

Poland's 1997 Constitution in Its Historical Context

Daniel H. Cole*

Introduction

Is Poland's 1997 Constitution legitimate? Opposition groups have characterized it as "a miserable monstrosity concocted by left-wing groups and the postcommunists in defiance of Poland's history, heritage and traditions."¹ According to Jan Olszewski, a former Prime Minister who currently heads the right-wing, nonparliamentary oppositionist Movement for the Reconstruction of Poland (ROP), the new Constitution "clearly continues the tradition of the communist state."² The Solidarity trade union and Catholic organizations criticized the Constitution for "generally neglecting

* Professor, Indiana University School of Law at Indianapolis.

¹ *The Draft Constitution: An Acceptable Compromise?*, Polish News Bulletin, Feb. 13, 1997, available in LEXIS, News library, Curnws file.

² *Pros and Cons of the New Constitution*, Polish News Bulletin, April 30, 1997, available in LEXIS, News library, Curnws file. And Andrzej Kierylo, the ROP's spokesman declared the outcome of the constitutional referendum irrelevant because his party had not the opportunity to present its views on the new Constitution. *Politicians on Constitutional Referendum*, Polish News Bulletin, May 19, 1997, available in LEXIS, News library, Curnws file.

Poland's 'national and Christian traditions.'³ The Polish Episcopate faulted it for failing to acknowledge the supremacy of natural law.⁴ And former Polish President and Solidarity leader Lech Wałęsa referred to the new Constitution as a “mistake for Poland;”⁵ he publicly announced his intention to vote against its ratification.⁶

These criticisms may amount to little more than political posturing by out-of-power politicians and parties, but they both reflect and reinforce beliefs strongly held by many in Polish society. For example, Antoni Heda, a resistance fighter during World War II, declared at a rally celebrating the May 3d Constitution Day that the new “constitution is against the Polish nation, it is for atheists and communistic masons.”⁷

³ *Solidarity to urge Poles to reject constitution in referendum*, Agence France Presse, April 17, 1997, available in LEXIS, News library, Curnws file; Anthony Barker, *Solidarity Chief Demands Godly Polish Constitution*, The Reuter European Community Report, Feb. 26, 1997, available in LEXIS, News library, Curnws file; Anthony Barker, *Polish voters give verdict on constitution dispute*, Reuters North American Wire, May 25, 1997, available in LEXIS, News library, Curnws file. A Solidarity Senator, Alicja Grzeskowiak, reportedly criticized the Constitution's Preamble, which refers to God but also recognizes the existence in Poland of nonbelievers, for “offend[ing] the feelings of the Catholic majority.” *Constitution Preamble Agreed On*, Polish News Bulletin, Dec. 12, 1996, available in LEXIS, News library, Curnws file.

⁴ See *Zych, Pieronek Discuss Draft Constitution*, Polish News Bulletin, Feb. 27, 1997, available in LEXIS, News library, Curnws file.

⁵ *Walesa: New Constitution is Mistake for Poland*, PAP News Wire, April 2, 1997, available in LEXIS, News library, Curnws file.

⁶ *Ex-president Walesa says he will vote against new constitution*, BBC Summary of World Broadcasts, May 21, 1997, available in LEXIS, News library, Curnws file.

⁷ *Protests grow against new Polish constitution*, Reuters World Service, May 3, 1997, available in LEXIS, News library, Curnws file. However, a clear majority of the public favored the new Constitution. According to a March 1997 poll by the Central Bureau of Statistics (CBOS), 61 percent of Poles favored adopted the new Constitution despite the fact the a number of political parties were not represented in the *Sejm* that adopted it. *CBOS: Majority for Early Constitution*, PAP News Wire, Mar. 5, 1997, available in LEXIS, News library,

The process by which the Constitution was ratified has contributed to the crisis of legitimacy. It was ratified on May 25, 1997 by a bare majority of 52.7 percent in a public referendum in which only 43 percent of eligible voters participated. Thus, fewer than one-quarter of the electorate actually approved the supreme law of the land.⁸ This outraged opposition groups, who not only questioned the Constitution's legitimacy but challenged its ratification in court.⁹ The Confederation for an Independent Poland filed suit in the Supreme Court to overturn the referendum results because of the low voter turn-out.¹⁰ But the Supreme Court validated the outcome.¹¹ Ten days later, President Kwaśniewski signed the Constitution,¹² which went into effect on October 17,

Curnws file. But it seems as if Poles were more interested in having a new constitution than with what was in it. According to a May 1997 CBOS poll, only nine percent of the population claimed to have "good knowledge" of the Constitution, while 43 percent said they were "poorly informed" and 27 percent admitted that they "did not know anything" about it. *Opinion poll shows poor knowledge of new constitution*, BBC Summary of World Broadcasts, May 22, 1997, available in LEXIS, News library, Curnws file.

⁸ See *Voters Approve New Constitution*, Facts on File World News Digest, May 29, 1997, available in LEXIS, News library, Curnws file.

⁹ See *Opposition leader pessimistic about referendum result*, BBC Summary of World Broadcasts, May 27, 1997, available in LEXIS, News library, Curnws file; Anthony Barker, *Polish Right Pleased with Narrow Constitutional Vote*, Reuters Financial Service, May 26, 1997, available in LEXIS, News library, Curnws file; *Political dispute in Poland continues despite referendum*, Deutsche-Press-Agentur, May 26, 1997, available in LEXIS, News library, Curnws file.

¹⁰ *KPN Files Referendum Protest*, Polish News Bulletin, May 28, 1997, available in LEXIS, News library, Curnws file.

