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Writing Rights: Factors Influencing the Strength of Rights Clauses in Post-Communist Constitutions

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While political scientists have recognized the importance of institutions in shaping political development in post-communist Eastern Europe and the former Soviet Union, there has been relatively little literature that investigates the factors influencing the choice of these institutions. This paper seeks to empirically investigate the factors that affected the choice of judicial institutions, more specifically, the strength of rights clauses in post-communist constitutions. Further it tests which factors (cultural, economic, ethnic, historical or political) most accounted for the variation among the post-communist constitutions. Using multivariate analytical techniques on twenty post-communist countries, we find that the most important variable is the effective number of actors involved in the negotiation process, a finding that supports other literature on institutional choice.

While political scientists have recognized the importance of institutions in shaping political development in post-communist Eastern Europe and the former Soviet Union, there has been relatively little literature that investigates the factors influencing the choice of these institutions. Although institutional choice would seem to be at the heart of political science, the literature on it in post-communist politics is

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sparse and progress in this area has been slow (Elster 1993a; Frye, 1997; Ishiyama 1997).

Recently, however, there has been a growing interest in the study of institutional choice in political science, specifically in the choice of constitutional structures. The simultaneous transition of the post-communist states in the direction of democratic governance has provided scholars an opportune quasi-experimental environment to test hypotheses regarding institutional choice (Elster 1992; Hellman 1998). These countries have also exhibited a striking variety of differences in the process of institutional choice.

Along with the new interest in institutional choice, there has emerged a growing interest in the choice of rights clauses, or constitutional statements that guarantee basic political rights and freedoms such as speech and assembly (Schwartz 1991; Sunstein, 1991a, 1991b; Elster, 1993b). Partially as a reaction to the communist past, most of the transition countries have adopted long, detailed rights clauses. Efforts to create strong, meaningful protections for rights lie at the heart of the new constitutions (Schwartz 1991). Unfortunately, most of the secondary analyses of rights clauses detailed in the new constitutions have consisted primarily of descriptive case studies. While these are useful in understanding what is guaranteed and the importance of those guarantees, they do not investigate the factors which influenced these outcomes. This paper seeks to investigate, empirically, the factors that affected the strength of rights clauses in post-communist constitutions, and tests which of these factors (cultural, economic, societal, historical or political) most accounted for the variation among the post-communist constitutions.

IS THE STUDY OF RIGHTS CLAUSES IMPORTANT?

The concept of "rights" has many different foundations. From being "God-given" to being practical barriers to the excesses of

majority rule, rights guarantees have been a mainstay of democratic theory. Rights guarantees can prevent many different kinds of excesses in transitional politics. These include the situation where a majority government may be tempted to manipulate rights to increase its chances for reelection (Elster 1992; Elster 1988). Second, a majority may set aside the rule of law under a "standing interest" or a "momentary passion" (Elster 1992, 20). These are the times where minority rights may be arbitrarily taken away to befit a majority interest, or that the majority, in the heat of passion, violates the rights of a minority and fails to perceive its true interests. Finally, there is the risk that the majority will fall prey to a "standing passion" (Elster 1992). Religious fanaticism and ethnic extremism are the usual examples of this type of majority passion. The situation in the Balkans makes very clear how a majority may fall under such a passion and violate the rights of others to the detriment of the social good. Thus, rights, in this type of utilitarian model, represent a bulwark against excess.

There of course have been many critics of this conception of rights. The most noteworthy of these are the arguments of Amatai Etzioni and Mary Ann Glendon (Glendon 1991; Etzioni 1993). They contend that Western rights culture emphasizes individual competition for rights and de-emphasizes the responsibilities that necessarily go with the exercise of those rights. De-emphasizing responsibility creates an increasingly insular society, which, according to them, is harmful to the community.

Some scholars have flatly rejected the notion that the inclusion of rights clauses in constitutions have any affect on politics, and hence do not represent important topics of inquiry. For example, the existence of a bill of rights does not necessarily result in greater respect for those rights. It is pointed out that the communist constitutions had very elaborate rights clauses which were not supported by the policies and attitudes of the govern-

ment. In this situation, rights clauses serve as a "legal opium for the masses" (Duchacek 1968, 98). Even the U.S. Bill of Rights was ignored for almost a century and a half before becoming the basis of much judicial activism.

