

The Proposed Constitution of Ukraine: Continuity Under the Banner of Change

With a Model Constitution for Authoritarian to Democratic Transitions

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Foreword

As this article goes to press, Ukrainians are completing their first parliamentary elections since independence (27 March 1994) as well as for new presidential elections. One of the first orders of business of the new Parliament and elected president will be to consider Ukraine's new Constitution; its fundamental law.

While this article focuses on Ukraine's Constitution, its implications and recommendations, in the form of model constitutional provisions, go well beyond Ukraine, extending to Russia, the other newly independent states (NIS), as well as to the developing countries of the world which also continue to reshape their constitutions. They even extend to many developed nations where citizens find themselves increasingly frustrated with what they perceive as political and economic leadership isolated and unresponsive to their needs.

Recent events make this need and the inability to effectively meet it, all too clear. If Ukraine and other nations bordering on Russia were shaken by the results of Russia's December elections for candidates to the Russian Parliament, indicating a rise of Russian nationalism and a turn to strong charismatic leadership, that concern was only strengthened by reading the words of Russia's newly adopted Constitution, approved by a bare majority of voters in a public referendum that same day. Russia's new Constitution, rather than creating new popular mechanisms for enforcing checks on government authority or over new forms of institutional power, continues to centralize authority in the hands of a few—particularly the president—and to provide citizens with “rights” in little more than name only. By favoring a strong executive, the Constitution invites the danger of presidential (or presidential and parliamentary) dictatorship and threatens a return to the abuses of tsarist and Communist Party rule which many Russians believe they have already begun to witness in the past several weeks.

Introduction

To best tell the story of constitutional and political “reform” in the NIS, individually and collectively, is to start with an allegory. In George Orwell's metaphorical tale about the Russian Revolution, after animals take control of the farm where they are

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enslaved, it is just a short time before a small group of animals begins to rule as tyrannically as the farmers whom all the animals had replaced.¹ Now, four years after the publication of *Animal Farm* in the Soviet Union, after the former republics have declared nationhood and freedom from Soviet and Russian domination, the lesson of the novella seems to have been forgotten in the formal restructuring of political authority in most of the new states, including Russia.

Although the new constitutions that have been proposed in the NIS appear to be different on their face from those that were in force before the breakup of the Soviet Union, their underlying structures are striking examples of cultural continuity; providing evidence in the non-Russian republics of the Russification (or Sovietization) of the political culture of the republics and remarkable agreement on political forms.²

This article will evaluate just one of the new constitutions, as a key to discerning the principles underlying all of them—the constitution proposed by the Parliament of Ukraine, the Supreme Rada, in March of 1992 and updated but little changed in July 1992 and October 1993.³ A comparison of the proposed Constitution in Ukraine—the largest of the former Soviet states outside of Russia—with the pre-independence Soviet and Russian constitutions, reveals the continuities and discontinuities in legal philosophy during the period of transition.⁴

As a means of evaluating Western efforts, this article will demonstrate further that, given the political and cultural realities of post-Soviet society, even those constitutional provisions “borrowed” from the West—e.g., from the United States Constitution—would fail to move the new states towards the Western ideal of democracy. To do so would either require major changes in those societies in a direction other than that which they have been moving since their independence, and/or a very different set of constitutional and legislative mechanisms than those proposed.

To make the analysis complete, the final section of this article presents a theoretical constitutional model with practical applications for the transition from authoritarian regimes to democratic forms of government in the post-Soviet Union and elsewhere; in the form of a series of hypothetical amendments to the Ukrainian Constitution which incorporate the principles of social contract democracy that underlie free market democratic systems.

Philosophical Traditions and Analytical Focus

Like many of the other countries of the former Soviet Union, Ukraine finds itself saddled with a legacy of political, economic and social problems having their roots in the Soviet period. Ukraine's political and economic institutions remain largely under the control of previous (Communist) elites at many levels, including the presidency, Parliament, and within institutions where management remains in the hands of a group referred to as “Red Directors.” Regional disputes and ethnic tensions (between the “Russified” Kiev and the “Western” Lviv; and between Russians and Ukrainians over the status of Crimea)—issues dating back to Russian and Soviet rule, and earlier—dominate debate over nation-building. Concerns over national security and fear of Russia (punctuated by disputes over dismantling the country's nuclear arsenal and division of the Black Sea Fleet), have distracted attention from many domestic issues. Most important, the country's economic

crisis—hyperinflation, sagging productivity, strikes, and environmental degradation—threatens to overwhelm what appeared at first to be attempts at political reform, as the country's president, Leonid Kravchuk, expands his authority in a state of emergency while parliamentary leaders dig in their heels to gird their own institutional power bases in the face of the crisis.

Underneath the debate over these issues of nation-building and survival is a larger and less visible debate about whether the NIS countries will re-affirm or re-awaken their pre-Soviet, pre-Russian-imposed traditions or whether they will continue to reflect the key attributes of Soviet and Russian culture, but on a smaller scale. Given the calls for national unity and construction of a new national identity by President Kravchuk and other political parties in new states like Ukraine, the country's decisions on its most fundamental laws following independence provide a means of measuring the direction which Ukraine is actually taking.

Ukraine provides an interesting setting for a test of the direction of its political and legal culture following its independence because of its dual political tradition. Constitutions in Ukraine have, historically, shown influences both of negotiated social contract democracy familiar in the West, as well as the tradition of an authoritarian state “granting” rights to the citizenry (and redefining them) at its discretion, which was characteristic of the Soviet constitutions and imperial rule which preceded the Soviet period.⁵ By setting these two views at opposite poles and elaborating the notions that underlie them, it is possible to chart the direction in which Ukraine's political and legal culture is moving.

Among Ukraine's constitutions prior to the Soviet period, for example, was the Constitution of Bendery, in 1710; a social contract between the nobility and its elected Hetman (“head man”). The document—the *Pacta et Constitutiones Legum Libertatumque Exercitus Zaporoviensis*—was modeled directly on the pact that the Polish nobility made with its elected kings, and bears a resemblance to the English *Magna Charta* in its form. The Constitution established a Parliament and protected the rights of towns.⁶

By contrast, during the Soviet period, Ukraine's imposed Constitution and the Soviet and Russian constitutions are evidence of an opposing tradition, with longer historical roots. The constitutions of the Soviet period were not contracts but “fundamental law” (*osnovnoi zakon*) established by the leadership. Indeed, as of 1991, first-year Soviet law students were still required to take courses in the “Theory and History of State and Law” and in “Roman Law” in which the foundations of the Russian and Soviet system were traced to the Code-based, leader-imposed legal systems of Hammurapi in Near Eastern civilizations, and the Roman Emperor Justinian.⁷ During the entire Soviet period, the system of civil law remained barely developed by Western standards; an attribute that has been traced historically from the Roman Empire through the Byzantine period (an integration of Roman law and Church canon), to the various imperial rules of Kiev, the Mongols and then Muscovy.⁸

Among the basic tenets of law during the Soviet period that reinforced the view of a constitution as a set of rights granted by the state rather than a contracted authority was the belief in the “perfectibility of law” (*sovershenstvo zakona*). The sign of a “developed legal system” according to the first (and last) chair of the Soviet Union's Constitutional Compliance Committee, Sergei Alexeev, was the amount of

“instructions expressed in a formalized way, in the texts of acts of law and rules” as worked out in a unified system building on and “perfecting” the Constitution's basic law.⁹

Thus, the two traditions which were found in Ukraine are not specific to the country and go to the heart of debates in legal philosophy. The positivist notion of perfectibility of law is a substantive notion that assumes expert ability of the system's leadership and the existence of fixed cultural rules that can be codified; a view consistent with the Soviet constitutions. Decisions are to be made by a small group at the top of a hierarchy and by their appointed administrators, rather than through sets of participatory and competing processes throughout the system. The basis of the constitution is to establish who the leadership is and how they make their decisions and to provide the legitimacy for that power. The opposing view of law is one based on procedures, with variable fair outcomes resulting from constant interaction and clash of preferences according to a set of rules; a view consistent with social contract theory. Western constitutions, based on this notion, assume continual shifts in preferences and attitudes and attempt to establish a set of processes through which individuals express their preferences and reach decisions.¹⁰

Flowing out of the notion of process is the concept of “checks and balances” which serve to reinforce the political equality that is necessary for processes to achieve outcomes that are reflective of the preferences of the participants. Indeed, James Madison, in framing the American Constitution, argued for a system of not only horizontal (among leaders at a given level) but also vertical checks and balances in which citizens could contest each other and government in order to prevent the rise of tyranny at the instigation of a single faction. Madison's goal was to design a set of processes such that “The private interest of every individual may be a sentinel over the public's rights.”¹¹ The American model is one of shared and overlapping powers, based on the principle that no one person and no set of institutions can be entrusted with too much authority and that the best check on self interest is not a strong central authority but a wide dispersion of political powers with mechanisms for oversight and challenge.

Although these two different models can be placed side by side, it is only the social contract model which provides a scale for which to test efficiency. When measured against the principles set forth in the American model and by its ability to protect the rights that it claimed to grant, Stalin's Constitution and other constitutions of the Soviet era fail because they did not provide citizens with any real reciprocal power to challenge the few who managed the society's most powerful institutions. As the Romans asked of their government, “Qui Custodiet Custodes?” (“Who Guards the Guardians?”). A constitution that creates a central authority but does not strengthen the abilities of individuals to check and balance each other and their leaders, is an unenforceable literary work rather than a mutually enforceable contract.

In short, the test of the direction in which Ukraine's legal culture is moving, as evidenced by its proposed Constitution, is really two-pronged. First, How much does it depart from Soviet and Russian constitutions in incorporating a view of the citizen as an individual contracting with other individuals on equal footing, for control and management of society's institutions and protections of civil liberties? Second, How much does it incorporate this view into the process of government itself by

maintaining a basic set of participatory processes (that continually restore an equal bargaining position), rather than trying to codify values and behaviors, or trying to limit these decisions to a small group?

Testing the Constitution

While there are no generally accepted formal models and indices of democratic structures and legal culture that can easily be applied to “measure” the direction of constitutional change,¹² it is possible to come at the problem from two different angles.¹³

The first approach is to model the type of system that the constitution establishes within the country's social and economic context; in other words, to look at the “deep structure” of politics—the actual allocation of political authority—and to determine the role that the constitution plays within that structure in balancing all of the different political actors. Most constitutional analyses are limited to modeling the formal structure—e.g., checks and balances within the institutions and branches of government itself—rather than modeling procedures established by the constitution within the context of the culture.