¹¹ *Polish supreme court validates constitutional referendum*, Agence France Presse, July 15, 1997, available in LEXIS, News library, Curnws file.

¹² *New Constitution Signed*, Polish News Bulletin, 17 July 1997, available in LEXIS, News library, Curnws file.

1997.¹³

Questions about the 1997 Constitution's legitimacy have not been limited to the political arena but have inevitably affected scholarly analysis. The noted constitutional law scholar Ewa Łętowska has suggested that the new Constitution "eludes immediate evaluation" not because of its contents but because of the political climate in which it was adopted. In particular, Łętowska points to the "vilification" of the Constitution by disaffected political groups and the Catholic Church. Their "politically induced' disgust for the Constitution is," in her view, "the first factor to consider in assessing the chances for real constitutionalism to develop in Poland."¹⁴

Some scholars have actually participated in the vilification of the new Constitution. For instance, the sociologist Paweł Śpiewak derides Poland's new Constitution as "a bundle of compromises," which "freezes the present order in place and hence preserves its flaws."¹⁵ According to Śpiewak, it does not even fulfill the basic objectives of a constitution:

The division of powers is not guaranteed and short-term political considerations define the economy, the state, and the administration of justice. It follows, too, that human rights are not well protected by the state. Moreover, the

¹³ *Constitution Takes Effect*, Polish News Bulletin, 17 Oct. 1997, available in LEXIS, News library, Curnws file. Poland's 1997 Constitution is reprinted in English translation in 1997 SAINT LOUIS - WARSAW TRANSATLANTIC L.J. 5.

¹⁴ Ewa Łętowska, *A Constitution of Possibilities*, 6 (2 & 3) E.EUR. CONST. REV. 76, 79-80 (1997).

¹⁵ Paweł Śpiewak, *The Battle for a Constitution*, 6 (2 & 3) E.EUR. CONST. REV. 89, 89 (1997).

state is weak, excessively divided, and at the same time, still very centralized and reluctant to grant any forms of self-government.¹⁶

Some of these criticisms can be dismissed out of hand. For example, how can Śpiewak legitimately maintain that “short-term political considerations define the economy” when article 22 of the new Constitution guarantees freedom of economic activity, article 216.5 explicitly limits public debt to 60 percent of gross national product and article 220.2 prohibits the National Bank from financing the debt? His other complaints are so general or paradoxical as to defy assessment. For instance, how can the government be, and in what ways is it, at once “excessively divided” and “still very centralized?”

But Śpiewak does not limit his ire to the Constitution’s contents; he also rails against the process by which it was ratified. Specifically, he contends that because fewer than half of eligible voters participated in the public referendum on the Constitution, “the majority of Polish citizens consider the Constitution irrelevant.”¹⁷ Consequently, he predicts, “the life of this latent Constitution will not be very long, and that its authority will be recognized by only part of society.”¹⁸ This assessment displays a certain naïveté about the nature and history of constitution-making — few, if any, constitutions in world history have been adopted by consensus and ratified by

¹⁶ *Id.* at 93.

¹⁷ *Id.* at 96.

¹⁸ *Id.*

a majority of the population.¹⁹ Yet many Poles of various political persuasions appear to share Śpiewak's view.

But the legitimacy of Poland's (or any) Constitution is not simply a function of who drafted it, who ratified it, and what's in it; another important factor is its historical pedigree — whether and to what extent the new Constitution's organizational and institutional structures and underlying philosophies relate to those of earlier constitutions in Polish history. As we have already seen, right-wing opponents of the new Constitution allege that it deviates in important respects from Poland's indigenous constitutional heritage. For example, they point out that, unlike Poland's 1791, 1921, and 1935 Constitutions, the 1997 Constitution makes no unambiguous references to God.²⁰ But beyond facile comparisons, little scholarly attention has been paid to the new Constitution's historical ties to past Polish constitutional documents.

This article marks a first effort at placing Poland's 1997 Constitution in its historical context. As we shall see, most of the structural features of Poland's new Constitution, including its division of governmental powers, its broad guarantees of

¹⁹ The American Constitution, for example, was not approved in a public referendum but ratified in state conventions whose representatives were specially elected for that purpose. And, in many states, fewer than half of eligible voters participated in those elections. *See, e.g.*, BRUCE A. ACKERMAN, II *WE THE PEOPLE: TRANSFORMATIONS* 437-38 n. 34.

²⁰ *See Discussion on Constitutional Preamble Resumed*, Polish News Bulletin, Sept. 19, 1996, available in LEXIS, News library, Curnws file. Of course, Poland's 1952 (Communist) Constitution made no reference at all to God. But then, from the perspective of many Poles, that constitution is not part of Poland's *indigenous* constitutional history; it was, in essence, the Soviet Constitution re-written in the Polish language. *See infra* note 137 and accompanying text.

civil and religious liberties, and its provision of various social “rights,” have roots in Polish constitutional documents extending back to the sixteenth century and beyond.²¹ These historical roots have important implications for the overall legitimacy of Poland’s new Constitution.