As others have noted, rights clauses are also not self-acting. In a constitution, there are two different types of structures established: those that channel power and those that are outside the political spectrum (Elster 1988; Bonime-Blanc 1987). Constitutional structures that channel power, like checks and balances, structure the political system in such a way as to make the dominance of a single majority more difficult. Bills of rights often do not have any means of enforcement, except through the government. Thus, in James Madison's words, they are mere "paper barriers" to oppression. Multiple factors influence whether rights are enforced, including the attitudes of judges, the culture, the number and strength of rights advocacy groups, and any special protections enacted in legislation (e.g., funding to support litigants bringing cases to court in protection of their rights) (Epp 1996; Sunstein 1995).

While the above are legitimate criticisms, they do not demonstrate that rights clauses are unimportant, only that they can be circumscribed. While very few people would go as far as the current chief justice of the Canadian Supreme Court, who called the writing of the Canadian Charter of Fundamental Rights, "a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser" (quoted in Epp 1996, 769), bills of rights can have several effects on the political environment. First, the existence of a bill of rights in a constitution results in a valuing of rights in the political culture (Hart 1994; Duchacek 1973; Duchacek, 1968). Second, bills of rights shape the development of political and social movements. Third, bills of rights increase the level of intervention and attention to rights by the

judicial system (Epp 1996; Schwartz 1992). Fourth, it results in the fragmentation of interest groups, who, instead of seeking a solution through compromise and coalition building in the legislature, look for more individualized solutions through the courts. Finally, even if the rights clauses are a sham, they often become unintended standards for reforms and sources of inspiration for anti governmental opposition (Duchacek 1968).

RIGHTS CLAUSES IN EASTERN EUROPE

The transitions that took place in Eastern Europe and the Newly Independent States were marked by a movement away from certain communist legacies and the maintenance of others. Unlike communist constitutions, the new constitutions did not see rights as subject to the will of any group within society. Rather, rights were considered natural, outside the control of any particular class. Hence, constitutions were designed primarily to protect these rights (Schwartz 1991; Elster 1993b). In their range and detail, these constitutions go well beyond the US Constitution (Sunstein 1992).

The post-communist constitutions contain three generations of rights (Sunstein 1992). First generation rights are the conventional political and civil liberties, including rights to property, freedom of speech, and freedom of religion. Nearly all post-communist constitutions have guarantees of the right to own and inherit private property, which were absent in communist constitutions. There are also guarantees of minority rights as discussed in the 1990 Helsinki Conference (Schwartz 1991), and of other fundamental rights that are familiar to the West.

Second generation rights are positive state protections of individual well being, including the right to social security, housing, leisure, and food. These are often seen as the clearest links between the communist and post-communist constitutions (Elster 1993b; Schwartz 1992). Positive rights play a very strong role in

the post-communist constitutions. Nearly all the post-communist constitutions contain some guarantee for welfare, social security and education, creating an interesting interplay between the rights guaranteed to the individual and those guaranteed to the collective (Howard 1992).

Third generation rights, or postmodern rights, are societal goals and ambitions, such as right to a healthy environment, peace, and economic development. Some of these are reflective of the abuses that took place under the communist government, but others seem to reflect also the increasing importance of particular issues in governmental affairs. While these rights are almost impossible to enforce legally, they are meant to signify the basic goals of government policy.

In the enforcement of these rights, the post-communist constitutions have a several interesting characteristics. Contrary to the argument of Ken Jowitt (1992) that the communist experience reinforced the separation of the official and political realms, post-communist bills of rights do not draw a distinction between the public and private sector. Both the restrictions and guarantees that appear in these rights clauses, theoretically, apply equally to both the public and private sectors (Sunstein 1992). Second, almost all bills of rights contain provisions for individual duties as well as rights (Sunstein 1992). Mandates for military service, voting and paying taxes are all included in these constitutions.