Examining the “deep structure” allows for analysis of the relative position of a full range of formal and informal institutions which are political actors in the system (military, secret police, organized crime, media, economic institutions and other juridical “persons,” government bureaucracy, political parties, foreign business) and across divisions in the society (ethnicity, gender, social class) on the basis of their actual and potential influence; their political power. Only by actually doing this and modeling the larger structure is it possible to evaluate the effectiveness of the constitution in protecting individual rights and promoting individual preferences throughout the culture. The effect of the constitution in preventing undue influence of particular institutions or sets of institutions, and in translating individual preferences into policy that moves the deep structure toward a socially desirable outcome, is the test of whether it is working as a social contract and guaranteeing process, or whether it is merely a symbolic document, providing existing authority with the opportunity to coordinate existing institutional or elite interests and to promise rights to citizens which it can take away at will.¹⁴

In the case of Ukraine, since the locus of power and the structure of institutions are fairly well known, it is relatively easy to place models of the system under the old Constitution and under the new, side by side, and to measure the changes which have occurred.

The second means of evaluating a constitution once it is modeled within the deep structure, is to apply a balance-of-power test to individuals throughout the system. A constitutional system which reflects the principles of social contract and checks and balances will equally weigh the political power of individuals at all points in the system. A good test is to pick out the weakest and strongest citizen actors in the system and measure the difference in their political power. These are both positive tests (comparing potential power—the freedom to turn one's preferences into policy) and negative (freedom from coercion and ability to protect one's basic rights).

To select individuals at different points in the system, one needs to look at the various roles in the society and the various types of stratification. The measurement is then whether the constitution renders the effect of these differences neutral when

applied to political power. For instance, in terms of social roles, an effective constitution would eliminate any political advantage due to position in secret police, military, political office, media institutions, economic institutions, and foreign political or economic institutions. In terms of stratification, an effective constitution would neutralize the advantages or disadvantages of wealth, social networks, education, age, ethnicity, and gender on political power.

In the case of Ukraine, these categories relate to particular documented abuses that Ukrainian citizens suffered under the Stalinist and other Soviet constitutions—victimization by the secret police (KGB), by the Soviet military, by dictatorial power of Soviet leaders, by centralized media, by unaccountable economic institutions (e.g., Chernobyl), and by outside interests (Russia). On almost all of the stratification dimensions, but particularly ethnicity and social networks, the Soviet constitutions provided no real protection to the weaker groups, though they pledged themselves to these guarantees.

Overview of the Ukrainian Constitution

Before evaluating the Ukrainian Constitution within the deep structure of Ukrainian society, the formal structure of the Constitution merits brief examination and comparison with constitutions under the Soviet regime.

Like the Soviet constitutions which preceded it, the proposed Ukrainian Constitution is lengthy. Stalin's 1936 Constitution and the 1977 Soviet Constitution contained over 100 articles. By 1989, with revisions, the Russian Constitution had grown to 185 articles. The Ukrainian Constitution is 235 articles long, with about 50 of these verbatim or copies of articles with slight additions from the constitutions of the Soviet period.

The document is divided into 10 parts. In order, these are: Principles; State Symbols; Human and Civic Rights and Freedoms; Civil Society (a section with newly introduced chapters on Ownership, Enterprise, and Ecology); Territorial Structure; State Power (legislative, executive and judicial branches of national government); City and Regional Government; Defense of the Constitution; Ratification; and Amendments.

—*Substantive “Guarantees.”* Almost all of the first 125 articles of the Constitution—slightly more than half of the total—are substantive provisions which describe the country's values and aspirations. Many of them are worded as “principles,” “rights,” “guarantees” and “duties” which are attached to the rights of citizenship or ownership. Some of these goals are expressed as limitations or prohibitions on government activity, but they are clearly distinguishable from other sections of the Constitution which allocate formal “powers.”

Like the Stalinist and other Soviet constitutions from which many of these provisions are drawn and elaborated, there are few enforcement mechanisms provided for any of these provisions. Without the potential for enforcement, they become “rights without remedies” and are redeemable at the will of the state.

Not only are most of these “rights” unenforceable by the terms of the agreement, but many are contradicted by provisions of the Constitution in which powers are allocated. Article 3, for instance, repeats the claims of the Soviet constitutions that state power is exercised by the people “directly”; though the formal powers of the Constitution are all indirect.¹⁵ Article 4 declares the right of regional and local self

government, though the rest of the Constitution specifies that the important posts of local power at local levels—prosecutors, military, judges, secret police, and some local officials—are to be selected by the national leaders. Article 24 asserts equality in exercising “constitutional rights and freedoms without any distinctions as to their origins, social and property status, gender, ethnic extraction, language, religion, education, political and other convictions, occupation, place of residence and other characteristics,” as did the Soviet constitutions, without providing safeguards against the political imbalances that these differences continue to create within Ukraine.

The list of “freedoms” and “rights” that have appeared in previous constitutions during the Soviet period that are declared again in the Ukrainian Constitution are those of: human rights and freedoms, and equality (Article 7); protection of ethnic minorities and religion (Article 25); privacy and freedom from unlawful arrest (Article 34); no unreasonable search and seizure (Article 36); freedom from unlawful spying by secret police (Article 37); free exercise of religion (Article 40); freedom of speech (Article 41); freedom to participate in political demonstrations (Article 44); fair wage (Article 49); safe working conditions (Article 50); social security (Article 51); housing (Article 54); rest and leisure (Article 55); ecologically safe environment (Article 57); education (Article 58); the right to sue government (Article 68); the right to a defense lawyer (*advokat*) (Article 69); equality of spouses in marriage (Article 96); maternity and childhood (Article 97); health care (Articles 100 and 101); and freedom of mass communications media (Articles 114 to 117).

Added to these are also several new aspirations and privileges: private property and pluralism (Article 10); humane treatment in jail without torture (Article 35); free movement and residence choice (Article 38); freedom from libel (Article 39); strengthened freedom of association (Articles 43 and 108-113); economic freedom (Article 48); right to strike (Article 53); protection of mental health (Article 56); the right of notice of new laws (Article 62)¹⁶; prohibition against being tried twice for the same crime (Article 64); freedom against self incrimination (Article 65); free enterprise and fair competition (Article 80); consumer protection (Article 87); ecological safety (Articles 88-94); and development of education, science and culture (Articles 102-107).

At the same time, certain freedoms and protections are eliminated in the proposed Constitution which appeared in Soviet constitutions. The proposed Constitution no longer guarantees freedom from exploitation at work, development of the individual through labor, material satisfaction and fulfillment of spiritual needs, nor the guarantee that economic activity will be in the interests of society.¹⁷ The right to leisure—e.g., the limit to required work hours—is marginally expanded by the reduction in the formal work week from 41 hours to 40 hours by Article 55; with no guarantees of an adequate wage during those 40 hours.

Like the contradictions of the basic principles in the opening of the Constitution, the document also provides several means for overriding its substantive provisions and guarantees. The provision that allowed Stalin to “legally” override many of the same rights that appeared in the 1936 Constitution was Article 131 which designated those who encroached on socialist property as “enemies of the people” and provided for their punishment for treasonous acts under Article 133 of the Constitution. The Ukrainian Constitution softens the language but does not prevent the same outcome.

Article 16 ensures the right of the people (apparently through either state power or state-condoned private act), to offer resistance to all who “may attempt” to “overthrow unlawfully” the system that the Constitution establishes.¹⁸ While the Constitution specifies a duty not to carry out criminal orders even under martial law (Article 63), a provision which would appear to be directed against crimes against humanity as established by international legal norms, it is invalidated by Article 67, which states, “No one may be prosecuted for actions . . . if, at the time of such actions . . . these were not recognized as offenses” in Ukraine.

Similarly, Article 110 restricts the freedom of association of organizations that the state believes are “undermining security.” There are also provisions for restricting mass media (Article 118) and for imposing martial law (Article 177).

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—*Processes.* The second half of Ukraine's Constitution is devoted to the structure of government. Ninety of the remaining 110 articles are contained in a single section on “State Power.” There is no section for “Citizen Powers” or “Citizen Checks on State Power” and only six articles (2.5 percent of the Constitution) deal in whole or in part with powers of citizens.

The structure of the government itself is straightforward. In place of a unicameral legislature with 450 representatives the draft Ukrainian Constitution establishes, similar to the Soviet and Russian models, a bicameral national assembly; one house with 350 members based on representation by population and a second house with 125 members based on geographic administrative districts. Sharing legislative powers with the legislature and holding all executive and appointive powers, including command of all of the country's military and police powers, is a single elected president. The Constitution also entrusts the president with the task of guaranteeing all of the rights established in the Constitution. The document provides for a judicial branch with presidentially appointed judges serving on a Supreme Court (the top of a hierarchy of first instance and appeals courts), a Constitutional Court charged with the task of maintaining the consistency of all laws throughout the country, and a Court of Arbitration.¹⁹ The courts are successors to the existing Supreme Court, the newly formed constitutional oversight committees, and state arbitration.²⁰

Beneath the national government are the city and regional governments with limited and separate powers. All of the judges, prosecutors, secret police (“State Security Service”), military, and national guard troops, are appointed by and/or directly responsible to either the president or a combination of the president and the roughly 500 other members of the national government. Article 226 specifies that, “The authority of city and regional administrative bodies can be suspended indefinitely if these bodies violate the Constitution or other laws of Ukraine.”

The six articles in the Constitution which specify the rights of Ukraine's 52 million citizens to hold national officials (.001% of the population) accountable, are strictly limited. Article 46 provides citizens with the right to vote and to run for

public office. However, there are no mechanisms to insure electoral fairness or openness of the system to all candidates on an equal basis; problems which made elections during the Soviet period no more than ritual. Under the proposed Constitution, the number of elected representatives to the legislature has dropped by 27 percent (and the number of elected judges has dropped to zero), though citizens can vote once every four years for deputies rather than once every fifth year (Articles 128 and 129). Article 68 grants citizens the right to sue government. It does not establish a remedy if the citizen wins, nor defines damages for violation of a constitutional right. The Constitution provides no lawyers for the suits, and places the actions in court rooms with government-appointed judges. Three new powers, which require the collection of three million signatures, are the right to hold a no-confidence vote for the entire national assembly (Article 156), for the president (Article 180; subject to approval of the national assembly—Article 183), and the right to hold a referendum. As in the Soviet constitutions, the Ukrainian Constitution provides for defense lawyers for arrested citizens (Article 69).

Along with these formal changes in the structure of government are also some titular changes in the deep structure. The Constitution removes the formal leading role of the Communist Party and declares the principles of “political, economic and ideological pluralism” in Article 10. Article 75 frees all of the economic institutions in the country, whether financed internally or from foreign sources, from providing any of the rights granted by the Constitution in the work place and from direct accountability, by declaring what was once public, “private.”

