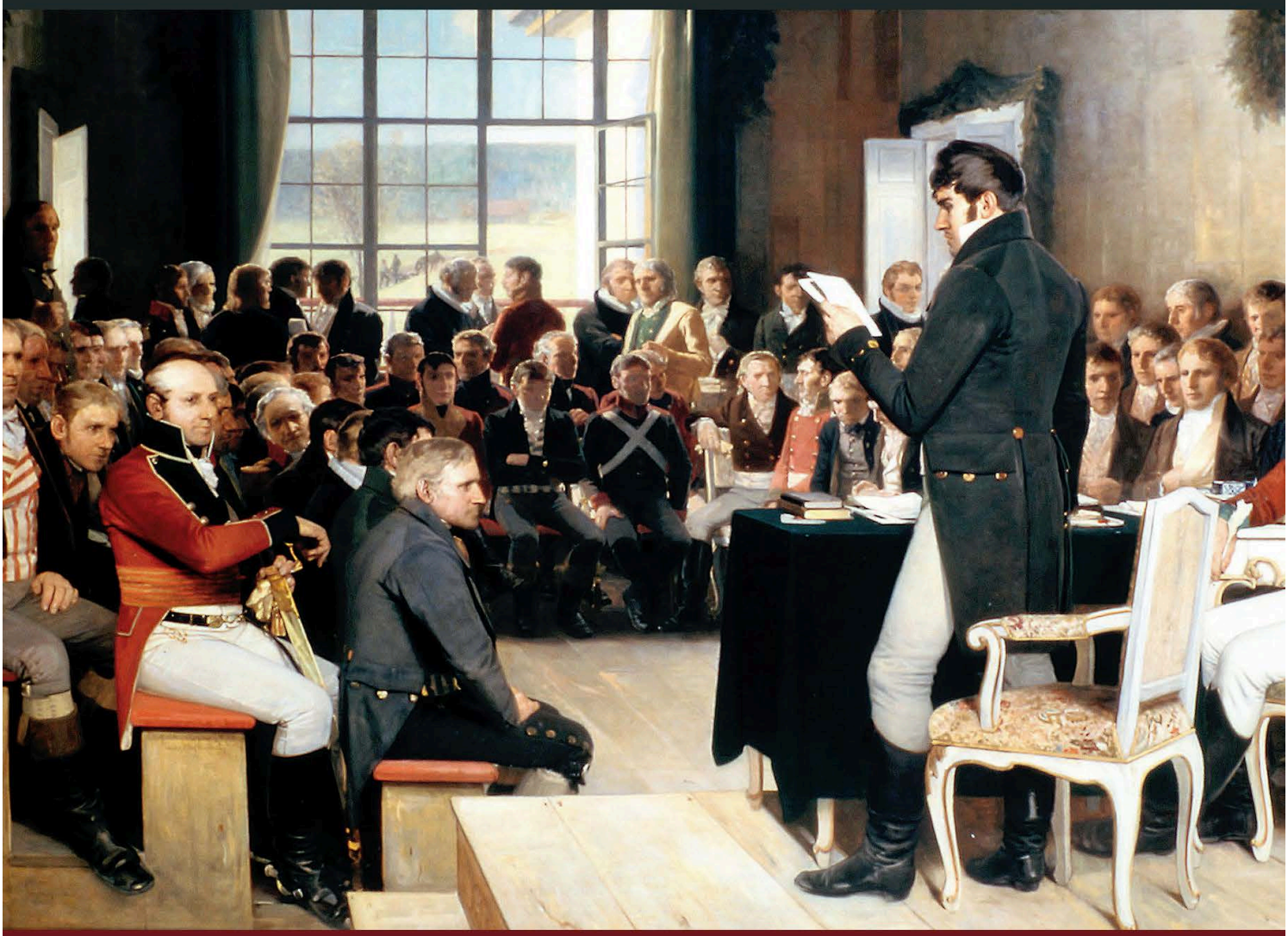
Comparative Constitutional Law and Policy



CONSTITUENT ASSEMBLIES

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Constitution Making and Legislative Involvement in Government Formation

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The majority of democracies in the world today operate a parliamentary constitution, meaning that the government (sometimes referred to as the cabinet or the executive) is politically responsible to the national legislature (Cheibub 2007). A common feature, but not a definitional attribute, of the parliamentary system of government is that the executive is not directly elected but instead somehow emerges from the legislature, typically following a legislative election. Scholars have long been intrigued by which party or parties get to form the executive, particularly when no single party controls a majority of seats in the legislature (Strøm et al. 2003). Yet, relatively little research has been conducted on the formal role of legislatures in government formation in parliamentary regimes (although, see further, Strøm 1990; Strøm et al. 1994; Bergman 1993a, 1993b; Cheibub et al. 2015; Rasch et al. 2015).

This chapter explores the role of national legislatures in government formation. The specific focus is on explaining variation in what we term parliamentary investiture. Parliamentary investiture consists of a vote to demonstrate that an already formed or about to be formed government has the support of a majority in the legislature. While parliamentary investiture votes are a common feature of parliamentary regimes, not all legislatures require them.[1] Where they exist, recent research has identified important variation in investiture rules from one legislature to the next, with significant consequences for how politics operates (Rasch et al. 2015).