INSTITUTIONAL CHOICE EXPLANATIONS

While there is little literature that specifically focuses on the choice of rights structures in post-communist constitutions, there is some literature on institutional choice regarding other political structures (such as presidencies, legislative rules, or electoral systems). The literature can be divided into five general categories: the cultural, economic, ethnic, historic, and political bargaining approaches.

Cultural Approach. Rights have long been associated with the existence of a "rights bearing culture," that is the willingness to deal with the inconveniences associated with the enforcement of individual rights. Theoretically, constitutional rights clauses are often seen as attempts to offset the most threatening tendencies of a political culture (Sunstein 1993; Mueller 1991; Sunstein, 1991a). On the other hand, constitutions are also seen as reflecting the flaws in the national character rather than counteracting them (Elster 1993). The making of constitutions is generally seen as a reflection of the society in which they are made and the support for the rights in that society (Epp 1996; Duchacek 1973; Howard, 1992). This approach suggests the following hypothesis:

Hypothesis 1: The more supportive the culture is of individual rights, the stronger the constitutional rights clauses.

Economic Approach. Economic factors are also cited as affecting institutional choice. Economic decline adds new stress and volatility to the post-communist political environment. Adam Przeworski (1991) has suggested that an increase in stress, due to the economic downturns in certain states, will raise calls for a strong central authority, which can cope with the economic dislocations (see also Mason 1995). Przeworski's argument suggests that bills of rights would also be weaker because they jeopardize the authority of a more centralized executive authority. From this the following hypothesis can be drawn:

Hypothesis 2: The greater the economic downturn in a country, the weaker the constitutional rights clauses.

Ethnic Approach. A third approach in explaining the strength of rights clauses is the influence of ethnic heterogeneity. Differences in political attitudes among ethnicities have been noted in

several studies of post-communist public opinion (Mishler and Rose 1996; Finifter and Mickiewicz 1992). Indeed, ethnicity was clearly on the mind of the framers of some constitutions. For example, the first draft of the Romanian constitution, contained an outright ban on ethnically based parties (Elster 1993), and although this provision was eliminated under pressure from Western democracies, a similar clause was incorporated into the Bulgarian constitution (art. 11.4).

Other theorists have also pointed to the effects of ethnic conflict on institutional choice. On the one hand, Horowitz (1985) suggests that the more ethnically fragmented a society is the stronger the push for a strong executive to unify the dominant ethnic group. This situation results in weaker bills of rights, as these would hinder the freedom of the executive. On the other hand, it has also been suggested that the same ethnic fragmentation could also lead to calls for a weaker central authority and more protection of individual rights, especially since claims of individual rights could act as a check against the dominance of the majority (Smithey and Ishiyama 2000). The ethnic heterogeneity literature suggests two contending hypotheses:

Hypothesis 3a: The more ethnically fragmented the country the stronger the constitutional rights clauses.

Hypothesis 3b: The more ethnically fragmented the country, the weaker the constitutional rights clauses.

Historical Approach. In discussing the post-communist rights clauses, one cannot discount the influence of the communist legacies. Several authors have highlighted the importance of historical context in its relation to the choice of institutions, particularly the effect of different communist legacies (Ishiyama 1997; Elster, 1992b; Sunstein, 1992). In dealing with constitution writing, Elster (1993, 171) states "the process took place within the framework of the existing communist constitutions, thus ef-

fectively giving them a life after death, since they never mattered before the fall of communism." In explaining post-communist politics, several scholars have pointed to the legacy left by the previous communist regime (Âgh 1995; Waller 1995; Evans and Whitefield 1995; Racz 1993). From this perspective, the nature of the previous regime affects the approach to legality taken by the successor states. The greater the emphasis on legalism rather than patronage in the previous regime, the more likely there would emerge an emphasis on individual rights guarantees in post-communist constitutions.

Hypothesis 4: The more open the society during communist rule, the stronger the rights clauses in the post-communist constitutions.