The “Deep Structure” of Post-Soviet Political Power in Ukraine

While, on its face, much of Ukraine's proposed Constitution is not only similar to but incorporates features from Western constitutions, the deep structure of Ukrainian politics in the 1990s is entirely different from the political cultures of agrarian colonial America in the 18th century, occupied post-War Germany or Japan, or pre-industrial Europe. The loci of power in authoritarian regimes, and particularly in the Soviet Union, is a familiar litany:

—*Military Power.* The Constitution of Ukraine supports a national standing army (with an estimated force of 400,000 troops—roughly one armed soldier per 100 citizens), as well as a National Guard, and Border Guards. These armed forces are in size an immediate successor to the Soviet forces which were stationed on Ukrainian soil and remain under the control of a small number of men. There are no provisions in the Constitution for citizens to protect themselves against or to have local control of or review authority over this centralized force.²¹

—*Police State Apparatus/The Power of Information Collection and Intimidation.* The successor to the KGB in Ukraine is the State Security Service; a unified police and secret police under centralized national authority. Like the KGB, the State Security Service retains the authority to conduct surveillance on private citizens and to act surreptitiously through private networks, without local control or citizen review.

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—*State Apparatus/Power of Government Bureaucracy.* Not only the military and police, but other agencies of state power responsible for economic regulation, allocation of benefits and services, and law enforcement, continue as before in Ukraine with no additional public control. During the Soviet period, the non-economic sectors of the state bureaucracy were inefficient in providing basic public services— regulation of nuclear power plants, product inspection, health, transportation, etc.—but were able to insulate themselves from scrutiny and protect their interests by linking themselves with individuals in legislative and executive authority, or with other sources of power, including the economic enterprises they were sometimes designed to regulate. The absence of strong local governments with competing authority and the absence of direct mechanisms of public oversight of the tens of thousands of workers in state bureaucracies, render the state apparatus beyond public control and a political authority in its own right.

—*Economic Institutional Power.* The key feature of the Soviet economy was the “command-administrative system” of large, centralized institutions exerting monopoly and monopsony powers. Through the ability to direct large amounts of society's resources and to make decisions involving vast numbers of employees, managers of economic enterprises—part of the *apparat*—held not only economic, but also enormous political power.

While the breakdown of centralized planning reduces the power of all the enterprises as a unified block, individual enterprises still retain enough power to make decisions that could threaten entire regions; giving them clout not only over individuals (as employees, consumers, neighbors and potential competitors), but also inordinate influence in the legislatures. Upon the independence of Ukraine, these enterprises continue to control much of the country's productive capital.²²

Most of the same managers retain their positions in newly privatizing enterprises,²³ which they held before independence, and are linked to political power—to members of the legislature and to President Leonid Kravchuk, a former Communist Party boss—through the same social networks as before.²⁴

—*Institutions for Inter-Generational Allocation of Resources and Power.* Authoritarian regimes tend to prevent access to political and economic power across generations by concentrating resources among elites and promoting the direct transfer of benefits to their children.²⁵ Capital transferred between generations translates into political power by developing civic skills and allowing for the acquisition of resources that can be used to influence the political process. Education, knowledge of and access to the legal system to assert one's rights, resources to gain access to mass media and run for political office, and others, are all entres to political power.²⁶ In social contract democracies, the issue of intergenerational transfers and the need to safeguard political processes over time, has taken on particular salience in modern societies. A constitution is a contract signed at a particular point in time that binds future generations.²⁷ For the principles of the contract to apply to future generations, the ex-ante position of every new citizen must be such so as to guarantee equal political power. In Ukraine, as it was under Soviet rule, access to higher education, to productive capital, to use of the courts, and to networks of political elites, remains allocated to those who were part of the previous ruling elite or to those who have access to new capital and competing networks, often through organized crime.²⁸

None of the provisions of the proposed Constitution deal with these pre-existing inequalities. In fact, some provisions of the proposed Constitution which favor property accumulation and intergenerational transfers of wealth, may even strengthen them.²⁹

—*Institutional Media and Control of Information.* One of the major channels of power of an authoritarian state is control of the political agenda by limiting access to competing messages in the mass media. By creating barriers to equal access to the mass media and through development of sophisticated techniques of persuasion, authoritarian regimes have been able to use limited channels of media for social control. In Ukraine, the mass communications media—television, newspapers, and radio—remain virtual monopolies. Licensing of the electronic media remains under government control and access to other media is dependent on access to limited paper resources and printing facilities, as well as major amounts of capital—most of which remain in the same hands as before.³⁰

Test 1: Modeling the Constitution Within the Deep Structure

Despite the new provisions in the Ukrainian Constitution and projected changes in Ukraine's economic system, these changes barely touch the deep structure of politics in Ukraine. The major difference between the political system established by Stalin's 1936 Constitution and the 1992 Ukrainian Constitution seem to be only in the points of access of certain institutions and groups of individuals to political power, and the opportunity for new institutions—multinationals and foreign capital—to gain political access.

Under the old system, the potential source of access to power for citizens was through voting. All of the institutions of formal power were under the control of a small number of individuals who coordinated their control through the Congress, for which members were pre-selected, and through the Communist Party. Because of the concentration of power in institutions and the ongoing coordination of power by elites, citizen power through voting was merely a ritual.

“What has not changed, however, is that the public remains at the bottom.”

Under the new system, the Communist Party has disappeared as a mechanism of coordination, and the institutions which were formally under state control have split into three parts—state institutions (the government bureaus, which still remain under state control), large economic enterprises (formally state, now “private” corporations), and foreign business (including joint ventures with formally state enterprises, purchases of formally state enterprises, and multi-national corporations invited to do business in Ukraine).

The positioning and points of access of these institutions has also shifted, indicating a recognition of pluralism in the system and a new form of coordination. What has not changed, however, is that the public remains at the bottom. Individual citizens continue to have little or no influence. In some areas, they may be politically weaker than before.

Most of the same institutions that threatened citizens before because they were

under control of a small elite without any direct citizen scrutiny or accountability, remain under control of the elites. As before, the prosecutor, the secret police, the courts, government bureaucracy, and the military, remain under the centralized control of a small group of individuals. Under the new system, there is a president along with a group of deputies, but this small group of 500 people still retains state powers with no more accountability. While citizens can bring issues before the courts and while there is a proposed new Constitutional Court, the judges in these courts are still to be selected by the leaders. The government also retains the power to select some of the local officials.

Before, citizens and government officials had potential authority (at least formally) over economic enterprises and the media. Now, these “private” enterprises (corporations) and the media, with the same managements as before, remain coordinated with and can exert influence over the small group of political leaders, while also exerting power over and influencing the public.

As the *apparat* (all of the institutions operating in the society—the military, prosecutor, state police, media, corporations, state bureaucracy) was unaccountable for its abuses during the Soviet period, so does it remain above the law and subject to regulation or sanction only at the initiation of coalitions of other institutions and elites under the proposed Constitution. There are no provisions for internal monitoring, for bolstering the effectiveness of the court system and the likelihood of prosecutions against abuse of authority in state or non-state institutions, for creating mechanisms to insure information access, or for real participation in deliberative decisions.

Under the Soviet constitutions, there was a principle of accountability through “people's control commissions,” even though these mechanisms for public oversight were ultimately turned into internal police forces used against workers and controlled by management rather than available to challenge it.³¹ This idea of an internal mechanism for citizens to hold management accountable has disappeared under the proposed Ukrainian Constitution. The concept of people's control has disappeared with the commissions.

The concept of public monitoring is similarly non-existent with regard to the activities of foreigners and foreign institutions on Ukrainian soil; institutions which could theoretically exert much more influence than Ukrainian citizens. Articles 79 and 80 give legal rights to foreign capital, but no articles of the Constitution give citizens the authority to directly monitor and counteract the potential political and social influence of foreign economic power in Ukraine.³²

Overall, the political power of the citizenry as established under the proposed Constitution remains symbolic—the ability to vote once every four years for representatives. These are leaders whom most voters will probably never meet personally and about whom they will learn through the mass communications media which remains in relatively few hands. It is such a system of distant representation which political theorists from Rousseau to Jefferson to Madison to Lenin to modern scholars, have warned against, with Jefferson referring to it as “elective despotism.”³³ To make the point even clearer, Article 233 gives the national assembly the authority to amend the Constitution at will.

As in the Soviet constitutions, Article 68 gives citizens the right to “appeal to courts of law against actions” of officials, and Article 45 gives citizens the right to

petition the state, but these determinations are to be made by officials appointed by the same government, and could potentially result in citizen complainers being harassed by the secret police or prosecutor. It is likely that citizens who attempt to initiate the referenda and recall processes, unless backed by major amounts of capital and institutional support among one segment of the elites, will meet the same fate. As in the Soviet constitutions, nothing protects citizens who make complaints and nothing provides them resources or an impartial audience of their citizen peers.

In short, it appears that while the one-party system and the lack of private property were one cause of political inequality, changing only these two features of the system does very little to change the deep structure of political power. Although there may appear to be more choice on election day among competing institutional coalitions, the proposed Constitution continues to protect those who already have power while extending little to the citizenry.³⁴ If anything, the proposed Constitution is a symbol of cultural continuity. The same networks of elite managers in enterprises, in media, in the military, and in government, will continue to work together.

Test 2: Balance of Power of Individuals in Ukraine

The second means of evaluating Ukraine's Constitution—an internal test which compares the political influence of individuals placed at different points in the system—demonstrates the same result. The relative power along a variety of “axes” suggests that the Constitution has resulted in few, if any, real changes.³⁵

The advantage of this test is that it lends itself to looking at whether or not Ukraine's proposed Constitution has incorporated any of the experiences that one might posit the Ukrainians had learned under Soviet-Russian rule—particularly in the previous half century. Under the Soviet constitutions, Ukrainians were victims of arbitrary dictatorial powers—resulting in the

“. . . the proposed Ukrainian Constitution is politics as before, but under a Ukrainian elite rather than a Soviet-Russian elite in Moscow.”

familiar litany of mass purges, imposed famine and police abuses, government cover-ups of environmental disasters such as Chernobyl, and discrimination by ethnicity and social origins and networks. By looking at the relative political positions of: the president and an ordinary citizen; a secret police official and an ordinary citizen; an economic manager and an ordinary citizen; Ukrainian vs. Jew; Kiev resident vs. peasant or former Party official vs. non-Party citizen under the proposed Constitution, it appears that the proposed Ukrainian Constitution is politics as before, but under a Ukrainian elite rather than a Soviet-Russian elite in Moscow.