The History of Constitutionalism in Poland²²

In order to place Poland’s *new* Constitution in its historical context, we must of course have some acquaintance with Poland’s preceding constitutional history. This section reviews in significant detail the long history of constitutionalism in Poland, extending back to the middle ages. That history can be divided roughly into five eras: (1) the period of initial constitution and consolidation, beginning in the thirteenth century and culminating in the sixteenth-century “Republic of Nobles;” (2) a period of political and economic decline during the seventeenth and eighteenth centuries, concluding with the ill-fated 1791 Constitution, partition, and more than a century of foreign occupation; (3) the re-emergence of an independent but short-lived Republic of Poland between World Wars I and II; (4) the post-war, Soviet-dominated People’s

²¹ By “constitutional document” I mean to include not only nominal constitutions but also fundamental laws that literally *constitute* a legal culture in a certain era. This is consistent with Thomas Cooley’s definition of a constitution: “a constitution may be written or unwritten. If unwritten, there may still be laws or authoritative documents which declare some of its important principles.” THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 22 (A.C. McLaughlin ed., 1898).

²² This section is adapted, with only a few significant changes, from an earlier review essay: Daniel H. Cole, *From Renaissance Poland to Poland’s Renaissance: Reflections on Mark Brzezinski’s “The Struggle for Constitutionalism in Poland,”* 97(6) MICH. L.REV. ____ (forthcoming Spring 1999).

Republic of Poland; and (5) the post-communist Republic of Poland.

Poland in the 13th-16th Centuries: The “Republic of Nobles”

Poland emerged from “the mists of prehistory” in the tenth century AD, when Mieszko I, King of the Polanians (the largest Slavic tribe of the Central European region), renounced paganism and accepted Catholic baptism.²³ Thereafter, the Polish Crown slowly consolidated its control over territories and their populations. By the late thirteenth century, when Polish society began developing institutions to limit arbitrary government, it could reasonably be labelled a “state.” Over the course of the 400 years that followed, state institutions evolved into a weak constitutional system, based on several fundamental laws rather than a single written constitution.²⁴ By the second-half of the sixteenth century, these fundamental laws literally “constituted” Poland as a Republic, such as existed no where else in contemporary Europe.

The Polish Kingdom united with the Grand Duchy of Lithuania during the late fourteenth century, in the “first example of an accomplished federation in the history of international law.”²⁵ By 1569, when the Polish-Lithuanian Republic was formalized by the Treaty of Lublin, it had blossomed into the largest, most powerful, and freest

²³ Quoted in NORMAN DAVIES, *I GOD’S PLAYGROUND: A HISTORY OF POLAND* 3-4 (1982).

²⁴ See *supra* note 21.

²⁵ See Wenceslas J. Wagner, *Justice for All: Polish Democracy in the Renaissance Period in Historical Perspective*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 127, 131 (S. Fiszman ed., 1988).

country in Europe, reputedly without waging a single war of aggression.²⁶ Extending from the Baltic Sea in the Northwest to the Black Sea in the Southeast, it encompassed 400 thousand square miles of territory and 7.5 million ethnically, culturally, and religiously diverse people.²⁷

In addition to Poles and Lithuanians, the Polish-Lithuanian Republic was home to Ruthenians (Bielorussians and Ukrainians), Germans (Prussians), Tartars from the steppes of Russia, Armenians, and ever-increasing numbers of Jews fleeing persecution from East and West. These various groups adhered to diverse creeds. Unlike neighboring countries in Europe and despite its official state religion — Roman Catholicism — sixteenth-century Poland opened its doors to all religious denominations, including Uniates (Greek Catholics of the Slavonic Rite), Moslems, Russian Orthodox, various Protestant groups, including Lutherans, Calvinists, Czech Brethren (the Hussites), Polish Brethren (the Arians), Menonites, Schwenkfeldians, Anabaptists, and of course Jews.²⁸

Six estates comprised the class structure of sixteenth-century Poland: the Crown (and its dependents), the nobility (*szlachta*), the clergy, city burghers, the Jews, and the peasantry. Each estate, with the exception of the peasantry, was autonomous,

²⁶ *Id.* at 132.

²⁷ DAVIES, *supra* note 23, at 215. Poland's population grew to 11 million by the middle of the seventeenth century, but declined precipitously in the second half of that century as Poland lost territories to imperialist neighbors. *Id.* at 24.

²⁸ See generally JANUSZ TAZBIR, A STATE WITHOUT STAKES: POLISH RELIGIOUS TOLERATION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES (1967).

exercising independent jurisdiction over its own members in matters not affecting other estates. The peasants were under the jurisdiction of the Crown, the Church, and predominantly the nobility.²⁹

The rise of the nobility and subjugation of the peasantry during the sixteenth century reflected a growing serf economy in Poland-Lithuania; but class distinctions throughout the Republic were not economically founded. Castes were functional. The rights, privileges, and obligations of each estate depended on the role that estate served in society. Successful burghers and Jews often were wealthier than the average petty nobleman. In fact, many impoverished nobles lived in worse squalor than peasants. But this did not impair their superior legal and political rights. The poorest “petty noble” possessed the same quantum of legal and political rights as the wealthiest “magnate,” including equal rights to vote and participate in Parliament.³⁰

²⁹ Peasants did, however, exercise “rural self-government.” See Józef Siemieński, *Polish Political Culture in the 16th Century*, in *THE POLISH PARLIAMENT AT THE SUMMIT OF ITS DEVELOPMENT (16TH - 17TH CENTURIES)* 54, 60 (W. Czaplinski ed., 1985).