Political Bargaining Approach. The political bargaining explanation hinges on the idea that those in power will want to remain in power and make institutional choices to guarantee their power, while those in the opposition will want to prevent this situation from happening. The constitutional order is a product, then, of compromise between leaders and opposition. Unlike what Elster (1988, 6) called the "rare moments in a nation's history when deep, principled discussion transcends the logrolling and horse-trading of everyday majority politics," post-communist constitution writing was "closer to labor-management bargaining than to a rational discussion among impartial framers" (Elster 1992b, 16). Thus rights clauses, like other parts of the constitution, are the products of political bargaining. In dealing with post-communist presidencies, Frye (1997) has suggested that when a clear "electoral favorite" existed, more power was invested in centralized political structures; on the other hand the more fragmented the polity the more likely efforts were made to fragment and limit executive power. A similar trend has been noted by Pedro Magalhaes

(1999) in dealing with judicial power. He found that Communist incumbents adopted institutions that maximized their power in the state apparatus according to the results they expected out of the next election. This result would tend to suggest that groups may try to make bills of rights stronger to ensure their interests should they lose the power to have such influence through the legislature (Elster 1992). Therefore, the final hypothesis is:

Hypothesis 5: The more fragmented the political system at the time of the constitution, the stronger the bills of rights.

DESIGN AND METHODOLOGY

Dependent Variable

To measure the strength of rights clauses, we content analyzed the rights sections of the new constitutions (normally contained in chapter two of the new constitutions, the exceptions being Hungary and the Czech Republic). The coding scheme was derived from Elster who contended that two questions must be addressed when considering rights—"what rights are included in the constitution, and how well does the constitution protect them?" (Elster 1992, 21).

A major problem, however, is how to weigh each type of right in the new constitutions. Indeed, different scholars see some rights as more important than others. The best example of this debate lies in the guarantee of "positive rights" (also known as second and third generation rights) in every one of these constitutions. In classic democratic theory, law and democracy consists of two different concepts of liberty—the negative, which makes liberty dependent on curbing authority, and the positive, which makes it dependent on the exercise of authority (Sejersted 1988). According to Isaiah Berlin, these two concepts of liberty

are "two profoundly divergent and irreconcilable attitudes to the ends of life," although each of them has an equal claim to being essential (quoted in Sejersted 1988, 131). Some authors contend that positive rights serve no practical purpose in the new constitutions and might even cause considerable harm to the enforcement of the more standard negative rights (Sunstein 1991b; Hartman, 1982; Wolff, 1991; Elster, 1998). Other authors contend that positive rights are not only judicially enforceable, but are essential for the new democracies (Fried 1978; Schwartz, 1991; Schwartz, 1992). Even those that are not judicially enforceable can be important as an embodiment of the goals and attitudes of the society they represent (Schwartz 1991).

Another issue to be considered is the role that duties play in these new constitutions. Theoretically, duties would weaken the individual's ability to "do what they want," but at the same time, some scholars (Glendon 1991; Etzioni 1993) would argue that by detailing these duties, the new constitution has set the guidelines, which will protect these rights in the long run. In both instances, it does not serve the purpose of this paper to take a side on these controversies, which show no signs of being resolved any time soon.

We employed a very simple rule when developing a coding scheme for strength of rights clauses: when rights are explicitly guaranteed they have more power than when they are not. Our procedure was based on the idea that the decisions of the judiciary will be more readily accepted if they invoked unambiguous language (Sunstein 1997). Thus, to answer Elster's first question of what is guaranteed, we use an additive index of the number of rights guaranteed.

To construct this index we formed a list of the general rights categories given in the articles included in the bills of rights. First generation rights, which are almost unanimously considered to be of the greatest importance in the literature, were given dou-

ble the weight of their second and third generation counterparts. The constitutions were then coded by which rights they included. Even with this simplified framework, 113 different rights guarantees were found in the twenty post-communist constitutions, resulting, with weighting, in a maximum score of 179. After the coding was complete, each country's total score was divided by 179, producing a score between 0 and 1.