Investiture procedures have tended to be shaped at moments of major constitutional design or redesign – of the forty-four European cases since 1834 with some form of constitutionally mandated investiture procedure, thirty-nine (89 percent) originated in the writing of a new constitution or the significant reform of an existing one (Cheibub et al. 2015). Also, after they have been introduced, investiture rules are hardly ever abolished or weakened by constitutional amendments (the French Fifth

[1] In Denmark and Norway, for example, the government comes to office without any vote in the legislature.

Republic is an exception; see Nguyen-Duy 2015). It seems conceivable therefore that the constitution-making process is the mechanism that shapes the investiture process, and through this the formal role of the legislature in government formation.

We take Elster's (1995) concept of "institutional interest" as a starting point for our analysis of the origin of investiture procedures. According to him, an institution that participates in the constitution-making process is likely to write itself an important role into the constitution at the expense of other institutions (Elster 1996, 63). Framers have different motivations to promote the centrality of the institution they belong to in the constitutional structure. Career goals or aspirations to keep the same political office after the constitution-making process ends may act as a strong incentive to reinforce the constitutional role of that institution. A sense of pride and identification with the institution they belong to – "this may be an important institution since I am a member of it" – may also motivate framers to strengthen its constitutional role (Elster 1996, 63–4).

From this perspective, if the legislature (or prospective legislature) is the constituent assembly, then the constitutional framework will be biased in favor of the legislature. As Congleton (2013, 186) suggests, "[T]he procedures chosen and initial assignment of authority tends to align the interests of officeholders and those of the *formateurs*."[2] Elster (1995, 382) also expects institutional interest to act as a strong determinant of the "machinery of government." If true, then we would expect that a constitution-making process dominated by the legislature would lead to a strong formal role for the legislature in government formation. A strong investiture procedure means that the legislature is more intensely involved in government formation. In contrast, executive-dominated constitution making processes should result in a weak or no formal parliamentary investiture procedures. Where neither the legislature nor the executive are involved in framing the constitution (a pure convention), we make no claim as to whether the legislature will have a strong or weak formal role in the formation of new governments.

The constitutional engineering of investiture procedures is particularly important because the cabinet represents the apex of political power in parliamentary systems (Cox 1987; Laver and Shepsle 1994). By defining how access is given to the most important political offices in the state, the rules concerning government formation become a topic of great empirical, theoretical, and normative significance. We need to know not just how investiture rules vary, but why. Elster (1998, 117) warns that "constitutions ought to be written by specially convened assemblies and not by bodies that also serve as ordinary legislatures" in order to reduce the scope for institutional interest. Yet, the link between interests and institutional outcomes is not always robust. For example, Elkins and Ginsburg (2013, 11) argue that "evidence

[2] The *formateur* in this context refers to the constitution makers.

of institutional self-dealing is largely anecdotal" in constitution making and they find no proof that legislatures give themselves more legislative power than do other constitution making entities.[3] By focusing on the origin of investiture rules, we seek to better understand why some legislatures are privileged relatively more in government formation rules and specifically whether any such privileges are the result of institutional interests in the constitution-making process.

The remainder of the chapter is organized as follows. Next, we discuss variation in the design of investiture procedures. To understand better the constitution-making origin of investiture, we then discuss three cases of constitutional design and investiture – France, Ireland, and Romania. We complement these cases with a cross-country analysis of constitutional process and investiture rules. To anticipate, we find evidence that the nature of the constitution-making process impacts the formation rules enshrined in a country's constitution – executive-dominated constitution-making processes tend to result in weaker investiture rules whereas legislative-dominated processes tend to result in stronger investiture processes.

1. WEAK VERSUS STRONG INVESTITURE RULES

Investiture procedures vary along several dimensions.[4] The first one concerns the extent to which the legislature plays a *proactive* role in the selection of a prime minister and cabinet from the beginning of the government formation process. In some constitutions, legislators are entirely responsible for the choice of a head of government but play no further role in the formation of the government. Following the election of a prime minister by a vote of legislators, the government can be removed only if the legislature withdraws its support by passing a censure motion or rejecting a vote of confidence initiated by the government. By contrast, in other constitutions legislatures play no formal role in the selection of the prime minister but must approve the government program and/or composition before a new cabinet takes office. The prime minister designate engages in negotiations with parliamentary parties over the government's program and composition, at the end of which the duly appointed government must be subject to a parliamentary vote. Thus, as opposed to making the first move in the game of government formation, legislators cast a *reactive* vote, which simply confirms or rejects a government that is already

[3] To measure legislative power, Elkins and Ginsburg (2013) employ Fish and Kroenig's (2009) Parliamentary Powers Index. This index has been the subject of criticism from other scholars (see, e.g., Desposato 2012).

[4] It is important to note that we are not discussing whether legislatures matter for government formation. Legislatures obviously influence government formation in all parliamentary systems in the sense that whoever is forming a government must necessarily take into consideration the distribution of seats and other aspects of legislative politics. We are concerned here with the constitutional rules concerning who participates in the government formation process and how.

in office. In other words, the investiture vote is functionally (and often nominally) equivalent to a vote of confidence. Yet, it is not the same as a vote of confidence because the government cannot call it for strategic reasons.