³⁰ Some have argued that, as a practical matter, the magnates’ vast wealth bought them extraordinary political power. See Antoni Mączak, *Polish Society and Power System in the Renaissance*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 17 (S. Fiszman ed., 1988); WITOLD KULA, *AN ECONOMIC THEORY OF THE FEUDAL SYSTEM: TOWARDS A MODEL OF THE POLISH ECONOMY 1500-1800* (1976). Others have argued, to the contrary, that by the beginning of the sixteenth century the political status of the most powerful lords had fallen, while that of the petty nobles had increased. See Siemieński, *supra* note 29, at 57. As Norman Davies has put it: “The *Szlachta* always insisted on the legal equality of everyone in their own order, irrespective of wealth or power. They made no distinction between the great magnates, the middle stratum of landed nobility, or the growing mass of landless and impoverished ‘noble rabble.’” NORMAN DAVIES, *HEART OF EUROPE: A SHORT HISTORY OF POLAND* 297 (1984). This greatly distinguished the Polish-Lithuanian Republic from other European countries of the same era. As von Moltke wrote, “[n]o Polish Noble was the vassal of a superior lord — the meanest of them appeared at the diet in the full enjoyment of a power which belonged to all without a distinction. It is here that we find the fundamental difference between [Poland] and the feudal states of the West and the despotism of the East.” FIELD-MARSHAL COUNT VON

Government in sixteenth-century Poland was based on “the right of resistance, the social contract, the liberty of the individual, the principle of government by consent [and] the value of self-reliance.”³¹ Like its European neighbors of the same era, the Polish-Lithuanian Republic was a monarchy, but unlike in neighboring states the King’s authority was strictly circumscribed by the nobility and its base of power, the *Sejm*.

The *Sejm* had its origins in the thirteenth century, and by the fourteenth century had become “vital to the governance of Poland’s provincial matters.”³² Its development tracked the evolution of other institutions in Poland. In 1374 King Louis of Anjou granted the Privilege of Košice in which he promised to impose no new taxes without the nobility’s consent. Louis’s successor, King Jagiełło, in 1422 pledged not to confiscate property without a court order. Eleven years later, he granted the Privilege of Jedlna, which proclaimed, “*Neminem captivabimus nisi iure victum*” (“We will not imprison anyone except if convicted by law”).³³ This revolutionary innovation in civil libertarianism gave Polish citizens due process-style rights that did not exist in any other European country for another 250 years.³⁴ The British monarchy first granted

MOLTKE, POLAND 3 (E.S. Buchheim trans., 1885).

³¹ DAVIES, *supra* note 23, at 371.

³² MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND 32-33 (1998).

³³ See Wagner, *supra* note 25, at 133.

³⁴ Originally, the Privilege of Jedlna was restricted to the *szlachta*, but it was extended to cover townsmen in the 1791 Constitution. It should also be noted that social classifications in Poland were not nearly as rigid as in other European countries, which is to say they were

habeas corpus rights to its citizens in 1679. In France, until the very end of the *ancien regime*, the King or anyone carrying *lettres de cachet* from him could incarcerate any person, even aristocrats, without cause or trial.³⁵ And Poland's Privilege of Jedlna provided broader coverage than many subsequently enacted *habeas corpus* laws because Poland's nobility constituted an unusually large percentage of Poland's total population, which was Europe's largest.³⁶ By the sixteenth century, the Privilege was protecting the liberty of between 500 thousand and a million Poles.

The size of Poland's nobility gave it immense political power, which it wielded through its political arm, the *Sejm*. In 1501 the *Sejm* firmly established its supremacy over the Crown by exacting from King Aleksander the power of legislative initiative, leading directly to the enactment four years later of the *nihil novi* "constitution,"³⁷ which prohibited the King from enacting new laws without the *Sejm's* concurrence. Then, after the death of the last Jagiellonian King (Zygmunt August) in 1572, the

not entirely immutable. Burghers and Jews were sometimes ennobled. See Siemieński, *supra* note 29, at 58.

³⁵ See W.J. Wagner, *Laurentius Grimaldus Groslicius and His Age — Modern Constitutional Law Ideas in the Sixteenth Century*, in POLISH LAW THROUGHOUT THE AGES: 1000 YEARS OF LEGAL THOUGHT IN POLAND 97, 98 (W.J. Wagner ed., 1970).

³⁶ See Wenceslas J. Wagner, *Introduction*, in POLISH LAW THROUGHOUT THE AGES: 1000 YEARS OF LEGAL THOUGHT IN POLAND 5 (W.J. Wagner ed., 1970) (estimating that the nobility comprised between 10 and 14 percent of the total population of Poland-Lithuania); DAVIES, *supra* note 23, at 215 (estimated that the nobility comprised approximately seven percent of Poland's total population in 1569 and nine percent by the late seventeenth century).

³⁷ *Reprinted (in the original Latin) and translated into English in* POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION 109 (M.B. Biskupski & J.S. Pula eds., C.S. Broeniman trans., 1990).

Polish nobles abolished hereditary monarchy altogether. All subsequent kings were elected by an assembly of all the nobles (the National Assembly); and the vote had to be unanimous. As Mark Brzezinski has noted, “[t]his procedure precluded the King from possessing any notion of ‘divine right’ or royal privilege and initiated the principle that national sovereignty belongs to the whole nation, not to one individual.”³⁸

Before coronation, newly elected kings had to swear oaths of allegiance to all previously enacted laws, the principle of religious toleration, the convention of an elected monarchy, the privileges of the nobility, the right of the *Sejm* to convene regularly and to oversee the Crown’s policies, the nobility’s right to approve declarations of war, foreign treaties, and new taxes, and finally the nobility’s right of resistance should the King fail to keep his word. These oaths were first codified in the the *Acta Henriciana (Pacta Coventa)* of 1576. From then on each newly elected King had to swear to uphold the *Pacta Conventa*, which enumerated ever-increasing numbers of oaths. A 1609 statute, *de non praestanda oboedientia*, established “a detailed procedure (which included three warnings by the Senate [the upper house of Parliament])” before the King could be removed for violating his loyalty oaths.³⁹

By the end of the sixteenth century then, Poland had clearly established the political dominance of the *Sejm* and its constituency, the nobility. And the nobility exercised its power defensively — to secure its own liberties. This is evident in the

³⁸ BRZEZINSKI, *supra* note 32, at 36-37.