The extent to which constitutions provided for protection of these rights was measured by identifying seven specific protections in each of the constitutions. The first, and perhaps most important of these was the protection offered by the constitutional courts (see Howard 1992). In order to measure the strength of the protection offered by the constitutional court, a scale of judicial power, devised by Smithey and Ishiyama (2000), was used. This scale is based upon six factors. If the court's decision could be overturned by other actors, then it was coded as a 0, if not, then it was coded as a 1. Whether the court was guaranteed *a priori* judicial review was also coded, with the scale ranging from 0 to 1, and a .5 indicating limited *a priori* review. The length of judges' terms compared to other actors was measured as a 0 when the court judges' term was less than or equal to one term of the actor with the longest constitutional term, a .33 when it was less than or equal to two parliamentary sessions, a .66 when it was longer than two sessions but still constitutionally limited, and a 1 if it was voluntary retirement. How many actors are involved in the selection of judges was coded as 0 if there was only one specified actor with this power, .5 if there were two, and 1 if there were three or more. Who establishes the court's procedures was measured as 1 if they were established by the court and 0 if they were established by other actors. And finally, how judges can be removed was coded a 0 if they can be

removed for any reason loosely described as a violation of the law, a .5 if they can only be removed by specific constitutional provisions, and a 1 if judges cannot be removed or there is no provision for removal. The scores for each country were then added together and divided by the total possible to yield a measure ranging from 0 and 1 (see Table 1).

The second protection that was coded was the right to legal counsel for cases dealing with rights violations. Government guarantees of legal counsel for rights cases can be very important in the protection of those rights, especially since many rights cases involve those who are not from the privileged or influential groups in society (Epp 1996). The third protection is the establishment of a Parliamentary Ombudsman, whose job it is to investigate rights violations and manage various public education programs on civil rights. As the case of Poland demonstrates, the Ombudsman can be a powerful force in shaping the actions of the establishment and increasing awareness of human rights (Letowska 1995). The fourth protection is the right to redress violations of rights. Holding government officials responsible for compensating the victims of their actions if they violate the bills of rights should make those officials more responsive to the population at large. The fifth is the right to defend all the rights guaranteed in the constitution by all means within the law. This specific guarantee ensures that all people have the ability to defend their rights, without worry about exclusion due to certain factors within their personal lives or within the case. The sixth protection is the right to civil disobedience. The right to civil disobedience is one guarantee that most states are very reluctant to give since it allows for violation of law because of conscience. Civil disobedience has a distinguished history in recent decades

TABLE I
SCORES FOR DIMENSIONS OF JUDICIAL POWER

Country	A Can Judicial Decisions be Overturned?	B Presence of a priori Review?	C Judge's Term relative to other Political Actors	D How many Actors are Involved in Selection of Judges?	E Who establishes Court procedures?	F Conditions for Judicial Removal?	Judicial Power Score A+B+C+D+E+F/6
Armenia	1.0	0.5	1.0	0.5	1.0	1.0	0.83
Azerbaijan	1.0	0.5	1.0	0.5	0.0	0.0	0.50
Belarus	1.0	1.0	0.67	0.0	0.0	0.0	0.45
Bulgaria	1.0	0.0	0.67	1.0	1.0	0.5	0.70
Croatia	1.0	0.0	0.33	0.0	1.0	0.5	0.47
Czech Republic	1.0	0.0	0.33	0.5	1.0	0.5	0.56
Estonia	1.0	0.0	0.33	0.5	0.0	0.5	0.39
Georgia	1.0	0.0	0.33	1.0	0.0	0.0	0.56
Hungary	1.0	0.0	1.0	0.5	0.0	1.0	0.58
Latvia	1.0	0.0	1.0	0.5	0.0	1.0	0.58
Lithuania	1.0	0.0	0.67	1.0	1.0	0.5	0.70
Macedonia	0.0	0.0	0.67	1.0	1.0	1.0	0.61
Moldova	1.0	0.0	0.33	1.0	1.0	1.0	0.72
Mongolia	0.0	0.0	0.33	1.0	1.0	0.0	0.39
Poland	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Romania	1.0	1.0	0.67	1.0	1.0	1.0	0.95
Russia	1.0	0.0	1.0	0.5	0.0	0.0	0.42
Slovakia	1.0	0.0	0.33	0.5	0.0	0.0	0.31
Slovenia	1.0	0.0	0.33	0.05	1.0	0.5	0.56
Ukraine	1.0	0.5	0.67	0.05	0.0	0.5	0.53

in the protection of rights, from Mahatma Gandhi to Martin Luther King Jr., and was especially important in the collapse of communism in several countries. The final protection is the right to appeal to international bodies. While in some countries, including Belarus, this particular protection is rather illusory in practice, it is a potentially powerful protection. It is also an interesting protection in that it gives international judicial bodies power superior to domestic constitutional decisions. The number of protections guaranteed in the bill of rights were added together and divided by the total number of protections coded for to yield a ratio level scale between 0 and 1.