The distinction between proactive and reactive investiture regimes may influence negotiations and the kind of governments that are formed. The latter arrangement provides the *informateur* and/or the *formateur*, an individual in whose selection legislature as an institution tend not to play a direct role (see Bäck and Dumont 2008), with a strong agenda setting position. The *formateur* can exploit the fact that the legislature is effectively faced with an up or down vote on the new government to obtain outcomes closer to her preferences (Romer and Rosenthal 1978). In comparison, the type of investiture in which the legislature plays a *proactive* role is more flexible. The legislature operates as if under an open amendment rule, and more than one coalition alternative might – at least implicitly – be on the table when the investiture vote takes place. Some parliaments even have elaborate procedures to handle the possibility of multiple alternatives; Slovenia, for instance, specifies a complex sequential procedure in the standing orders. Thus, it is plausible to suppose that the difference in the bargaining environment that each of these investiture approaches imply also affects some of the features of the governments that emerge, although not necessarily easily measurable characteristics such as the type (minority or majority) or duration of the governments.

The second dimension along which parliamentary involvement in government formation varies is the number of decision points. This dimension manifests itself in two ways: (1) in terms of the number of chambers involved in the formation process and (2) in terms of the number of times the chamber is called to make a decision about the government.

The majority of bicameral systems in Europe operate under constitutions which specify that government formation is a function reserved exclusively for one chamber, normally the lower chamber (Heller and Branduse 2014; Tsebelis and Money 1997). Yet, some constitutions require the involvement of both chambers (Druckman and Thies 2002; Druckman et al. 2005). For example, in Italy the president appoints the government, and to continue in office the government must win separate confidence votes in the Chamber of Deputies and the Senate within ten days of the presidential appointment.

Legislatures may be involved in multiple decision points even if only one chamber votes to invest a government. In both Ireland and Lithuania the legislature selects a prime minister proposed from within the legislature itself and only subsequently votes on the cabinet. In this sense, the legislature is firmly in control of the entire government formation process: although it empowers an individual to form a cabinet (and possibly negotiate a program), it retains the power to reject that government if it so desires.

A third important dimension of government investiture is the extent to which individual members of the legislature are actively involved in the decision process. This can be captured by the decision rule applied to investiture votes. Although the possibilities are infinite, there are essentially three decision rules employed in practice: negative majority, simple majority, and absolute majority. Absolute majority means that at least 50 percent *of the members* of an assembly need to vote for a government to be invested. Simple majority means that at least 50 percent *of those voting* must explicitly support the government to be invested. Since what counts is only the vote of those casting a Yes or No ballot, abstentions make it easier for a government to be invested as the committed supporters of the government might constitute less than half of the assembly. What we here call *negative majority* is the weakest of the decision rules from the point of view of the legislature. Under this rule, a government is invested as long as an absolute majority does not vote against it. Investitures based on a negative majority rule are even weaker than the situation in which the government remains in place as long as a majority, simple or absolute, does not approve a motion of no confidence. Under a negative majority requirement, a prime minister designate could survive even if a simple majority voted against him or her (i.e., as long as this majority has less than half of the MPs). Sweden has a *proactive* version of this decision rule, and Belgium and Portugal use a *reactive* (or confidence vote) variant of the same rule. Table 8.1 illustrates the great variation in rules governing parliamentary investiture across a number of European parliamentary democracies.

The entries in the table are investiture regimes in Europe since the first one we have been able to identify (the vote on the Monarch's Speech in the UK from the 1830s on). There are forty-four cases in total, including three instances of negative investiture rules. Today, a majority of European countries has some kind of investiture vote specified in their constitutions. All of the post-Communist constitutions have investiture provisions, as is true also for other European countries at the beginning of the third wave of transitions to democracy. The share of parliamentary constitutions with no mention of a vote of investiture has declined sharply over the last few decades. Simple majority investiture is more common as a decision rule than absolute majority. Also, the reactive form of investiture – similar to a confidence vote – is clearly more common than proactive rules where the parliament elects the prime minister.

II. EXPLAINING INVESTITURE PROCEDURES

What explains such variation in the formal role of legislatures in government formation? As noted earlier, recent research has suggested that investiture rules were created during constitutional moments – times when new constitutions were written or old ones fundamentally redesigned. As such, investiture rules could be

TABLE 8.1. *Investiture Regimes in Europe, 1834–2015*

	Absolute Majority		Less than Absolute Majority	
	Proactive	Reactive	Proactive	Reactive
Bicameral, single chamber investiture	Germany (1949–)[c]	France (1946–1953)	Austria (1920–1928)	Belgium (1995–)[b]
	Poland (1989–1991)	Poland (1992–)	Ireland (1922–1936)[a]	Bosnia–Herzegovinia (1995–)
	Slovenia (1991–)		Ireland (1937–)[a]	Czech Republic (1993–)
	Spain (1978–)[c]			France (1954–1957)
				Italy (1906–1922)
				Turkey (1961–1979)
				United Kingdom (1834–)
Bicameral, dual chamber investiture	Romania (1991–)	Yugoslavia (1992–2002)		Belgium (1919–1994)
				Italy (1948–)
Unicameral	Hungary (1990–)	Armenia (1995–)	Albania (1998–)	Albania (1991–1997)
	Ukraine (1996–)	Croatia (1990–)	Bulgaria (1991–)	Greece (1952–1967)
		Georgia (2004–)	Estonia (1992–)	Greece (1975–2016)
		Macedonia (1991–)	Finland (2000–)[c]	Latvia (1991–)
		Moldova (2000–)	Lithuania (1992–)[a]	Moldova (1994–1999)
		Serbia (2006–)	Serbia and Montenegro (2003–2005)	Montenegro (2006–)
		Slovakia (1993–)	Sweden (1974–)[b]	Portugal (1976–)[b]
				Turkey (1982–)

[a] Double investiture in the same chamber.
[b] The decision rule is negative majority.
[c] The initial decision rule may be lowered if no *formateur* pass the specified hurdle.