³⁹ Wagner, *supra* note 25, at 137. This was, in essence, a progenitor of impeachment procedures.

“ancient” institution of the *liberum veto*,⁴⁰ which established unanimity as the rule for parliamentary action. A single legislator could prevent the 236-member *Sejm* from acting merely by stating “Veto” or “*Nie pozwalam*” (“I do not allow it”). The philosophical basis of this right was the *szlachta*’s credo: “*Nierządem Polska stoi*” (“It is by unrule that Poland stands”).⁴¹

Although legally subordinate to the *Sejm*, the King exercised substantial power in the everyday governance of Poland. The *Sejm* met for only six weeks every two years, leaving the King in almost unfettered control for the other 98 weeks. Most significantly, the King’s estate was by far the country’s largest; he was lord over one-sixth of Poland’s land and inhabitants.⁴² The King was also the “natural protector of the lesser nobles against the magnates, and of the weaker estates — burghers, Jews, peasants and clergy — against the nobility as a whole.”⁴³

Nevertheless, the nobility was dominant. And with so much political power vested in that one estate, sixteenth-century Poland could hardly be considered a democracy in the modern sense.⁴⁴ It was, however, far more democratic than any of its European neighbors of the same era. Contrary to the assertions of some Marxist

⁴⁰ DAVIES, *supra* note 23, at 345.

⁴¹ *See id.*

⁴² *Id.* at 335.

⁴³ *Id.*

⁴⁴ *See generally* James Miller, *The Sixteenth-Century Roots of the Polish Democratic Tradition*, in *POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 11* (M.B. Biskupski & J.S. Pula eds., 1990).

historians, the “golden freedoms” of sixteenth-century Poland did not belong to the nobility alone.⁴⁵ In acting defensively to secure its own liberties, the nobility also protected, in varying degrees by law and in fact, the personal and religious liberties of other estates (generally excepting the peasantry, admittedly the largest estate).

Religious liberties were extended to minorities in Poland as early as the twelfth and thirteenth centuries, when laws were enacted to protect Jewish religious practices and customs, providing that Jews should not be required to desecrate the Sabbath, even for judicial proceedings. The law recognized the Jewish oath as valid in court, and permitted Jewish ritual slaughtering of animals.⁴⁶ In 1264 King Bolesław the Pious placed the Jews under royal protection, assuring their right to settle and live safely in Poland without fear of persecution. More specifically, the 1264 law provided that: no Christian could testify in a case involving the person or property of a Jew, unless corroborated by a Jewish witness; any Christian who wounded a Jew would be fined and forced to pay compensation; any Christian who murdered a Jew would be “punished by proper judicial action” and forfeit all his property; no Jew could be obstructed from entering Poland; Jews could freely buy and sell anything; and

⁴⁵ See, e.g., *Introduction*, in *POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 2* (M.B. Biskupski & J.S. Pula eds., 1990) (discussing and criticizing the emphasis Polish Marxists have attached to “the selfish class interests” of the nobility in sixteenth-century Poland).

⁴⁶ See BERNARD D. WEINRYB, *A SOCIAL AND ECONOMIC HISTORY OF THE JEWISH COMMUNITY IN POLAND FROM 1100 TO 1800* 121 (1973).

Christians were obligated to help Jews in need of assistance.⁴⁷

Jews had been in Poland at least since the ninth century (predating the introduction of Catholicism), establishing separate communities alongside Polish cities and villages. By a law of 1367, these Jewish communities, called *kahaty* were given substantial autonomy to establish their own organizations and tribunals.⁴⁸ By the sixteenth century some 150 thousand Jews lived in Poland, mostly in and around the larger cities, and they were self-governed by Jewish parliaments known as *waady*.⁴⁹ Jewish liberties in Poland were not absolute, however. Aside from the continual, unofficial intolerance they suffered from burghers and peasants, Jews were also *legally* prohibited from owning land, taking out tenancies, leasing state revenues, and trading in royal cities.⁵⁰ Nevertheless, Jews *did* own land, take out tenancies, and even refused to pay taxes under protection of the nobility.⁵¹

The nobility “cultivated a special relationship” with Jewish communities for reasons that were largely economic. Unlike most other European countries, Poland allowed Jews to establish businesses and engage in various trades; they were not

⁴⁷ The Privilege of 1264 is reprinted in translation in W. SOROKA, BASIC SOURCES RELATED TO THE HISTORY OF EASTERN AND CENTRAL EUROPE: A SELECTION 17-19 (1966).

⁴⁸ This law is discussed in Wagner, *supra* note 25, at 133.

⁴⁹ See Jerzy Kłoczowski, *Some Remarks on the Social and Religious History of Sixteenth-Century Poland*, in THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT 96, 106 (S. Fiszman ed., 1988).

⁵⁰ See WEINRYB, *supra* note 46, at 121.