—*Leaders and Citizens: The Potential for Dictatorship*. In a social contract democracy in which individuals are politically balanced, for officials, Rousseau wrote, “there is no question of contract but of obedience . . . [I]n taking charge of the functions the State imposes on them, they are doing no more than fulfilling their duty as citizens.”³⁶ Under the Ukrainian Constitution, however, as under the Soviet constitutions, the roles of master and servant continue to be reversed.

Under the proposed Constitution, a dictatorship could be established in just a few

hours, either by the president or by a few deputies working with military leaders. The president (with the legislature's approval), appoints all of the prosecutors and judges in the country. The president also controls the secret police and the military. Within hours, any opponents could be arrested and brought to trial by the appointed prosecutors before the appointed judges.³⁷

A second step in achieving control, requiring more time but preserving the outward appearance of legitimacy, is through elections. Since the leaders have retained the power to appoint several officials at local levels under the proposed Constitution, they also have the power to manipulate elections either directly or through intimidating voters, using their authority (military, secret police, links to major institutions, etc.), and enforcing it through courts and prosecutors.

A government with connections to the leaders of the mass media and industry, as Ukraine's government is, would have the power to use propaganda to influence Ukraine's citizens and to use the economy to create compliance. A president who knew how to use the media for propaganda and who had such contacts, could easily maintain his control.³⁸

Once in power, a group opposed to any of the rights promised in the Constitution could immediately rewrite them out of the Constitution or suspend them under the authority granted by the Constitution for amending it.

—*Agents of the Secret Police and Ordinary Citizens: The Potential for Abuse and Intimidation.* Even without establishing a full dictatorship, Ukraine's proposed Constitution does little to protect dissidents from being arrested or liquidated in government-sanctioned massacres.

Government deputies are said to be protected from arrest by Article 133 and citizens are assured that they will be protected from spying by the secret police by Article 37 unless a prosecutor or judge approve of such intrusion. But the prosecutor and judge and secret police and military are all under the president's control. Since there is no authority to allow citizens to monitor the activities of the prosecutor, police or high court judges, nor gain information about their activities, not even a deputy would be safe. If the secret police and military worked as unofficial "death squads," little or nothing in the proposed Constitution would stop them.

—*Public Officials and Ordinary Citizens: The Excesses of Unchecked Government*

“Under the proposed Constitution, a dictatorship could be established in just a few hours. . .”

Corruption. During the Soviet regime, Ukraine's citizens were victims of the government's unwillingness to hold itself to its own laws. President Gorbachev and other leaders withheld information from the Ukrainian people about the nuclear disaster in Chernobyl and other ecological catastrophes, for

which early warning would have saved lives. Similarly, trails of organized crime led all the way to the Kremlin but Gorbachev's chosen prosecutors would not prosecute.³⁹

Recently, the Supreme Rada has been calling for the prosecution of Gorbachev in connection with the Chernobyl disaster.⁴⁰ For Ukraine's leaders to seek to prosecute Russian leaders increases their popularity, but nothing suggests that Ukraine's leaders would allow themselves to be prosecuted for similar crimes. Ukraine's

Constitution adopts the same system as the Soviet Constitution, where prosecution is centralized and where the president appoints his own prosecutors.

—*Enterprise Managers (Foreigners and Domestic) and the Ordinary Citizen: Citizens' Vulnerability as Workers, Consumers and Neighbors.* The proposed Ukrainian Constitution contains several articles dealing with environmental protection following the damage caused in industrial disasters like Chernobyl, but offers no provisions which would help protect against these disasters by holding the institutions or management accountable.

Under the Ukrainian Constitution, such industries may be either state owned, privately owned, or like the chemical plant where disaster occurred in Bhopal, India, under control of foreign business.

The Chernobyl tragedy in Ukraine and foreign “accidents” like the one in Bhopal, were made that much more likely by the lack of public monitoring and weak civil law systems.⁴¹ The Ukrainian Constitution provides no mechanisms for citizens to query workers and management about safety conditions and then bring the issues before juries before accidents occur. Citizens have no right to lawyers to investigate these hazards, and few resources to hire lawyers to pursue compensation after the fact. Citizens also have no direct access to media to voice concerns about these problems.

—*Political Power of the Elites and That of Ordinary Citizens: The Advantages of Networks and Training.* If the average Ukrainian citizen had little power during the Soviet period in relation to upper-level Party leaders—the members of the *nomenklatura* and the *apparat*—Ukraine's proposed Constitution makes the elites even less accountable and gives them more influence than before.

Part of the corruption of the Soviet system was that the elites passed on benefits to their children—entrance to special schools, entrance to universities, and better jobs—and that they had more influence in politics. The proposed Constitution promotes the passing of large amounts of capital from elites to their children, for the advantages that money can buy in a market system, through protected inheritance laws (Article 48). Two other articles, Articles 24 and 75, support the accumulation of large amounts of wealth with no accounting for how that wealth was obtained during the transition period to a market economy.

While the Constitution asserts the protection of individuals against certain forms of discrimination, there is nothing to protect against discrimination by former Party officials against those who do not have access to the wealth or power that the elites acquired from the Communist system or, in many cases, from organized crime.

Peasants, workers and their children have little under the proposed Constitution—no chance to pay for university or private education, no money for political campaigns, no chance to buy access to the media, no chance to use the legal system to enforce their rights, and little chance to choose their jobs. Similarly, the power to make economic decisions remains with the managers, though they may owe their positions to accident and to previous compromises rather than ability.

Under the Soviet system and under the tsars, citizens were exploited by those who had control over economic decisions. Without providing the public with the power of representation in banks and in industry, those who have capital and those who are trained as managers, take or continue control from their predecessors and use their positions to favor their friends, families and those whom they choose under

the proposed Constitution.⁴²

—*The Power of Ethnic Majorities over Minorities: Discrimination.* Although Ukrainians were themselves victims of discrimination under the Russians, in writing their own Constitution, they have not created protections for those who may be discriminated against within their borders. The history of Ukraine under the tsars and during the Soviet period is one not only of purges but of discrimination and harassment, particularly of Jews, and unequal treatment of women.⁴³ While leaders have voiced their commitment to equal rights and the proposed Constitution contains promises that there will be no discrimination, there are no mechanisms in the proposed Constitution for addressing any of these issues.

Discrimination and harassment under the Soviet period occurred in university examinations, in job hiring, in promotion. The way to address these problems is through direct citizen oversight of these procedures and through enforcement of constitutional rights before juries. Ukraine's proposed Constitution does not grant these rights, while it strengthens the ability of economic establishments and universities to remove themselves from any scrutiny at all as newly “private” organizations.

A Model for Authoritarian to Democratic Transitions Through Constitutional Reform

One of the most difficult issues in trying to aid the transitions from authoritarianism to democracy in the emerging industrial states of eastern Europe and elsewhere has been to define a system of constitutional democracy and a vision of process as a model of effective government that is not only aspirational but that is also “self-activating;” a model which through its very mechanisms will help to mold legal consciousness and legal culture by giving new responsibilities to the citizenry.

The key task in constitution-building in these states is to take the substantive principles of rights that already existed when Western constitutions were developed but which do not yet exist in post-authoritarian states, and to translate them into guarantees of process that go beyond their current status of unenforceable promises, and which are understandable to the citizenry. Such models must take into account the deep structures of the post-authoritarian administrative states, considering their cultural and political realities, and address them directly rather than postponing political issues until the “long term.”

These are more than academic questions. Western scholars and foreign governments are currently exerting influence and their advice is being eagerly sought by leaders and members of the public in countries like Ukraine.⁴⁴ What is often lacking is a well conceptualized theoretical model that applies not only the tools of particular disciplines or area expertise, but also considers political culture and will build the roots for democracy to take hold.

The following amendments are designed to target the specific problems in the Ukrainian Constitution with specific structural reforms, and to add to them some substantive amendments to uphold the values of political equality and sanctity of the processes over time. Many of these are applicable elsewhere:

POWERS OF CITIZENS

Chapter 1. Powers of Citizens in Political Accountability: Checks and Balances and Enforcement⁴⁵**Citizen Panels**

Section 1. The power to serve as special watchdogs of non-elective government employees in the executive and legislative branches of government, to protect against abuse of government authority and ensure the fairness and accountability of decisions made by officials of the government apparatus, shall be vested in twelve-person citizen panels to be regularly and randomly constituted from a pool of all citizens eligible to vote.

Section 2. Citizen panels will serve in all of the following:

—they will participate in confirmation hearings for all presidential administrative appointees including the procurator general, the head of the armed forces of Ukraine, the heads of state security and all police organizations, and all other ministry and official appointments;

—they will serve in every embassy or its equivalent; in all government personnel departments or offices or agencies which have the power to hire and fire or test employees;

—they will serve in all agencies, departments or offices where materials are classified for reasons of national security; and in all government offices in the executive branch which have as major responsibilities the presentation of information to or maintenance of relations with the public or the national assembly of Ukraine. There will be a minimum of one citizen panel serving in every government office site, installation, or program classification, with the exception that for classifications or offices of less than 20 employees, those offices may be combined.

There will be a minimum of one additional citizen panel for every additional 100 government employees.

Section 3. Citizen panels may also be constituted to evaluate specific legislative proposals before the national assembly of Ukraine as an adjunct to a national assembly of Ukraine committee, or called into being by the president in order to consider broad policy questions or problem areas.

Section 4. No citizen panel will serve for a term of more than six months, unless necessitated by the attempts of government officials to delay or evade scrutiny, or where some special preliminary training of duration of three weeks or more is essential for the panel's ability to carry out its tasks. Panels will function continuously such that a newly appointed panel will begin work immediately upon completion of a task by another panel.

Section 5. Citizen panels will have the power to recommend legislation to the national assembly of Ukraine (including new legislation, as well as increases or reductions in appropriations), to prepare reports recommending judicial or administrative action against particular employees, to veto any administrative appointee of the president by a two-thirds vote, and any additional powers as delegated by the president or by the national assembly of Ukraine from their stated powers.

Section 6. All citizens serving in citizen panels will be compensated at a rate not to be less than their highest average rate of earnings during any six month period in the 18 months prior to being called for service. Provisions will be made for additional compensation in cases of hardship and care for dependents, and for necessary travel to the place of service.

No citizen may be removed from a panel for cause other than conflict of interest. Conflict of interest occurs where the citizen is either a beneficiary or employee of the

agency being studied, or a close relative of an employee or beneficiary, or where the individual is subject to current sanctions or regulations by that body.