Source: Adaption of Table 2 in Cheibub et al. (2015).

considered part of a package of constitutional rules regulating the roles, functions, and powers of the national legislature. In other words, the design of investiture procedures occurred in tandem with the allocation of powers between the legislature and the executive. Cheibub et al. (2015) suggest that legislatures are most involved in selecting the government where the executive is endowed with strong agenda-setting power. They provide circumstantial evidence – both statistical and historical – that constitutional framers explicitly and consciously perceive the need to design strong investiture institutions in reaction to creating a relatively powerful executive in the legislative arena. In what follows, we expand on this perspective by exploring the possibility of a link between investiture rules and the form of the constitution-making process.

A number of different actors can participate in the constitution-making process. Constitutions may be written or rewritten by, among others, a constituent assembly, the sitting legislature, or the sitting executive. Here, we explore whether the dominance of either the executive or the legislature in the constitution-making process impacts the type of parliamentary investiture rules provided for in the constitution. Before exploring the issue with cross-national data, we consider three cases of constitutional reform, covering France, Romania, and Ireland. Our goal is to explore evidence of what Elster terms "institutional interests." If the legislature (or prospective legislature) is the constituent assembly, the constitutional framework should be biased in favor of the legislature. If, on the other hand, the executive dominates the constitution-making process, the legislature will not be given as significant a role in investiture. The three countries we have chosen to focus on are broadly representative of the variation in the role that executive and legislative institutions may play in constitution making. France during the Fourth Republic and Romania at the beginning of the country's transition to democracy illustrate the strong role in government formation that constituent assemblies may play. The Fifth French Republic and Ireland point to the opposite roles granted to legislatures by executives that dominate constitution making: while the former stands for the weakening of legislative involvement in the formation of governments in a constitution written by the Executive, the latter shows that legislatures may also be granted a strong role in government formation even when the executive dominates the writing of the constitution. Thus, the variation across and within our case studies provides a useful illustration of the different ways in which executive and legislative institutions may shape constitutions.

III. CASE STUDIES: FRANCE, ROMANIA, AND IRELAND

A. *France*

Constitution making in France during the 1945–6 period illustrates the self-serving tendency of constituent legislatures (Elster 2006, 195). The investiture procedure

constituted a key aspect of executive–legislative relations that the Left aimed to keep under the full control of the legislature. Previously, under the Third Republic, the president named the new prime minister who appointed his cabinet and only afterwards came before the Chamber of Deputies for a vote of approval (Williams 1958, 225). The president's involvement in government formation was seen by many legislators as undemocratic. Consequently, starting with the "Law Draft for the Provisional Organization of the French Government," which was approved by the October 21, 1945 referendum as a temporary organizational framework until the constituent assembly adopted a new constitution, an effectively double investiture procedure was introduced. Under these provisional regulations, a single-chamber legislature elected the President of the Provisional Government in a public vote by an absolute majority. The prime minister was then required to submit his cabinet composition and government program to a new vote of the assembly. This procedure was preserved in the first constitutional project that was narrowly passed by the Socialist-Communist majority of the constituent assembly elected in 1945. However, the pure "regime d'Assemblée" (Gicquel and Gicquel 2015, 495) that characterized the first constitutional proposal was defeated in the popular referendum held in May 1946.

The constitutional project adopted by the second constituent assembly elected in June 1946 modified the investiture procedure. Article 45 reflected the compromise between the Left and the conservative Popular Republican Movement (MRP) by keeping the focus of the investiture vote on the prime minister alone, while allowing the president to propose candidates for the head of government (Williams 1958, 226). Paul Coste-Floret, the rapporteur of the 1946 constitution, argued that from the Constitutional Commission's perspective, the designation of the prime minister by the president ensured the former's independence with regard to the political parties and the legislature, while the investiture vote prevented the president from making arbitrary choices and gave the prime minister the necessary authority to form the government (Coste-Floret 1996, 17).

The French people approved the second constitution in the October 1946 referendum. The constituent assembly dissolved itself and elections for the first regular legislature of the Fourth Republic were held one month later. Nonetheless, as legislators were reluctant to accept a head of government without any knowledge of his cabinet, the double-investiture procedure was informally reactivated from the very beginning of the Fourth Republic, as prime ministers accepted a vote of confidence on the composition of their cabinets or effectively formed their cabinets before investiture (Williams 1958, 226). This practice was blamed for much of the governmental crises that characterized the Fourth Republic, as several prime ministers successful in the first investiture vote were unable to pass the second vote; some would even give up presenting a cabinet altogether (Massot 1996, 53). The 1954 reform, which lowered the majority requirement for the investiture of new

cabinets from absolute to simple majority, did not make the double investiture practice any easier to cope with (Massot 1996, 56).