The scale for the number of rights was then multiplied by the scale for protections in the bills of rights, resulting in an overall rights index that scaled from 0 to 1 (with 1 being constitutions with the strongest rights clauses and 0 being the weakest. See Table 2).

Independent Variables

Five independent variables were operationalized to evaluate the hypotheses enumerated above: the support for rights in the political culture, the severity of the economic collapse during the writing of the constitution, the ethnic fragmentation of the country, the openness of the country in the communist period, and the number of actors in the negotiation process and the uncertainty of the initial electoral outcome.

To measure the extent to which the political culture is supportive of rights (RCULTURE), this study uses recent survey research (Wyman 1997). Surveys represent popular attitudes that should also be theoretically related to the strength of rights clauses, even if the polls are not representative of deeper cultural attitudes towards rights. The data used was taken from equivalent

TABLE 2
SCORES FOR STRENGTH OF RIGHTS CLAUSES

Country	1 Right to Appeal to Constitutional Courts	2 Right to Legal Counsel	3 Parliamentary Om- budsman	4 Right to Redress for Violations	5 Right to Defend Rights W/I the law.	6 Right to Civil Disobe- dience	7 Appeal to International Bodies	8 Percentage of Rights Explicitly Guaranteee
Armenia	0.83	0	0	1	0	1	0	0.25
Azerbaijan	0.50	0	0	0	1	0	0	0.39
Belarus	0.45	1	0	1	0	0	1	0.26
Bulgaria	0.70	1	0	0	0	0	0	0.31
Croatia	0.47	0	1	1	0	0	0	0.35
Czech Republic	0.56	0	0	1	0	1	0	0.27
Estonia	0.39	0	0	0	0	0	0	0.35
Georgia	0.56	0	1	0	0	0	0	0.24
Hungary	0.58	0	1	0	0	0	0	0.26
Latvia	0.58	0	0	0	0	0	0	0.01
Lithuania	0.70	0	0	1	0	0	0	0.26
Macedonia	0.61	0	0	0	1	0	0	0.32
Moldova	0.72	1	0	1	1	0	0	0.31
Mongolia	0.39	1	0	1	0	0	0	0.18
Poland	0.0	0	1	1	0	0	0	0.38
Romania	0.95	0	1	1	0	0	0	0.26
Russia	0.42	0	0	1	1	0	1	0.33
Slovakia	0.31	0	0	1	0	1	1	0.30
Slovenia	0.56	0	1	1	0	0	0	0.45
Ukraine	0.53	0	0	1	1	0	1	0.35

questions in the *New Democracies Barometer II* and the *New Russia Barometer II*. A set of paired statements was given to each of the respondents and they were asked to pick the one that was closer to their view. They were

- It is most important to maintain peace and order in our society.

or

- It is most important to have personal liberty, the right to do all one wants without state interference.

The percent of positive responses to the latter statement made up the score for a rights supportive culture, ranging from 0 to 100, with 100 being the most supportive of rights. Data was collected for fourteen of the twenty cases.

Operationalization of the severity of economic decline was based on the assumption that the perceptions of government do not change immediately when an economic downturn occurs, but rather a sustained economic downturn is what tends to result in stronger central authority (and hence circumscribed individual rights) (Mishler and Rose 1996). Therefore, the measure employed was based on the average annual percent decline in real GDP for the period two years prior to the writing of the latest constitution (AVGGDP).