No citizen may opt out of service on a citizen panel. Short deferments, up to a maximum of one year in length, may be taken in cases of hardship.

Section 7. Citizen panels will be provided investigative lawyers of their choosing and all additional resources necessary for completion of their tasks, including the hiring of experts.

Section 8. Criminal penalties will be established for employers who fire or otherwise discriminate against employees because of their service on citizen panels.

Private Procurators⁴⁶

Section 1. The power to compel government to implement and enforce the laws of the national assembly of Ukraine and of the Constitution shall be shared between the procurator, acting under the president, and the people of Ukraine through private procurators.

All lawyers and any citizen choosing to act as a procurator on behalf of the general public may institute civil or criminal process in the courts of Ukraine on behalf of Ukraine.

Section 2. Lawyers acting as private procurators will be compensated from out of the “common fund” which will consist of both whatever monies are awarded from judgments against defendants—in criminal fines or civil damages—plus general public funding.

The amount available to lawyers from this common fund will include half the actual savings to the public resulting from the action, plus any additional amounts which a jury chooses to award. All decisions on compensation for private procurator and all decisions in processes initiated by private procurators (in all processes of first instance) will be made by juries of no less than six randomly chosen citizens.

Juries will also have the authority to award a portion of the common fund to any private individual, body of citizens, or organization which assists in the discovery of information serving as the basis of trial and the trial proceedings, where the case is decided in favor of the private procurator.

Public Accountability of Law Enforcement Officials⁴⁷

In order to insure that appointed judges, prosecutors, police officials, secret police officials, military officers, and any other appointed officials in positions of law enforcement are responsive to the public, these officials shall be subject to a recall vote by the citizens of Ukraine. Upon petition of 5% of the eligible voters in the area served by that official (national, *oblast*, city, town), a recall election will be held.

In cases where such officials have violated any citizen rights which are enumerated in this Constitution of Ukraine, the official and the government shall be jointly and severally liable for treble damages (three times the value of the damage caused).

The monetary value of a constitutional right for purposes of a court award shall be no less than the equivalent of one month's salary of the highest paid public official in Ukraine.

Public Officials and Public Trust⁴⁸

Section 1. In protecting the principle of government as a sacred and public trust and to establish the power of the citizen to enforce their contractual agreements with their representatives and to hold their representatives to their promises to the people of Ukraine, all public representatives and appointed officials in Ukraine shall be sworn and bound to oaths of truth and avoidance of conflicts of interest as if in a court of law.

Section 2. Before any elected public official or other public servant shall enter on the execution of his/her office, he/she shall take the following oath or affirmation: "I do solemnly swear that I will faithfully execute this office and that in all meetings with members of the public and with other officers of government, which are relevant to the duties of this office, I will cooperate fully in the presentation of information on matters for which I am responsible, that I will tell the truth, the whole truth, and nothing but the truth and will correct any misstatements made in the past while as a public official working on the soil of Ukraine, which I now know to be untrue."

Any individual declaring candidacy for public office shall, upon declaration of candidacy, take the same oath, substituting for the first clause the words, "I do solemnly swear that as a candidate for public office, in all meetings . . ."

Penalties for violation of this oath will include removal from office and punishment as a felony not pardonable by any member of the executive branch. These penalties are to be enforced by the procurators general or by private procurators in processes before juries or by established proceedings for impeachment of government officials.

Violators of this oath will also subject to civil liability for any public costs incurred as a direct result of perjury or knowing deception.

Section 3. All public officials, elected or appointed, will be restricted from serving or receiving any financial benefit for a period of 15 years from any agency or enterprise or from individuals involved in those activities for which they had responsibility in government as legislators, executives, or judges where their decisions resulted in specific benefits for any profit-making enterprise. Enforcement mechanisms for this section will be the same as those above.

The Civil Court System⁴⁹

Section 1. In order to encourage citizens of Ukraine to use the courts to enforce all of the guarantees of this Constitution—of human and civic rights and freedoms and of civil society—and to ensure that all components of state power as well as all foreign powers conducting economic activities in Ukraine and all juridical persons and private persons acting in Ukraine uphold the basic principles of dignity and rights of the person, the courts of Ukraine shall establish new civil mechanisms to enforce these agreements.

Section 2. In cases where individual recovery for civil damages may be small but where the individuals affected by a harm (e.g., harmful products, discrimination, infringement of privacy or other civil rights) constitute an identifiable class, a lawyer with a client who is a member of that class and who publicizes the willingness to represent that class as a whole, may commence a civil suit on behalf of all members of the class. Lawyers who take these cases may receive, in addition to their normal salary, a percentage of the sum awarded to the class if the class prevails in the suit (contingency fees).

Section 3. In all civil cases, in addition to normal salary from the state for work as a lawyer, a lawyer may contract with a plaintiff for a percentage of the sum awarded to the plaintiff if the plaintiff prevails in the suit (contingency fees).

Citizen Defense of Constitutional Rights

In order to enforce the guarantees of Human and Civic Rights and freedoms in those public institutions and in large private enterprises and institutions which are granted to the citizens of Ukraine by this Constitution, in situations where the state has not yet designed legislation for enforcing a provision of this Constitution and where a citizen believes that a constitutional right has been violated by an individual or juridical person, that citizen has the right to begin a civil process in the locale where the matter arose or where the defendant is located. The determination of the court on such a matter will be published in writing and will enter into being with the force of law for all similar cases.

The court may also grant such relief as in other civil processes appearing before it.

Public Access to Media⁵⁰

Section 1. Minimum access to media shall be a fundamental right of citizens of Ukraine.

Section 2. All mass media—book, newspaper, magazine, other print, broadcast, or other forms of communication—which reach an audience of 100 or more persons will be covered by this section. Any member of the intended audience and its geographic distribution area for that medium, will be entitled to place a communication of similar length and format in a specified medium upon selection at random (lottery) from a pool of interested citizens applying to place or transmit an original piece of work through that medium.

At least 40% of all space in media covered by this amendment will be available for public access.

Section 3. The national assembly of Ukraine must authorize sufficient funds to enable citizens who are selected to prepare work which is of minimal quality suitable for transmission.

Section 4. The right to media access shall be non-alienable. No citizen may sell his space or submit work which is not his or her own.

Amending the Constitution⁵¹

The power to amend the Constitution shall rest solely with the people of Ukraine. No law embodying proposed amendments or additions to the Constitution shall be approved only by a vote within the houses of the national assembly and without an all-Ukrainian referendum.

Chapter II. Citizen Rights and Democratic Values in the Economy and Social Sphere⁵²

Constitutional Rights in Large Organizations

To protect citizens against exploitation in and to hold all major institutions on Ukrainian soil responsible to the interests of the citizens of Ukraine while protecting private initiative and associations from government interference, all large organizations which exert unusual authority over the workers, resources, or communities of Ukraine shall be subject to the same standards as those governmental organizations which also are responsible for upholding the public trust. No enterprise, joint venture, publicly chartered organization (e.g., stock company), and no private organization with more than 100 employees or assets equivalent to 1,000 times the minimum annual subsistence income in Ukraine, shall make or enforce any rule or create any contract which shall abridge the privileges or immunities of citizens of Ukraine nor shall it deny to any person on its premises those constitutional protections available to persons on public property or extended to public employees as guaranteed by this Constitution of Ukraine.

Citizen Panels in Large Organizations

Section 1. In order to guarantee the safe and fair use of major holdings of Ukraine's resources which are in the hands of private individuals or juridical persons of Ukrainian or foreign origins, the power to serve as special watchdogs of large non-governmental organizations, not to include political associations (organizations whose primary purpose is to influence public policy), owned or operating within Ukraine shall be vested in twelve-person citizen panels and six-person sub-panels to be regularly and randomly constituted from a pool of all citizens eligible to vote in Ukraine, in a manner similar to the selection of jurors.

Section 2. There will be a minimum of one citizen panel in all publicly chartered organizations—including banks, joint ventures, educational institutions, and economic enterprises—with a minimum of 100 employees, and all organizations whose reported assets are greater than the average assets of those 200 business enterprises with 100 or more employees which hold the smallest amount of assets or 1,000 times the minimum annual subsistence level in Ukraine, and in all professional associations with licensing authority.

There will be a minimum of one additional citizen sub-panel for every additional 120 employees in all companies with over 250 employees.

The number of employees will be calculated by the number of total work hours, salaried or unsalaried, in a week, divided by 40.

Section 3. Citizen panels may also be constituted to evaluate specific legislative proposals before the national assembly of Ukraine as an adjunct to a national assembly of Ukraine committee, to serve as watchdogs in other publicly chartered organizations not covered by this act and with at least 40 employees (as the national assembly of Ukraine shall provide), or called into being by the president in order to consider broad policy questions or problem areas relevant to a particular industry, region, or other matter of policy concern.

Section 4. Citizen panels will serve for a term of six months, minimum (unless requested to address specific policy issues by the president or the national assembly of Ukraine, in which case they may serve for less time), and will serve for no more than six months unless necessitated by the attempts of government officials to delay or evade scrutiny, or where some special preliminary training of duration of three weeks or more is essential for the panel's ability to carry out its tasks.

Panels will function continually such that a newly appointed panel will begin work immediately upon completion of a task by another panel.

Sub-panels will serve for 3 months, and no more than two sub-panels will serve at the same task over the course of one year, unless the national assembly of Ukraine deems otherwise.

Section 5. Citizen panels will have the power to investigate any matter relating to the business of an organization, but not those particular activities protected by the Constitution (e.g., religion), to recommend legislation to the national assembly of Ukraine and to the appropriate bodies or agencies at state and local levels if requests are made to the national assembly of Ukraine, to make recommendations to regulatory agencies, to report suspected violations of the law to appropriate law enforcement officials, and any additional powers as delegated by the president or by the national assembly of Ukraine or recommended by appropriate local and state governments where organizations covered by this provision hold property or do business.

Section 6. Compensation, requirements of service and availability of deferments will be the same as for citizens in government citizen panels.

No citizen may be removed from a panel for a reason other than conflict of interest. Conflict of interest occurs where the citizen is either a stockholder, employee, competitor, or employee of a competitor of the large organization being studied, or has extended contact with that organization as a major purchaser, supplier, or subcontractor, or whose earnings are dependent on maintaining an adversarial relationship with that organization.

Section 7. Citizen panels will be provided investigative lawyers and all additional resources necessary for completion of their tasks, including the hiring of experts.

Section 8. All employees of private organizations which are the subject of citizen panel inquiries will be notified that they are sworn to tell the truth and to cooperate fully in the presentation of information on matters for which they are responsible, under penalty of

perjury and civil liability for any public costs incurred as a direct result of perjury or knowing deception.