The making of the 1958 constitution points in the opposite direction, that is, to the weakening of legislative involvement in the formation of governments in a constitution written by the executive. When General De Gaulle accepted President Coty's invitation to form a government in May 1958, he demanded special powers to draft a new constitution. Out of respect for the institutions of the Fourth Republic, he went through the regular government formation process and obtained the investiture of the National Assembly on June 1, 1958 by 329 votes to 224. Two days later, the Constitutional Law of June 3, 1958 revised Article 90 of the 1946 constitution delegating the new government full power to draft a new constitution. According to this law, the constitutional project had to respect several principles, including universal suffrage, the separation of executive and legislative powers, the government's responsibility to the legislature, and the independence of the judiciary. Procedurally, the government's project needed to be endorsed by a consultative constitutional committee, made up mainly of sitting legislators, and the Council of State before being adopted in the Council of Ministers and put to referendum for popular approval (Gicquel and Gicquel 2015, 514–5). The constitutional draft was adopted by the government on September 3 and overwhelmingly approved by the people in the referendum of September 28, 1958.

The removal of the investiture vote from the 1958 constitution arguably reflected De Gaulle's belief that there was no (formal) place for the legislature in the formation of the government. His constitutional ideas were clearly expressed in the Bayeux speech of June 16, 1946, when he argued that the government should be formed exclusively by the head of state (Gicquel and Gicquel 2015, 497). Thus, the two French constitutions seem to suggest that assembly written constitutions are more likely to result in strong legislative involvement in government formation while constitutions written by the executive are more likely to result in no or weak investiture rules.

B. *Romania*

Following the violent collapse of Romania's communist regime in December 1989, the executive and legislative power was assumed by the Council of the National Salvation Front (CFSN). The provisional body included dissident communists and demonstrators and was led by Ion Iliescu, a former Communist party official (Birch et al. 2002, 91). Among the main tasks of the Council were the appointment of a commission to design a constitutional project and the adoption of an electoral system for the first free elections (Preda 2012, 284). However, the FSN's

decision to transform itself into a political party and stand in elections triggered demonstrations that could be appeased only by the formation of the Provisional Council for National Unity (*Consiliul Provizoriu de Uniune Naţională*), which included representatives from other political parties and minority organizations. Half of the CPUN seats were kept by CFSN, with Ion Iliescu serving as president, while the other half was assigned to representatives of political parties and minority organizations (Birch et al. 2002, 92).The CPUN held meetings between February and May 1990, paving the way for concurrent presidential and legislative elections on May 20. The most important document adopted by this unelected body was the Decree Law no. 92/1990 of March 14, 1990 on the Election of the Legislature, the President of Romania and Local Councils.[5] Proposals for this key law were submitted by the CFSN committee responsible for the draft and the registered political parties to public debate, before the CPUN met for the first time on February 9 (Birch et al. 2002, 91–2).

Apart from setting the rules for the first free elections, the decree law provided a general framework for executive–legislative relations and defined the tasks and duration of the constituent assembly. Thus, the newly elected Chamber of Deputies and Senate were set to form a constituent assembly, which would operate concomitantly with their regular functions. However, the constituent assembly was not allowed to transform itself into a sitting legislature at the conclusion of the constitution-making process, as new elections had to be organized within one year following the adoption of the constitution (Article 80). Moreover, the president could dissolve the constituent assembly with the agreement of the prime minister and the speakers of the Chamber and Senate if a new constitution was not adopted within nine months following elections. Additionally, the constituent assembly was to be dissolved automatically if a new constitution was not adopted within eighteen months following election (Article 82).

Most provisions for the postelectoral executive structure were included in Article 82 of the Decree Law, which set out a relatively extensive range of presidential powers over government formation, foreign affairs, defense, and relations with the legislature, including its convocation and dissolution. Following elections, the president was required to appoint as prime minister the representative of the party or political organization with a majority of seats in the legislature. If no party held the majority, then the president had to select as prime minister one of the sitting deputies or senators after consulting the parties and political organizations represented in the legislature. The composition of the government needed to be approved by the Chamber of Deputies and the Senate but there was no mention of

[5] Decret-Lege Nr. 92 din 14 martie 1990 pentru alegerea parlamentului si a Presedintelui Romaniei. Retrieved from: www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=7528 (accessed August 9, 2016).

the government's responsibility to the legislature. A broader debate surfaced during the CPUN meetings regarding the form of government to be adopted, whether presidential, semipresidential, or parliamentary. As this matter was left for the constituent assembly to decide, so was the question of whether the government should be accountable to the legislature or to the president or to both of them.

The transcripts of the CPUN meetings held during March 9–14 when the draft decree law was debated do not reveal any questioning of the [lack of] legislative involvement in the selection of the government (IRRdD 2009a, 2009b). The only proposal in this regard was that both the Chamber of Deputies and the Senate should participate in the investiture vote (IRRdD 2009b, 173). There were some discussions about the president's leeway in selecting a candidate prime minister when no party obtained a majority and whether he was bound to nominate the leader of a parliamentary party or any other legislator (IRRdD 2009b, 176–9). The issue at stake was how much discretion the president should have in selecting a new prime minister when no clear winner emerges from a general election. By and large, though, the legislature's ability to control the choice of the executive seems to have been taken for granted from very early on in Romania's post-Communist constitution-making process.