Ethnic fragmentation is measured in this study using the *Herfindahl-Hirschmann Index of concentration for ethnicity* (HH). While this index was originally devised by economists to measure the fractionalization of corporate market shares, it has also proven useful in electoral studies (Taagepera and Shugart 1989). The formula for the index is

$$HH = \sum p_i^2$$

Where p_i represents the fractional share of the i^{th} component, which is squared and summed across all components. In this case, the components are the shares of the population made up of various ethnic groups. This sets up a scale between 0 and 1, with 1 representing perfect ethnic homogeneity, and values tending toward 0 representing extreme fragmentation.

To measure the differences between regime types in Eastern Europe and the former Soviet Union, Kitschelt (1995) constructed a useful three-part typology of communist regimes: *patrimonial*, *bureaucratic-authoritarian*, and *national consensus communism*. The first, *patrimonial communism*, relied heavily on hierarchical chains of personal dependence between leaders and followers, with low levels of inter-elite contestation, popular interest articulation and rational-bureaucratic professionalization. Moreover, these systems were characterized by a heavy emphasis on "democratic centralism" which fit well with the hierarchical structure of dependence between leaders and the led. In this category, Kitschelt placed Serbia, Romania, Bulgaria, Russia, Ukraine, Belarus and most of the rest of the former Soviet Union (coded as 1).

In the second type, *bureaucratic authoritarian communism*, inter-elite contestation and interest articulation were circumscribed, but the level of rational-bureaucratic institutionalization was high. In this category, Kitschelt placed the former German Democratic Republic, and the Czech Republic, as well as Slovakia (coded as 2). The third type of system (coded as 3) was *national consensus communism*, where levels of contestation and interest articulation were permitted, and there was a degree of bureaucratic professionalization. In essence, the communist elites allowed for a measure of contestation and interest articulation in exchange for compliance with the basic features of the existing system. In this category Kitschelt places Poland and Hungary, as well as Slovenia and Croatia. Also within this cate-

gory, as "borderline" cases, were the three Baltic states, Estonia, Latvia, and Lithuania. Although these states had been absorbed by the Soviet Union, there was a remarkable degree of intra-regime contestation and the tolerance of the demands of the national independence movements, at least far more so than in other parts of the USSR (Kitschelt 1995).

Finally, the amount of electoral competition and uncertainty was measured by the number of "effective" political parties at the time of the first legislative election following the adoption of the latest constitution (EFFECTIV) (Taagepera and Shugart 1989). An ideal measure would have been the actual number of actors involved in the negotiation process and the "roundtable" talks that negotiated the transitions from communist rule. However, since "actors" had hardly coalesced at the time of the transitions, we use a "second best" strategy of measuring the number of actors after the initial elections. We assume that the number of effective parties resulting from the initial elections roughly reflects the number of effective actors in the negotiation process. The number of effective parties is based on the share of seats each party or organization receives in the lower house of the legislature using the formula:

$$\text{EFFECTIV} = 1/\sum p_i^2$$

Where p_i represents the fractional share of the i^{th} component (seat shares in the lower house of parliament for each party in the first parliamentary election), which is squared and summed across all components

Twenty cases were chosen for this study based on the following criteria. Each of them had to have some legitimate experience with democracy, defined as having at least one free and competitive election between 1991 and 1995. This omits several of the Central Asian states including: Kazakhstan, Kyrgyzstan

Turkmenistan, Tadjikistan, and Uzbekistan. In all of these cases, elections had been essentially rigged or the competition was extremely limited. These criteria also excluded Bosnia-Herzegovina, where the political process was disrupted by a bloody civil war. Table 3 presents these twenty cases.

ANALYSIS AND CONCLUSIONS

To test the relationship between the independent and dependent variables, a multivariate regression model was employed. In this model, we employ an ordinary least squares procedure. Standardized coefficients (Beta) and tests of significance are reported, as well as standard tests for multicollinearity (VIF or the variance inflation factor). Table 4 illustrates the results of these tests.

In Table 4, the rights culture variable was not shown to be significantly related to the strength of rights clauses (coefficient=-.233, $p=.346$) therefore rejecting hypothesis 1. Average decline in GDP for the two years previous also did not show any significant relationship (coefficient=.286, $p=.298$), which does not support hypothesis 2. Examination of ethnic fragmentation's effect on the strength of rights clauses failed to show a significant relationship (coefficient=.069, $p=.788$). Thus, we must also reject hypotheses 3a and 3b. Finally, the type of communist regime prior to democratization did not relate with the strength of bills of rights (coefficient=-.117, $p=.638$) refuting hypothesis 4.