Section 9. Criminal penalties will be established for employers who fire or otherwise discriminate against employees because of their service on citizen panels.

Chapter III. Equal Opportunity for Ukrainian Citizens

Equal Education⁵³

Section 1. To ensure that all Ukrainian citizens will have the opportunity to benefit from the powers and privileges of this Constitution, all citizens will have an enforceable right to develop their potential abilities to become as productive as possible. In addition to the minimum social guarantees provided as part of the Human and Civic Rights and Freedoms, Ukraine shall guarantee to every citizen the fundamental right to equal education independent of wealth, inheritance, political views, gender, ethnicity, urban or rural origin, or membership in any organization. All citizens shall have the opportunity to develop their full capacities as individuals and to fully exercise their potential.

Section 2. All educational institutions, public or private, if qualifying as large organizations for the purposes of Chapter II, above, shall be subject to the same scrutiny and laws as other institutions in Ukraine. On issues of admissions, grading, and advancement of students and faculty, citizen panels will have oversight and students, teachers and other employees will have the right to challenge decisions in front of the courts, and to be heard by juries.

Section 3. Like other rights granted as part of the Human and Civic Rights and Freedoms section of this Constitution, education will be viewed as a contract between students and educational institutions for which students and graduates will have a right to sue in the case that the institutions have not fulfilled their contractual obligations in providing education. Students shall have the same constitutional rights in universities as employees in organizations in Ukraine.

Section 4. No educational institution may receive accreditation in Ukraine unless it provides direct practical opportunities to students to solve public problems and to prepare for their role as citizens of Ukraine. All students shall be prepared with the necessary skills to bring lawsuits at all levels of the court system, to run campaigns for elective office, to prepare transmissions in Ukraine's media, and to serve effectively on citizen panels and juries. Educational institutions should also include opportunities for students to have access to resources for providing services to the public in their professional fields and communities while in school, for forming their own cooperatives and economic enterprises, and for developing their own courses and curricula.

Equal Justice⁵⁴

Section 1. Equal access to legal services shall be a fundamental right of citizens of Ukraine.

Section 2. All lawyers in Ukraine will be available on a rotating and non-discriminatory basis in their *oblast* of residence or neighboring *oblast* (at additional compensation) to any citizen who requests a lawyer for any matter in which it shall be appropriate to employ the services of a lawyer. Lawyers may continue to work for a particular client only for the duration of litigation on a single matter. However, lawyers may work "in-house" (as *iriskonsulty*) on several matters for one client only for a maximum of six months, before seeking reassignment.

In criminal cases, a defendant may request the services of a particular *advokat* subject to availability of that lawyer as determined by lottery. A defendant may reasonably reject an appointed *advokat* if he believes that *advokat* may prejudice his defense.

Lawyers will register with the Ukrainian Association of Lawyers in specialized fields in which they have expertise and wish to practice law. Or they may choose to practice as generalists. Attorneys may declare their unavailability for specific types of legal matters and for any periods of time, in protection of their right to avoid involuntary servitude. Lawyers may also choose to work full or part time representing themselves or serving as private procurators. However, a lawyer may refuse to represent an assigned client only where there is an apparent conflict of interest.

Lawyers shall be adequately compensated at current market rates—no less than payment for deputies in the national assembly—and at future rates to be determined by the courts, in a manner consistent with the various areas of practice, type of work required, and amount of experience.

Section 3. No court fees shall be charged to any party. However, a party and his lawyer can be subject to payment of fees and court costs as a penalty for commencing legal actions in bad faith and in abuse of the legal system. This is to be determined by a jury of no less than six persons.

Section 4. The national assembly of Ukraine shall provide for the adequate training of lawyers sufficient to meet the demand created by this and other provisions of the Constitution.

Veterans Support and Democratic Values⁵⁵

Section 1. Upon return to civilian life following military service, all veterans will be required to complete training in civic values which will be, at a minimum, for the same duration and intensity as basic military training. Such training shall be conducted by an agency with no connection to Ukraine military and will be funded at the same level as military basic training.

This agency will also make available additional counseling and mental health services to all veterans and assistance services for all veterans with incomes falling below the poverty line. These tasks of the agency will be funded, at minimum, at a level equivalent to the amount expended annually by the military on recruitment.

Section 2. All active military personnel in the service of Ukraine shall be ineligible for service on citizen panels for the duration of their service.

Notes

¹ George Orwell, *Animal Farm* (New York: Harcourt Brace, 1946).

² Although a case could be made that the Constitution is not only reflective of Russian culture but also of political culture in market economies/administrative states of the West, this article will focus on the similarity of Ukraine's proposed Constitution to the Russian models with only occasional references to the influence of foreign advisors from the West and from Western experts in shaping the Constitution. For a discussion of continuity in Russian political culture, a discussion of political culture and for explanation of the influences of the West, and a theoretical discussion of the principles of social contract and industrial market economies, see David Lempert, "Changing Russian Political Culture: Paradigms, Parasites, Perestroika," *Comparative Studies of Society and History*, Vol. 35, No. 3 (July 1993). While it could be argued that Ukraine is a Slavic republic with a long history of shared traditions with Russia and with a Parliament in which most of its deputies continue from the previous regime, Ukraine is also a republic which suffered heavily from Russian domination in this century and which would have great incentives to establish mechanisms to prevent the types of problems which occurred under Russian and Soviet rule and to demonstrate a clear break. Lowry Wyman, an attorney at the Harvard University Russian Research Center who is advising the Lithuanian and Estonian governments on their constitutions, calls the proposed Ukrainian Constitution the "most advanced" of the four.

³ Citations to the proposed Ukrainian Constitution in the text are to a draft document titled "Constitution of Ukraine" prepared by the working group of the Constitutional Commission of the Parliament of Ukraine and translated by the Commission. The draft is dated January 1992 but

first appeared in March 1992. This copy was circulated among constitutional scholars in the United States for comment and was first received by U.S. Circuit Court Judge Bohdan Futey. It is the most widely available version, in English, of the various drafts. Two additional published drafts have appeared, dated July 1992 and October 1993, with few substantive changes from the March 1992 version. The two major differences between the July and March drafts are that the more current version provides for a unicameral rather than a bicameral assembly (to preserve the status quo), and seeks to place some of the appointment power for judges in the hands of the national assembly rather than solely in the hands of the president. The latest draft also changes the term for which judges are selected. The analysis contained in this article remains the same; unaffected by new drafts or discussions expected to lead soon to the preparation of a third draft.

⁴ For purpose of this analysis, making the similarities with Soviet Russian culture even more striking, the proposed Ukrainian Constitution was compared article for article with the 1989 amended Constitution of the Russian Soviet Federated Socialist Republic. With the exception of differences for national symbols, territorial issues, and structure of parliaments (Russia's Parliament was bicameral with a larger total number of representatives than Ukraine's unicameral legislature), the constitutions of all of the republics were duplicates of one another and in parallel to the constitutions of the USSR. The 1989 Constitution was a slightly amended version of the basic 1977 Constitution. There were four basic constitutions during the Soviet period which provide baselines for examination of government structure, citizen and government powers and individual rights and guarantees. These are the constitutions of 1918, 1923, 1936, and 1977. Each constitution provides an empirical test in itself and of the potential of newly written constitutions. Stalin's 1936 Constitution, with its enumeration of citizen rights which were enforced at governmental discretion, is an excellent model from which to evaluate constitutions of the NIS.

⁵ A constitution based on social contract principles implies agreements between individuals of equal power who can constantly oversee those running the institutions that they create such that "For [officials] there is no question of contract, but of obedience. . . [I]n taking charge of the functions the state imposes on them, they are doing no more than fulfilling their duty as citizens." Jean Jacques Rousseau, *The Social Contract*, translated by G.D.H. Cole (London: J.M. Dent and Sons, 1743), pp. 80 and 83.

⁶ "Turning the Pages Back . . ." *Ukrainian Weekly*, 12 April 1992.

⁷ From the 1990-91 "Uchebnii Plan" at Leningrad State University Law Faculty and from observations of law school classes in 1990.

⁸ For the history of the development of law through these periods, see for example, Harold Berman, *Justice in the USSR* (New York: Vintage Books, 1963); John Hazard, *Law and Social Change in the USSR* (London: London Institute of World Affairs, 1953); William Butler, ed., *Russian Law: Historical and Political Perspectives* (Copenhagen: A.W. Sijthoff, Leyden, 1977).

⁹ Sergei Alexeev, *Socialism and Law: Law in Society* (Moscow: Progress Publishers, 1990), p. 90. For studies of the Soviet and Russian approaches to law, see Donald D. Barry, William E. Butler and George Ginsburgs, *Contemporary Soviet Law* (1974); Robert Conquest, *Justice and the Legal System in the USSR* (London: The Bodley Head, 1968); F.J.M. Feldbrugge, ed., *The Distinctiveness of Soviet Law* (Boston: Martinus Nijhoff, 1987); Olympiad S. Ioffe and Peter B. Maggs, *Soviet Law in Theory and Practice* (Oceana Publishers, 1983); and Peter Solomon, Jr., "Soviet Criminal Justice and the Great Terror," *Slavic Review*, 1988, p. 391.

¹⁰ The distinction between "substantive" and "procedural" is as basic to an understanding of Western law as is the civil notion of "contract." Indeed, U.S. Supreme Court decisions often hinge on the interpretation of the "due process" guarantees of the 5th and 14th amendments of the U.S. Constitution and whether those guarantees are substantive or procedural with regard to particular rights and privileges. For some of the leading discussion of the issue in political science and political philosophy, see Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), and John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

¹¹ James Madison, *Federalist* 51, 1787.

¹² For attempts to do this, see Alex Inkeles, ed., *On Measuring Democracy, Its Consequences and Concomitants* (New Brunswick: Transaction Publishers, 1991). Much of the work in the volume attempts to build on a checklist suggested by Robert Dahl in 1971 in *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1971).

¹³ While the purpose of this article is to analyze the Ukrainian Constitution as a legal and political document, the Constitution also merits study as a literary text. There is much to be found in the document in its use of political symbols, ideology, and as an indication of issues of current political importance to Ukrainians. The emergence of "private property" as a new ideology appears several times in the document. Several articles deal with ecology and with nuclear power or nuclear weaponry; results of the accident at Chernobyl. There are specific items borrowed from

Western constitutions, and provisions which could be viewed as overtures to foreign investment. Not necessarily inconsistent with the structure established by the Constitution is the choice of the emblem of the "Kievan State of Volodymyr the Great," the trident, the symbol of Ukraine as an empire and monarchy, as the official state emblem (Article 18).