The presidential and legislative elections held on May 20, 1990 were overwhelmingly won by Ion Iliescu and the National Salvation Front (FSN). Of the 515 members of the new legislature that met as a constituent assembly on July 11, 355 belonged to the NSF. A twenty-eight-member Constitutional Commission was tasked with the drafting of a constitutional project, which was presented to the constituent assembly on December 12, 1990.[6] Debates on this proposal took place in the assembly between February 12 and June 20, 1991, leading to a draft constitutional proposal being published on July 10. New amendments proposed by legislators were debated during plenary meetings held between September 10 and November 14. The final draft constitution was approved by 414 out of the 510 deputies and senators on November 21 (Stănescu-Stanciu 2012, 129–30). In December 1991 the document was ratified by popular referendum and new elections were scheduled for September 1992.

Although the records of the Constitutional Commission have not been made public, we have full access to the transcripts of the plenary meetings of the constituent assembly dealing with the institutional nature of the new regime (Stănescu-Stanciu and Neacşu 2011, 2015). Similar to the debates held during the plenary

[6] Interestingly, among twenty-three sitting deputies and senators (thirteen of whom were FSN members) the Commission included five legal experts who had not been elected to the Constituent Assembly. Antonie Iorgovan, the chair of the Commission, was a formally independent senator, but he was considered close to the FSN (Blokker 2013, 191).

meetings of the CPUN in early 1990, the government's investiture by the legislature was not questioned during the meetings of the constituent assembly. Very few proposals to change the provisions made in the Decree Law no. 92/1990 with regard to government formation were put forward. Among them were several suggestions concerning the identity of the prime minister to be selected by the president and the details of the investiture vote. The government's investiture by both chambers and the absolute majority hurdle were never under serious debate.

The concern regarding the legislature's effective power to control the president's choice of a prime minister stands out during the debates of the constituent assembly. Legislators had extensive discussions about how much leeway the president had in choosing a new prime minister and whether the investiture vote concerned the entire composition of the new government, including the prime minister. In his account of the work of the Constitutional Committee, Iorgovan (1998, 238–9) notes the legislators' insistence on denoting the president's choice as a "prime minister candidate," so as to strengthen the principle that a new prime minister and cabinet can take office only after passing the legislative vote of investiture. The selection pool for the prime minister post was also extended beyond sitting legislators, while previously the president was required to choose the prime minister from among elected deputies and senators (Stănescu-Stanciu and Neacşu 2011, 704). Additionally, where the decree law included a somewhat laconic provision that "the composition of the government must be approved by the Chamber of Deputies and the Senate" (Article 82, Decree Law no. 92/1990), the new constitutional draft clearly specified that

> (2) The candidate to the office of Prime Minister shall, within ten days after his designation, seek the vote of confidence of Legislature upon the program and complete list of the Government. (3) The program and list of the Government shall be debated upon by the Chamber of Deputies and Senate, in joint sitting. Parliament shall grant confidence to the Government by a majority vote of Deputies and Senators. (Article 102, 1991 Constitution)

Antonie Iorgovan, the chair of the Constitutional Commission, noted that the "approval" condition was replaced with the specific requirement to "grant confidence" in June 1991 at the recommendation of Swiss experts led by Professor Jean François Aybert. The main concern was that if the Legislature only "approved" the governing program instead of "grating confidence," then it would not have been able to withdraw its confidence through a censure motion (Stănescu-Stanciu 2011, 68). By and large, the evidence suggests that constitution makers were aware of the importance that the investiture vote played in the design of executive–legislative relations and strived to ensure that the legislature would be in a position to control the executive from the beginning of the formation process.

C. *Ireland*

Today, the Irish Constitution provides for a double-investiture vote in the lower chamber of the national legislature. First, in a proactive form of investiture, the legislature elects a prime minister who is then formally appointed by the head of state. Thereafter, the prime minister nominates the remainder of the cabinet for approval by the legislature in a second, reactive, vote. If approved, members of the cabinet are then formally appointed by the head of state. Any change to the composition of the cabinet requires a fresh investiture vote.

Given the assimilation of the Irish political elite into the Westminster parliamentary tradition, it is of little surprise that the fledgling state borrowed many of the practices and procedures from the British political system. Yet, some notable breaks in institutional design and procedures occurred. A key difference enshrined in the provisional *Dáil* Constitution of 1919 concerned the process by which the government would be selected. Retaining the overall character of a parliamentary system of government, the 1919 constitution granted government selection decisions to the legislature. The key break with the Westminster model occurred in requiring an explicit investiture vote, provided for as follows in the 1919 Provisional Constitution:

> 2. (b) The Ministry shall consist of a President of the Ministry, elected by *Dáil Éireann*, and four Executive Officers, viz.; A Secretary of Finance, A Secretary of Home Affairs, A Secretary of Foreign Affairs, A Secretary of National Defence – each of whom the President shall nominate and have power to dismiss.
>
> (d) At the first meeting of *Dáil Éireann* after their nomination by the President, the names of the Executive Officers shall be separately submitted to *Dáil Éireann* for approval.
>
> (e) The appointment of the President shall date from his election, and the appointment of each Executive Officer from the date of the approval by the *Dáil* of his nomination.