There was one independent variable that showed a significant relationship with the dependent variable, the number of effective parties in the first parliament after the adoption of the constitution ($p=.018$). The direction of this relationship is positive and fairly strong (coefficient=.527) which supports hypothesis 5.

TABLE 3
SUMMARY OF DATA FOR TWENTY STATES

Country	Rights Index	Ethnic Heterogeneity	Economic Performance	Previous Regime Type	Number of Effective Parties	Rights Culture
Armenia	0.10	0.87	5.00	1	2.44	
Azerbaijan	0.09	0.81	-19.45	1	5.29	
Belarus	0.12	0.63	-15.25	1	12.66	17
Bulgaria	0.08	0.74	-10.40	1	2.56	14
Croatia	0.13	0.63	-15.10	3	3.34	35
Czech Republic	0.10	0.89	-10.30	2	4.44	19
Estonia	0.02	0.50	-22.35	3	5.38	35
Georgia	0.06	0.51	-16.60	1	3.85	
Hungary	0.06	0.81	-2.60	3	3.24	38
Latvia	0.00	0.39	-21.55	3	6.06	28
Lithuania	0.06	0.65	-26.20	3	2.99	35
Macedonia	0.08	0.47	-9.80	1	2.91	
Moldova	0.08	0.45	-15.05	1	2.62	
Mongolia	0.04	0.81	-8.75	1	2.74	
Poland	0.11	0.95	-2.20	3	5.71	34
Romania	0.08	0.80	-9.25	1	4.07	22
Russia	0.17	0.65	-11.60	1	8.77	20
Slovakia	0.15	0.75	-10.40	2	4.59	12
Slovenia	0.04	0.83	-9.30	3	6.33	40
Ukraine	0.23	0.58	-12.00	1	13.33	17

Moreover, the adjusted R square of .326 indicates that a considerable amount of the variation in the dependent variable is accounted for by the model. There is also no significant problem with multicollinearity as indicated by the variance inflation factor (VIF) scores (see Fox 1991).

Of the approaches discussed above, only the political bargaining approach was supported by the evidence. This result is

TABLE 4
COEFFICIENT ESTIMATES AND COLLINEARITY DIAGNOSTIC FOR STRENGTH OF RIGHTS CLAUSES IN POST COMMUNIST CONSTITUTIONS

Variable	Standardized Coefficient (Beta)	Significance (P)	VIF
Ethnic Heterogeneity	0.069	0.788	1.775
Economic Performance	0.286	0.298	1.964
Previous Regime Type	-0.117	0.638	1.680
Effective Number of Parties	0.527	0.018	1.088
Rights Culture	-0.233	0.346	1.612

consistent with the findings of other scholars who have noted that the number of actors involved in the bargaining process is the crucial variable in explaining institutional choice (Frye 1997; Ishiyama 1997; Smithey and Ishiyama, 2000) In other words, this finding suggests that the strength of rights clauses is largely determined by the amount of uncertainty in the outcome of the initial election and the degree of competition in the political system. The results also supported the thesis that the stronger the competition among political groups, the stronger the structure of the bills of rights. It would seem from these results that the more uncertain a group is about being able to achieve their agenda

through legislative action, the stronger they make the overarching legal clauses to protect against the whims of the majority.

These results are also supported by several other empirical studies on other parts of institution choice, including choice of the powers of the presidency (Frye 1997) and the judiciary (Smithey and Ishiyama 2000; Magalhaes 1999). When the results of these studies are taken as a whole, it would seem to suggest that political bargaining plays a much larger role in the institutional choice process than is suggested in much of the literature. Indeed, unlike other approaches which focus on background conditions to explain institutional outcomes (such as culture, economic performance or ethnic conflict) the bargaining approach explicitly contends that institutional choice is not merely a reflection of an environment but the result of crafted compromises among political actors.

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