¹⁴ A corollary to the debate on deep structure is the reappearance, in recent literature, of the debate on the link between market economic systems and democracies. Indeed, both Gorbachev and the Bush administration have made numerous statements in which phrases such as "market democracy" or "capitalist democracy" link the two concepts. See, for example, Gabriel Almond, "Capitalism and Democracy," *Political Science & Politics*, September 1991, p. 467; Joseph Schumpeter, *Capitalism, Socialism and Democracy*, (New York: Harper & Row, 1946); and Barrington Moore, *The Social Origins of Dictatorship and Democracy* (New York: Beacon Press, 1966). Capitalism, as it suggests some dispersion of economic power, is a marker of some dispersion of political power in those societies in which economic power is the key determinant of political power. One must consider the dispersion of economic power and the determinants of political power in general. See Charles Lindblom, *Politics and Markets* (New York: Basic Books, 1977); and Lempert, "Changing Russian . . ."

¹⁵ As in previous constitutions, despite Article 3, all of the state powers in the Constitution's provisions of powers are exercised through indirect and representative government with citizen participation limited to voting; a power which proved to be more symbolic than real during most of the Soviet period.

¹⁶ Directed against Stalin's "secret laws"—laws which were enforced but never publicized before their enforcement.

¹⁷ See articles 14, 15 and 17 of the Constitution of the Russian Republic.

¹⁸ Since "may attempt" deals with actions which have not occurred, it is possible that this section would be interpreted to apply to anyone who opposed particular laws or governmental acts in their beliefs alone. Thus, this article also would negate Article 41 which states that "No one may be persecuted for his or her convictions and views."

¹⁹ The greater definition in workings of the three branches of government, including the creation of the office of an elected president and the addition of a "Constitutional Court" follow the same developments in the Soviet and Russian constitutions before the breakup of the Soviet Union. These are not Russian traditions but have been imported from the West. Indeed, legal scholarship in the Soviet Union during the late 1980s and early 1990s is filled with calls for "separation of powers." See A. V. Vengerov, "Sotsialisticheskii pluralizm v kontseptsii pravovoe gosudarstvo," *Sovietskoe Gosudarstvo i Pravo* No. 2 (1989); V.I. Kudriavtsev and E. A. Kukasheva, "Sotsialisticheskoe pravovoe gosudarstvo," *Sotsialisticheskoe Pravovoe Gosudarstvo: Problemy i Suzhdeniya* (Moscow: Institut Gosudarstva i Prava, 1989); G.N. Manov, "Sotsialisticheskoe pravovoe gosudarstvo: problemy i perspektivy," *Sovietskoe Gosudarstvo i Pravo*, No. 6 (1989); V.N. Topornin, "Konstitutsiya v sotsialisticheskom pravovom gosudarstve," in *Sotsialisticheskoe Pravovoe Gosudarstvo: Problemy i Suzhdeniya*; and E. A. Chirkin, ed., *Sotsialisticheskoe Pravovoe Gosudarstvo: Kontseptsiya i Puti Realizatsii* (Moscow: Iuridicheskaya Literatura, 1989). Although the concepts of separation of powers and of pluralism have entered the political culture, it is not in the Madisonian sense of individuals holding each other or the state accountable. Instead, the balance is among the 500 or so officials who, collectively, hold all of the state power. Some political scientists would see this as just a refashioning of the rules among the elites, to better coordinate what was already being described as a society with a plurality of institutional and elite interests. See H. Gordon Skilling and Franklin Griffiths, *Interest Groups in Soviet Politics* (New Jersey: Princeton University Press, 1971) and Helene Carrere d'Encausse, *The Russian Syndrome* (New York: Holmes & Meier, 1992). For slight differences in these provisions in the July 1992 draft, regarding selection of judges and form of the legislature, see Note 4, above.

²⁰ The *komitety konstitutsionnogo nadzora*, which can be translated from the Russian either as committees of constitutional oversight or control, were established in the USSR and in the republics in 1989. While the Ukrainian Constitution renames this body a "Constitutional Court," in the same way that the Russian Constitutional Court has replaced the Constitutional Compliance Committee in Russia, it is not a court in the formal sense, since citizens have no standing to bring lawsuits on constitutional grounds. In fact, the "Court" is set up as a presidentially appointed "control," with the power to invalidate acts at any level of government on the basis of "constitutionality." The "Court's" powers also extend beyond government. Section 10 of Article 228 empowers the Court to review acts of "political parties, citizens organizations and movements." The Court may also target individual legislators by its power in Article 230 to "hear questions concerning parliamentary immunity." Its jurisdiction does not extend to upholding constitutional rights of workers in economic enterprises.

²¹ For the classic discussion of civil-military relations, see Samuel Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968). For recent work on the Soviet military (before the breakup of the Soviet Union), see Timothy J. Colton and Thane Gustafson, ed., *Soldiers and the Soviet State: Civil-Military Relations from Brezhnev to Gorbachev* (New Jersey: Princeton University Press, 1990). For a theoretical discussion of transition from authoritarian rule, see Guillermo O'Donnell, P.C. Schmitter, and L. Whitehead, eds., *Transitions from Authoritarian Rule: Comparative Perspectives* (Baltimore, 1986).

²² For discussion of the political power of large economic institutions in the administrative states and the potential distortion of the democratic process, see Charles Lindblom, *Politics and Markets: The World's Politico-Economic Systems* (New York: Basic Books, 1977) and John Kenneth Galbraith, *The New Industrial State* (New York: Houghton Mifflin, 1967). For a complete case study, see James Phelan and Robert Pozen, *The Company State* (New York: Grossman Publishers, 1973).

²³ Much of the early privatization which has occurred in the former Soviet Union in the transition from "state" to "non-state" enterprises, has actually been "spontaneous privatization" in which managers have taken control of economic enterprises for their own benefit. Simon Johnson and Heidi Kroll, "Managerial Strategies for Spontaneous Privatization," *Soviet Economy* 1991, Vol. 7, No. 4: (1991) pp. 281-316. While strategies to place ownership in more hands have suggested giving stock ownership rights to the public or to managers, it is not likely that this would have much impact on control. For a discussion of the separation between ownership and control and the lack of management accountability in Western corporations, see Adolphe Berle and Gardner Means, *The Modern Corporation and Private Property* (New York: MacMillan Company, 1933).

²⁴ Certainly these networks and the potential for coordinating economic and political power among a small circle of elites representing institutions is not only a phenomenon of authoritarian states. There is a long track of political science literature offering evidence to back the thesis offered by C. Wright Mills in his description of American politics in *The Power Elite* (New York: Oxford University Press, 1956). For an explanation of how the networks worked previously in the Soviet Union, see Michael Voslensky, *Nomenklatura: An Anatomy of the Soviet Ruling Class*, (London: Bodley Head, 1984).

²⁵ Indeed, the Soviet Union was beginning to develop into a caste or class system with "spets shkoly" (special schools) and restricted university education for children of elites. See, for example, David Wilkes, *Klass: How Russians Really Live* (New York: St. Martin's Press, 1985).

²⁶ Such is the basic thesis of Robert Dahls' work, *Who Governs?: Democracy and Power in an American City* (New Haven: Yale University Press, 1961), in which he traces the differential ability of citizens to influence the political system based on the resources they have access to. These considerations were not a part of the discussion in the U.S. Constitution because among citizens, mobility in an agrarian society and access to political power were not dependent on institutions or controlled resources. Lawyers were readily available to citizens at a very low cost, rather than just allocated to the wealthy through market mechanisms. Bargaining and negotiation were on an equal basis because there were few sophisticated dealings that a common person could not understand. Further, there was a widespread use of the civil courts on all issues of importance, as well as representative juries. See Lawrence Friedman, *A History of American Law* (New York: Simon & Schuster, 1973). Similarly, availability of economic resources and the ability to be productive without specialized training or capital investment, allowed individuals to be economically independent; which translated into political independence. Citizens had opportunities to obtain their own capital without relying on banks or loans from others. There was land available on the frontier. Throughout most of the country there was also no need for specialized training in order to be successful. General education was available at a level which did not create exclusive advantages, and inherited wealth was not an important factor in the ability to succeed. See Bureau of the Census, U.S. Department of Commerce, Historical Abstract of the United States, Washington, D.C.

²⁷ It was for this reason that Thomas Jefferson argued that a revolution, or at least a rewriting of the Constitution, every twenty years, would be an essential and healthful feature if social contract democracy were to survive in America. Said Jefferson, "The earth belongs to the living and not to the dead." Thomas Jefferson, letter to Charles Yancey, in *The Writings of Thomas Jefferson*, p. 384.

²⁸ For a description of the links between government elites and organized crime and the effects on keeping the system inaccessible to newcomers, see Arkady Vaksberg, *The Soviet Mafia* (London: Weidenfeld F. Nicolson, 1991); Konstantin Simis, *USSR: The Corrupt Society: The Secret World of Soviet Capitalism* (New York: Simon & Schuster, 1982); and Louise Shelley, "Crime in the Soviet Union," in Anthony Jones, Walter D. Connor and David E. Powell, eds., *Soviet Social Problems* (Boulder CO: Westview Press, 1991). See also the work of Virginie Coullodon.

²⁹ See discussion of Articles 24, 48 and 75, below.

³⁰ For details of the reality of "Big Brother" that George Orwell described in 1984 (New York: Harcourt Brace, 1948), see Claes Arvidsson and Lars Erik Blomqvist, ed., *Symbols of Power: The Esthetics of Political Legitimation in the Soviet Union and Eastern Europe* (Stockholm: Almqvist & Wiksell International, 1987), and Ellen Propper Mickiewicz, *Split Signals: Television and Politics in the Soviet Union* (New York: Oxford University Press, 1988). For a description of the trends in media control, National Public Radio's "Marketplace" (23 March 1992) reported that market pressures are expected to force 30 out of 32 of Russia's national daily newspapers out of business in the next two years, leaving the two largest papers in the same monopoly position as before the transition.

³¹ Lenin originally proposed the idea of checks against the bureaucracy through the "Peasant Workers' Inspection," the "RabKrIn," which soon become an unaccountable bureaucracy itself due to the lack of rotation of its membership. See V.I. Lenin, "Better Fewer But Better," 2 March 1923, in *Collected Works*, Volume 33. For more information on the history of People's Control, see Jan Adams, "Institutional Change in the 1970s: The Case of the U.S.S.R. People's Control Committee," *Slavic Review*, September 1978, pages 457-73, and "A New Profile for the USSR People's Control Committee," *Radio Free Europe/Radio Liberty*, 444/87, 10 November 1987. This idea probably did not originate with Lenin; nor is it particularly "Soviet." Indeed, in its original form before it became corrupted, it very similar to the Anglo-American concept of "grand juries." Such grand juries, empowered in the U.S. Constitution as well as by earlier laws in the American colonies, were representative bodies with extensive investigatory powers. Their role and powers in America have diminished over time. See Leroy D. Clark, *The Grand Jury: The Use and Abuse of Political Power* (New York: Times Books, 1975).