Given the limited historical records covering the drafting of the Provisional Constitution, one can only speculate as to the reason for specifying a vote of investiture, both for the head of government and in requiring a separate vote for each individual minister. Given that Ireland would initially remain part of the British Commonwealth, one reasonable explanation concerns the desire of the rebel legislature to ensure that the British monarch not be permitted a role in determining who would govern Ireland. The rebels wanted political power to be vested within Ireland and the obvious way to do this was to empower the lower chamber with the exclusive right and authority to select the government. Moreover, the 1919 constitution provides evidence in favor of Elster's institutional interest thesis: The

legislature adopted a constitution which significantly enhanced its role in government formation – departing on this point from the Westminster model that otherwise served as the sourcebook for how executive-legislative relations were to be organized.

Following a peace treaty between Ireland and the United Kingdom, a new constitution was enacted in 1922. As part of the settlement, this constitution deepened the influence of Britain on the Irish political system, creating for example, a governor general as the representative of the British monarchy in Ireland. Yet, the Free State Constitution followed the earlier constitution in not assigning any role – formal or informal – to the monarchy or governor general in relation to the selection and appointment of the government of the Irish Free State.

The drafting of what would become the 1937 constitution was heavily dominated by the executive. In particular, Éamon de Valera, the head of government played a central role in shaping the constitution, although the draft constitution was formally approved by the legislature and subsequently approved in a popular referendum. Regarding the investiture procedure, the only significant change between the 1922 constitution and the 1937 constitution concerned a role for the newly created office of president. The president would formally appoint the *Taoiseach* and government, on the nomination of the lower chamber. Ireland remained a parliamentary system by most accounts, with a president as symbolic head. Notably, the 1937 constitution did not depart from the right of the lower chamber to select the *Taoiseach* and confirm the *Taoiseach's* choice of ministers. The drafters of the 1937 constitution could have assigned the president a more significant role in selecting the *Taoiseach* akin to that of the Britain's head of state in selecting a prime minister. Indeed, aside from formally appointing those nominated by the *Dáil*, the president plays no role in government formation, neither selecting the persons to hold office nor acting as, or appointing, an *informateur* to facilitate negotiations between parties. Thus, despite dominating the process, the executive, felt unable or unwilling to move away from the earlier constitutional process of parliamentary investiture.

The brief review of constitution making in France, Romania, and Ireland with regard to investiture procedures provides evidence that the constitution-making process shapes the investiture process. Ireland appears a notable outlier, with the last constitutional moment dominated by the executive but nevertheless producing a constitution that requires a double investiture vote.

It should be noted that the 1937 constitution did grant significant agenda-control powers to the executive, suggesting the possibility that the strong investiture procedure constituted a form of compensation for the granting of strong executive rights (Cheibub et al. 2015). After all, self-dealing is constrained by the anticipation of who must approve the constitution. Thus, given a status quo that favored the legislature at the time the 1937 constitution was being written, the executive would be hard

pressed to remove the legislature's role in investiture knowing that the "offended" body would have to approve the proposal before being presented to voters in a referendum.

IV. CROSS-NATIONAL EVIDENCE

To investigate further the possibility of a relationship between constitution making and a legislature's role in government formation, we conduct a cross-national statistical analysis using two types of data related to the constitution-making process and investiture regimes. First, building on our earlier discussion, we separate investiture requirements into two broad categories. The first one includes negative formation rules (where there is no investiture at all or where the voting rule applied to investiture votes is negative majority) and positive formation rules that require the support of less than the majority of all legislators. This category includes countries such as Iceland and the Fifth French Republic, where there are no investiture procedures, and countries such as Ireland and Italy, where the investiture requirement is limited to a majority of the legislators present and voting. The second category includes absolute majority investiture rules, which represent the highest hurdle that new governments must pass before taking office. This category includes countries such as Germany and the Fourth French Republic (before 1954), as well as a good number of the East European new democracies, such as Croatia and Romania.

We code different types of constitution-making processes according to the coding scheme presented in Ginsburg et al. (2009) and the replication dataset publicly available. Owing to our limited number of observations we focus on the involvement of three particular actors in the constitution-making process: constituent assemblies/legislatures, sitting legislatures, and executives. We categorize constitution-making processes in our countries as either legislature-centered (if the actors involved are limited to a constituent legislature and/or a sitting legislature), mixed executive–legislative (if the executive was also involved in the constitution-making process along a constituent legislature and/or a sitting legislature), or a mixed constituent assembly–executive (if the only actors involved in constitution making are a constituent assembly and/or the executive).

The results of our analysis are presented in Table 8.2. Unfortunately, we have only thirty-eight cases with information on both the dependent and independent variable. The information on constitution-making processes and type of investiture is presented in the appendix. Given the small size of this sample, we refrain from including in the analysis any other variables except for those of primary interest. A probit estimation of the relationship between absolute majority investiture and different types of constitution-making processes suggests that absolute majority investiture is almost three times more likely to be adopted in a legislature-centered

TABLE 8.2. *Absolute Majority Investiture and Constitution Making*

	Probit Estimates (*p*-value)		
	(1)	(2)	(3)
Dependent variable: *Absolute majority investiture*			
Independent variable: *Constitution-making process*			
Legislature-centered	0.804		
	(0.075)		
Mixed legislature–Executive		–0.270	
		(0.607)	
Mixed constituent assembly–Executive			–0.378
			(0.463)
Constant	–1.003	–0.495	–0.464
	(0.004)	(0.042)	(0.060)
N	38	38	38
Pseudo R^2	0.072	0.006	0.012
Marginal probabilities			
Legislature-centered process	0.42	0.31	0.32
Mixed process	0.16	0.22	0.20

constitution-making process. According to the results presented in Table 8.2 (model 1), the probability of a more demanding absolute majority investiture decreases from 0.42 to 0.16 as we move from a legislature-centered constitution making to a mixed process that also involves the executive and/or a constituent assembly. These results should be interpreted with two obvious caveats: the small number of observations and the significance of our results at 10 percent level. Notwithstanding these limitations, we interpret these results as evidence in favor of the suggestion that the constitution-making process impacts the strength of the investiture rule that is ultimately endowed in a country's constitution.