⁵¹ See DAVIES, *supra* note 23, at 213.

restricted to money-lending. Because Poland's Jews could become debtors as well as creditors, the nobles who lent Jews money to start businesses or trades were incented to ensure their well-being.⁵² Consequently, when the King abandoned his *legal* responsibility to protect the Jews, the nobility became, first, their *de facto* protectors and, later, their new *legal* protectors (under laws enacted in 1539 and 1549).⁵³ Under the nobility's auspices, Jewish tradesmen were able to circumvent cumbersome town-guild regulations, and Jewish financiers were able to loan money at favorable interest rates set by the *Sejm*.⁵⁴ And, like other minority groups in Poland, Jews were able to lobby the *Sejm* to protect their rights; they contributed to officials and attended meetings of Parliament.⁵⁵

In sum, in the sixteenth century, while Jews were being expelled from whole regions of Germany, Austria, and Bohemia, they lived in Poland in relative peace and prosperity. With the exception of the "Catholic elite," their situation in Poland differed little from that of any other group.⁵⁶ Indeed, they were not the only minority group to prosper under the political reign of the nobility. The *szlachta* became the guarantors of religious liberty for *all* parties in Poland throughout the Renaissance and into the

⁵² See WEINRYB, *supra* note 46, at 131.

⁵³ While this change was generally favorable for the Jews, it did give some "capricious or cruel lords . . . a virtually free hand to oppress their Jews at will." *Id.* at 112, 120.

⁵⁴ *Id.* at 114, 157.

⁵⁵ *Id.* at 148-49.

⁵⁶ See *id.* at 114, 157.

Counter-Reformation.

Every law the *Sejm* enacted which protected religious or civil liberty had its roots in the nobility's struggle to retain its own political rights. And the *szlachta* resisted every call for religious persecution out of fear that legally sanctioned intolerance might result in increased royal authority at their expense.⁵⁷ But their motivations were not only political and economic; a real streak of libertarianism runs through their writings. For example, Jan Zamoyski, Chancellor of the Polish Crown in the sixteenth century (during the reign of King Stefan Batory), wrote, "I would give half my life if those who have abandoned the Roman Catholic Church should voluntarily return to its pale; but I would prefer giving all my life than to suffer anybody to be constrained to do it, for I would rather die than witness such an oppression."⁵⁸ Even the King, Zygmunt August (the last of the Jagiellonian dynasty), reflected the religious tolerance of his time when he wrote, "I am not king of your consciences, I wish to be monarch equally of the sheep and of the goats, I am afraid of tearing wheat as well as tares."⁵⁹

Poland had been officially Catholic since the tenth century, but while other

⁵⁷ TAZBIR, *supra* note 28, at 122.

⁵⁸ Quoted in WACŁAW LEDNICKI, LIFE AND CULTURE OF POLAND AS REFLECTED IN POLISH LITERATURE 47 (1944). Zamoyski had received his doctorate in law at Padua, and subsequently served as rector of the law school there. He later founded his own aristotelian Academy in his home town of Zamość. See Robert I. Frost, "Liberty without License?" *The Failure of Polish Democratic Thought in the Seventeenth Century*, in POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 29, 39 (M.B. Biskupski & J.S. Pula eds., 1990).

⁵⁹ Quoted in LEDNICKI, *supra* note 58, at 47.

Catholic countries were persecuting their religious minorities and executing dissidents (especially during the Reformation), Poland consistently permitted its minorities and dissidents to pursue their own religious beliefs and practices unhindered. In the eighteenth century, the French Catholic Rulhiere wrote of sixteenth-century Poland: “This country, which in our day we have seen divided on the pretext of religion, is the first state in Europe that exemplified tolerance. In this state, mosques arose between churches and synagogues.”⁶⁰ Indeed, in 1616 there were more than 100 mosques in Poland.⁶¹

Religious toleration was not only official policy in sixteenth-century Poland; it was the law, codified in the 1573 Warsaw Confederation, reputed to be the first document in European history to constitutionalize religious toleration.⁶² It provided:

. . . because there is not a small dissension in our country in the matter of the Christian religion, we should like to prevent any harmful sedition that could develop among the people for this reason. What we see in other kingdoms, we promise to all on our behalf and for our successors, for eternity, under oath, faith, honor, and our conscience, that no matter who the dissidents from the religion [Roman Catholicism] are, we shall preserve peace among us, and not shed blood for difference in religion or in Church observance. We shall not penalize ourselves for this reason by confiscation of landed estates, by punishment of honor, by imprisonment or exile. We also promise not to help in any way the authorities or officers in such a procedure. We all shall be obliged to oppose the shedding of blood, even if

⁶⁰ *Quoted in id.*

⁶¹ DAVIES, *supra* note 23, at 190.

⁶² See Miller, *supra* note 44, at 21.

anyone would want to do this for a good reason, under the pretext of a decree or of any court procedure. . . .

We have promised for ourselves and for our descendants to seriously respect and to preserve all those matters under the authority of our faith, honor and conscience. And we shall stand up against anyone who would like to oppose peace and to spoil public order; we shall stand up against him for his perdition.⁶³

These guarantees applied officially only to the nobility but nevertheless resulted in a degree of religious freedom in Poland found nowhere else in Renaissance or Reformation Europe (with the possible exception of Transylvania). And although religious freedom was not *legally* extended to the lesser estates, they too benefitted from the pervasive spirit of toleration that the Warsaw Confederation exemplified. Throughout the entire sixteenth century, only two persons in Poland lost their lives for their religious beliefs as a result of legal proceedings.⁶⁴

Despite its pious and philosophical language, the aims of the Warsaw Confederation were largely political. It represented the nobility's anti-clericalism, rooted in fear of absolute monarchy. Thus, the Warsaw Confederation's underlying theme: "let no one try to upset the political balance of the country on allegedly religious grounds."⁶⁵ But the Confederation also represented the nobility's sincere and oft-

⁶³ Quoted in SOROKA, *supra* note 47, at 44-46. A complete version of the Warsaw Confederation is reprinted (in the original Latin) and translated into English in POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 131 (M.B. Biskupski & J.S. Pula eds., M.B. Biskupski trans., 1990).