³² If the experience of other developing countries is any indication, foreign banks and multi-national corporations operating on Ukrainian soil may soon have more power to determine Ukraine's policies than even Ukraine's leaders, who may be subject to direct threats, blackmail, and, potentially, covert violence that leaders of other small countries have faced. See, for example, Richard Barnet and Ronald E. Miller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974), and Richard Barnet, *Roots of War* (New York: Penguin Books, 1971). For an explanation of the changing structure of the world economy and the political implications of small nations for entering into it, see Immanuel Wallerstein, *The Capitalist World Economy* (Cambridge, England: Cambridge University Press, 1979) and James D. Cockroft, Dale L. Johnson and Andre Gunder Frank, *Dependence and Underdevelopment: Latin America's Political Economy* (Garden City, NY: Anchor Books, 1972).

³³ See Thomas Jefferson, *Notes on the State of Virginia*, p. 195, quoted in James Madison, *Federalist 48*, 1787. Madison goes on to explain the importance of ties between citizens and their elected representatives in a republican form of government. Article 1 of the U.S. Constitution established a ratio between population and elected representatives of 30,000:1, five times closer than that established for Ukraine's Council of Deputies. The argument of democratic theorists that continues to this day, is that representation itself, without a series of continual checks on government representatives and institutional power, is an invitation to tyranny. "The instant a people allows itself to be represented, it loses its freedom," Rousseau wrote in 1743 (Jean Jacques Rousseau, *The Social Contract*). The handwriting on the walls in contemporary France echoes Rousseau more simply. "I vote, You vote, He/She votes, We vote. They rule." Elihu Root, a constitutional scholar and America's secretary of war under President Theodore Roosevelt, agreed with Rousseau, when considering constitutional reforms at the beginning of this century. "We should . . . reject every proposal which involves the idea that the people can rule merely by voting or merely by voting and having one man or group of men to execute their will." *Experiments in Government and the Essentials of the Constitution*, 1913. Five years later, Lenin argued the same position. "Take the fundamental laws of modern states, take their administration, take freedom of assembly, freedom of the press, or 'equality of all citizens before the law', and you will see at every turn evidence of hypocrisy . . . consisting of loopholes or reservations in its Constitution guaranteeing . . . the possibility of dispatching troops against the workers, of proclaiming 'martial law' [or pogroms] and so forth . . . [T]he ruling party . . . extends the protection of the minority only to another [similar] party . . ." V.I. Lenin, *The Renegade Kautsky* (1918). In recent political science literature, Benjamin Barber has termed elections and other distant mechanisms—including referenda and recall, which are added in the proposed Ukrainian Constitution—examples of "weak democracy." Writes Barber, "Under a representative government, a voter is free only on the day he casts his ballot." *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1987).

³⁴ Several other political systems, even those with almost exact copies of the United States Constitution and with market economies, like the Philippines under Marcos, were turned into military dictatorships almost overnight. Indeed, the Nazis in Germany were elected to power and

turned a multi-party market economy into a dictatorship. The irony of the changes is that in some respects, Stalin's 1936 Constitution was more democratic than the one Ukraine's leaders present now. Stalin's Constitution also promised free speech, but it went beyond Ukraine's proposed Constitution in promising access to printing presses; another promise that was unenforceable (Section 125 of the 1936 Soviet Constitution). Stalin's Constitution established a system of "people's assessors" (Section 103) to sit alongside judges in deciding cases, and election of judges to people's courts (Section 109). Ukraine's Constitution provides neither.

³⁵ For a theory of the allocation of political rights in order to achieve bargaining efficiency, including allocations between institutional actors and aggregates of individuals, see R.H. Coase, "The Problem of Social Cost," *The Journal of Law & Economics*, Volume 3 (October 1960), p. 1.

³⁶ Rousseau, *The Social Contract*, 1743.

³⁷ Two recent examples of how this occurred under constitutional regimes are Ferdinand Marcos' declaration of martial law and suspension of the Philippine Constitution in 1972, and events in Peru in April of 1992. For discussion of the Philippine case, see Raymond Bonner, *Waltzing With a Dictator: The Marcoses and the Making of American Policy* (New York: New York Times Books, 1987).

³⁸ The current president of Ukraine, Leonid Kravchuk, worked as one of the key Communist Party ideologues in Ukraine before the country's declaration of independence, in a job that included mass persuasion through the media.

³⁹ See Vaksberg, *The Soviet Mafia*, as well as his recent work on Stalin's prosecutor, Vyshinsky, who directed the show trials and purges. *Stalin's Prosecutor: The Life of Andrei Vyshinsky* (New York: Grove Weidenfield, 1991).

⁴⁰ Chrystyna Lapychak, "Parliament Charges Leadership with Chernobyl Cover-Up," *Ukrainian Weekly*, 15 December 1991.

⁴¹ For explanations of the legal implications of the unaccountable activity of multi-national corporations on host country citizens, in light of the Union Carbide tragedy at Bhopal, India, see Tara Jones, *Corporate Killing: Bhopals Will Happen* (London: Free Association Books, 1988); Upendra Baxi and Thomas Paul, *Inconvenient Forum and Convenient Catastrophy: The Bhopal Case* (Bombay: Law Publishers, 1986); and Baxi and Paul, *Mass Disasters and Multi-National Liability, The Bhopal Case* (Bombay: N.M. Tripathi, 1986).

⁴² When asked what kind of protection against exploitation there would be in Ukraine and what economic rights there would be for citizens who don't have capital or human capital (education) after market reforms are instituted, Vyatcheslav Prilyuk, an economist at Kiev State University and Fulbright Scholar explained, "They will have the right to work. They will work for the people who have capital." Speech at Harvard University Ukrainian Research Institute, Spring 1991.

⁴³ It would be impossible to find a current history of Ukraine without reference to the millions of Ukrainian victims of genocide during the 1930s. For a history of Jewish pogroms in Ukraine and anti-Semitism, see Nora Levin, *The Jews in the Soviet Union Since 1917* (New York: New York University Press, 1988); Benjamin Pinkus, *The Jews of the Soviet Union* (Cambridge, England: Cambridge University Press, 1988); and Salo Baron, *The Russian Jews Under Tsars and Soviets* (New York: MacMillan and Company, 1964). Interestingly, constitutional acts of the Ukrainian People's Republic of 1918-20 included what many considered to be the most progressive provisions for minority rights in Europe at the time. These provisions have not been proposed in the current debate. See Moses Silberfarb, *The Jewish Ministry and Jewish National Autonomy in Ukraine*, translated by Rabbi Lincoln, 1993.

⁴⁴ Two programs at Harvard University, alone, are underway in which scholars are providing advice to the leadership in Ukraine. The John F. Kennedy School of Government has a program called the Strengthening Democratic Institutions Project, which provides advice to the former Soviet republics, and which has offices at Harvard and Moscow. There is also a separate program, the Project for Economic Reform in Ukraine, with offices at Harvard and in Kiev.

⁴⁵ This first series of amendments addresses the problem of a military, secret police, governmental bureaucracy, and set of political officials that withheld information from the public and violated the rights of citizens. The idea is to implement a policy of openness and inclusion in a way that neither sets up a new bureaucracy nor is overly burdensome. It is based on the concept of grand juries that was used actively in the United States in the 18th century and Lenin's idea of "people's control." For the value of representative juries as a method of direct democracy, see Alexis de Tocqueville, *Democracy in America*, 1832. Such participatory mechanisms fit Barber's concept of "strong" democracy, and have an advantage over "weak" mechanisms like referenda in that they are "deliberative." See James Fishkin, *Democracy and Deliberation* (New Haven: Yale University Press, 1991).

⁴⁶ The logic of this provision is simple. It takes a part of government that was centralized and socialized and subject to abuse and makes it competitive using market principles. The idea of private attorneys general has already been tried in the United States, though on a limited basis, in such statutes as RICO, a federal racketeering statute.

⁴⁷ This provision strengthens the public's ability to fire its public servants. While there is a possibility that large amounts of money could be used to sway public opinion and to target minorities through recall, the check and balance is the greater openness of the media in a later provision.

⁴⁸ This provision attempts to provide some teeth to the idea of government openness and responsibility to lead rather than mislead by viewing public officials in their dealings with the public as if they were witnesses presenting evidence to a jury.

⁴⁹ The idea here—in this article and the one following it—is to establish the basis of a civil law system that will enable individuals to use the judiciary as a meaningful check against government and institutional wrongdoing.

⁵⁰ In order to solve the problem of the mass communications media being dominated by networks or wealth, citizens must have a real opportunity to gain access to those media. This provision treats the media as natural monopolies—which they have become—and applies the solution of the “common carrier” scheme, which has been used to make communications monopolies like AT&T more accessible to competitors.

⁵¹ This provision overrides Article 233 of the Ukrainian Constitution and takes away the ability of the national assembly to rewrite the Constitution through amendments without the approval of the citizenry.

⁵² The goal of Chapter II is to restore accountability of institutions that were previously of the state but which the proposed Constitution removes from citizen scrutiny by declaring them “private.” It is also designed to ensure the accountability of foreign corporations working in Ukraine. It is important to note that this chapter does not interfere with economic efficiency or the workings of the market system. It merely seeks to allow the public to protect its rights within large organizations and to keep informed about how its natural resources are being used so that it can effectively call for appropriate regulations. These provisions are designed to address the problems of Chernobyl and Bhopal.

⁵³ This provision is a combination of substantive and procedural aims. On the one hand it sets up a substantive goal of equal education; a necessity for guaranteeing political equality necessary for the Constitution to work over generations. On the other hand, it seeks to establish mechanisms for the education of citizens so that they may effectively carry out their roles in running and monitoring their government and institutions.

⁵⁴ This provision establishes the notion of justice as a right, not to be bought and sold in the market. See Marvin E. Frankel, *Partisan Justice* (New York: Hill and Wang, 1980).

⁵⁵ One of the means by which the Russians were able to develop a single set of cultural values throughout their empire which reinforced the notion of loyalty and obedience to authority was by socializing young men into the military. Civic culture and legal consciousness are learned behaviors. If Ukraine socializes its young men into military values, it must recognize that when placing those men back in society, they need to be retrained in the values of democracy—political equality and consensus.