V. CONCLUSION

The composition of the national legislature plays a key role in determining "who governs" under the parliamentary system of government. In the absence of a single-party majority, the formal rules that shape the role of the legislature in government formation become particularly important. Recent research has begun to unpack the great variety in parliamentary investiture rules.

This chapter explored the possibility of a relationship between the constitution-making process and the rules of parliamentary investiture. A degree of obscurity surrounds the origins of constitutional design. As Elster (1995) observed, constitution making is a craft not well studied or well understood. By defining the rules of political encounters, constitutions create incentives and rewards for some of the actors involved in the constitution-making process. Modern political science focuses heavily on explaining political outcomes by examining the consequences of the preferences of actors' interacted with institutions and rules. Within this research agenda, the understandable practice has been to treat the rules and structures – particularly constitutional rules and structures – as exogenous. Citing a political institution or rule as having a constitutional basis is a typical way to assure readers that the institution in question is truly exogenous of party and political influence.

In reality, political interests and outcomes are not just shaped by constitutions, but also shape constitutions. Political interests also reshape constitutions (Martin and Rasch 2013). Accepting this proposition may seem obvious, but the consequences and challenges of this are significant for scholars of constitutional law, constitutional change, and for political scientists interested in the impact of institutions. The dominant approach of treating constitutionally prescribed institutions as exogenous to particular models and theories of political behavior and political outcomes requires rethinking. The evidence presented in this chapter points to the potential for actors' interests to influence the design of constitutional investiture procedures.

Our point of departure was Elster's (2006) concept of institutional interest. His discussion was mainly to make a normative "argument for the view that constitutions ought to be written by assemblies called into being exclusively for that purpose and devoting themselves exclusively to that task." Our discussion has been empirical: There is a tendency for legislature-centered constitution-making processes to end up with investiture provisions that make legislatures more involved in government formation.

APPENDIX

TABLE 8.A1. *Investiture Procedures and Constitution-Making Processes*

Country	Type of Investiture				
	Investiture Regime	None	Simple	Absolute	Constitution-Making Process
Albania	1998–2013	0	1	0	Executive + legislature
Armenia	1995–2013	0	1	1	Constituent legislature + executive
Austria	1920–1928	0	1	0	Constituent legislating assembly
Bosnia-Herzegovina	1995–2013	0	1	0	None
Bulgaria	1991–2013	0	1	0	Constituent legislature
Croatia	1991–2013	0	1	1	Constituent legislature
Czech Republic	1993–2013	0	1	0	Constituent legislature
Czechoslovakia	1920–1938	1	0	0	Legislature
Estonia	1920–1934	1	0	0	Constituent assembly
Estonia	1992–2013	0	1	0	Constituent assembly
Finland	1919–1927	1	0	0	Legislature
Finland	2000–2013	0	1	0	Legislature
France	1875–1939	1	0	0	Legislature
France	1946–1953	0	1	1	Constituent legislature
France	1958–2013	1	0	0	Executive
Germany	1919–1933	1	0	0	Constituent legislating assembly
Germany	1949–2013	0	0	1	Constituent assembly
Greece	1952–1967	0	1	0	Executive + legislature
Greece	1975–2000	0	1	0	Executive + legislature
Iceland	1944–2013	1	0	0	Legislature
Ireland	1922–2013	0	1	0	Constituent legislature
Italy	1948–2013	0	1	0	Constituent legislature + executive
Latvia	1922–1934	1	0	0	Constituent assembly
Lithuania	1922–1926	1	0	0	Constituent assembly
Lithuania	1992–2013	0	1	0	Executive
Macedonia	1991–2013	0	1	1	Legislature

(*continued*)

TABLE 8.A1 (*continued*)

Country	Type of Investiture				
	Investiture Regime	None	Simple	Absolute	Constitution-Making Process
Moldova	1994–1999	0	1	0	Executive + legislature
Portugal	1976–1981	0	1	0	Constituent legislature + executive
Romania	1991–2013	0	1	1	Constituent legislating assembly
Serbia and Montenegro	2003–2005	0	1	0	Legislature
Slovakia	1993–2013	0	1	1	Constituent legislature
Slovenia	1991–2013	0	1	1	Constituent legislature
Spain	1978–2013	0	1	1	Constituent legislature + executive
Sweden	1974–2013	0	1	0	Executive + legislature
Turkey	1961–1979	0	1	0	Constituent assembly
Turkey	1982–2013	0	1	0	Constituent assembly + executive
Ukraine	1996–2013	0	1	1	Constituent legislature
Yugoslavia	1992–2002	0	1	1	Legislature

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