⁶⁴ TAZBIR, *supra* note 28, at 117, 122.

⁶⁵ *Id.* at 99.

expressed desire for peace in the country. As one signatory, the Catholic Bishop Francis Krasiński, explained, the Warsaw Confederation was not opposed to religion generally nor the “true faith” in particular; “[i]t merely substituted for the greater evil of war and bloodshed the lesser one of granting the dissidents certain rights.”⁶⁶ What gave this argument weight was the fact that the nobility was divided among itself on the subject of religion.

During the Reformation a great many Polish noblemen converted to Calvinism, Lutheranism, Polish Antitrinitarianism, and the Czech Brethren.⁶⁷ At one point in officially Catholic Poland, Roman Catholics did not even command a majority in the *Sejm*.⁶⁸ Religious conflict would have pitted noble against noble, to the advantage of the Crown. But the *szlachta*’s caste solidarity was too strong to permit this, as exemplified in Piotr Myszkowski’s famous appeal to the *Sejm* of 1565: “*Rozumienie różne Pismaświątego niech miłości nie targa między nami*” (“Let not the different understanding of the [Sacred] Scripture shatter the love between us”).⁶⁹ The nobility understood that they all had more to lose from religious conflict than any fraction of them stood to gain.

⁶⁶ Quoted in *id.* at 148.

⁶⁷ *Id.* at 54. Calvinism proved especially attractive to nobles because it “admitted the right of opposition to royal authority, but not by the general populous, only by their elected representatives.” *Id.* at 56. Thus, Calvin supported the nobility against both Crown and peasantry.

⁶⁸ Wagner, *supra* note 25, at 138.

⁶⁹ TAZBIR, *supra* note 28, at 50, 117, 121.

Despite the Warsaw Confederation and the nobility's self-interested policy of toleration, there was, of course, religious persecution in sixteenth-century Poland, though not to the same extent as in other European countries of the same era. Officially-sanctioned persecution was less common than unofficial intolerance. And in virtually every case where persecution was officially-sanctioned, it went unenforced. In the 1520s, for example, King Zygmunt August prohibited the propagation of Lutheranism in Poland under penalty of death, but his edict was never enforced.⁷⁰ In 1552 the King extended the jurisdiction of the Catholic clergy to cases of heresy, but he immediately suspended this grant of jurisdiction and later abrogated it entirely (in 1562-3).⁷¹ Perhaps he was persuaded by his commander of the royal armies, Jan Tarnowski, who argued in 1552 against ecclesiastical jurisdiction: "Cases of heresy . . . should be tried in the senate 'in full view of the whole nation, not in a bishop's cellar, under Polish, not Roman law.' Stressing his own attachment to the Catholic Church, Tarnowski wrote, '[t]his is not a matter of faith, but of liberties which your court violated.'" ⁷² Even the most fanatical of Poland's Catholic writers, Piotr Skarga, acquiesced in the general atmosphere of tolerance. For all his polemics against heretics, Skarga repudiated violent methods: "Heresy is bad, but our neighbors and good brothers sharing our love of country know that nothing won by force is durable,

⁷⁰ *Id.* at 42.

⁷¹ *Id.* at 65, 68, 82.

⁷² *Id.* at 64.

that anything secured under duress does not last long.”⁷³

With freedom of religion in sixteenth-century Poland came substantial freedom of expression. Intellectuals from throughout Europe flocked to Poland, knowing that there they could freely express and publish their views. In 1561 Bonifacio d’Oria, a religious exile living in Poland, wrote of his adopted country’s virtues to a colleague back in Italy: “You could live here in accordance with your ideas and preferences, in great, even the greatest freedoms, including writing and publishing. No one is a censor here.”⁷⁴ This was an exaggeration. There was official censorship in Poland dating from the introduction of printing. But in the sixteenth century, censorship was only sporadic and, more often than not, ignored without consequence.

Dissident publishing houses arose throughout the Polish-Lithuanian Republic, producing everything from Bibles written in the vernacular to polemics against the Catholic Church, with little state interference.⁷⁵ In 1551 Church censors attempted to suppress Andrzej Frycz Modrzewski’s classic, *de Republica emendanda*, which advocated, among other things,⁷⁶ reform of the Church. Despite their efforts, the book

⁷³ *Id.* at 149.

⁷⁴ *Id.* at 133.

⁷⁵ *Id.* at 140, 144.

⁷⁶ In addition to church reform, Frycz Modrzewski’s *de republica emendanda* advocated the improvement of the state through reform of customs, laws, and education. Strongly influenced by Erasmus, Frycz Modrzewski attacked the unwise, innane, and grossly inequitable political and social customs of his own country. In particular, he took on his own class, the ruling *szlachta*. Just as the Polish nobility denied the inborn superiority of kings, so Frycz Modrzewski rejected the inborn superiority of the nobility in calling for a state governed by men distinguished by merit rather than birth. As merit required education, Frycz

was widely available in Poland by 1554. Frycz Modrzewski shrewdly dedicated it to King Zygmunt August, who declared that its author should not be punished.⁷⁷ An index of banned books was published for the first time in Poland only in the seventeenth century, and it too was rarely enforced. When it was enforced, books were never destroyed; instead, they were placed in a special closed section of the Jagiellonian University library in Kraków.⁷⁸ Until 1627, no Polish noble was punished for publishing a heretical tract, and no writer or publisher ever forfeited his life.⁷⁹

The pervasive freedom of expression and conscience in sixteenth-century Poland created an atmosphere of great intellectual ferment. Poland became a premier center of knowledge and learning as religious and intellectual exiles immigrated there to avoid the persecution they suffered elsewhere in Europe. They joined native intellectuals, including Copernicus, the poet Jan Kochanowski, Frycz Modrzewski, and Wawrzyniec Goślicki.

Goślicki, in particular, personified Poland's "Republic of Nobles." He was a son of the nobility, born near Płock, and educated in Kraków, Padua, and Bologna, from

Modrzewski became the first of the Humanists to call for secular control of schools and education directed toward public service. Modrzewski also argued in *de Republica emendanda* for the abolition of serfdom, equality before the law, and the mediation of international conflicts instead of war. His work was highly influential with the likes of Grotius, Bayle, and de Real. See Waldemar Voisé, *Polish Renaissance Political Theory: Andrzej Frycz Modrzewski*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 174 (S. Fiszman ed., 1988).

⁷⁷ TAZBIR, *supra* note 28, at 139. Also see Siemieński, *supra* note 29, at 61.

⁷⁸ TAZBIR, *supra* note 28, at 143.

⁷⁹ *Id.* at 144.

whose university he received a doctorate in civil and canon law in 1566. After completing his education, Goślicki travelled to Rome, where he wrote the book that brought him fame across Europe: *de Optimo Senatore* (“The Accomplished Senator,” first published in Venice in 1568).⁸⁰ Goślicki later served as Chancellor of Poland and as Bishop of Poznań, which position he held when he died in 1607.⁸¹

Goślicki intended *de Optimo Senatore* as a primer on good government,⁸² but it turned out to be an original and influential work of political philosophy. Presaging the Enlightenment, Goślicki equated godliness with reason and reason with law.⁸³ He argued for the rule of law as a constraint on both Parliament and the Crown. And he asserted in no uncertain terms the ultimate sovereignty of the people:

Sometimes a People, justly provoked and irritated by the
Tyranny and Usurpations of their *Kings*, take upon
themselves the undoubted Right of vindicating their own

⁸⁰ For a recent translation of this work from the original Latin, see LAURENCE GRIMALD GOZLISKI, *THE ACCOMPLISHED SENATOR* (K. Thompson trans., 1992). A facsimile of a 1598 English translation of *de Optimo Senatore* is reprinted in WITOLD CHWALEWIK, *ANGLO-POLISH RENAISSANCE TEXTS* (1968). However, the accuracy of the 1598 translation has been disputed. See W.J. STANKIEWICZ, *THE ACCOMPLISHED SENATOR OF LAURENTIUS GROSLICIUS* 11-12 (1946); Teresa Bałuk-Ulewiczowa, *The Senator of Wawrzyniec Goślicki and the Elizabethan Counsellor*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 258, 265-72 (S. Fiszman ed., 1988). Oddly, Goślicki’s book was not translated into Polish before the present century. See H.E. Tytus Filipowicz, *The Accomplished Senator*, in 26 *PROCEEDINGS OF THE AMER. SOC. INT’L L.* 234, 234 (1932).

⁸¹ For biographical information about Goślicki see Wagner, *supra* note 35, at 105-08.

⁸² Such primers, known as *specula* or “mirrors,” were quite popular during the Renaissance, Machiavelli’s *The Prince* being a prime example of the genre. See Bałuk-Ulewiczowa, *supra* note 80, at 258.

⁸³ GOZLISKI, *supra* note 80, at xxix.

Liberties; and by a well-formed Conspiracy, or by open arms, shake off the Yoke, drive out their Lords and Masters, and take the Government entirely into their own Hands...⁸⁴

An unfamiliar reader might suppose that these words were written two hundred years later by Thomas Jefferson. Indeed, intellectual historians have attempted to trace a direct line of influence from Goślicki, through Father Bellarmine and Algernon Sydney, to Jefferson.⁸⁵ However, a direct connection between *de Optimo Senatore* and the American Declaration of Independence remains doubtful. Yet, there is no doubting that Goślicki's work made quite a splash in England when an anonymous (and not very careful) translation appeared in London in 1598.⁸⁶ The book became immensely

⁸⁴ *Id.* at 32-33. According to Filipowicz, *supra* note 80, at 238, this was the "earliest statement in a political treatise of the right of revolution." It should be pointed out, however, that Goślicki defined the term "People" narrowly to exclude "a Mix'd Multitude of Rusticks, Boors, and Mechanicks, the Mob and Rabble, the Scum and Less of a Country." Goślicki defined the "People" as "a Regular Body of Citizens and Subjects, generous by Birth, civilized by Education, and every way duly qualified to fill the Publick Offices of a State, whenever they shall be legally Invited and Advanced thereto." GOZLISKI, *supra* note 80, at 38. Consistent with the prevailing aristotelian political philosophy of sixteenth-century Poland, Goślicki plainly preferred republican to democratic government. See generally Frost, *supra* note 58.

⁸⁵ See generally *id.* and Wagner, *supra* note 35.

⁸⁶ Queen Elizabeth herself may have been acquainted with the book. See Bałuk-Ulewiczowa, *supra* note 80, at 273. And William Shakespeare certainly read it. Indeed, when the English translation of Goślicki's book first appeared, Shakespeare was working on his masterpiece, *Hamlet*. Apparently, Goślicki's book induced Shakespeare to greatly expand the role of the King's Counsellor in *Hamlet* and to give him the name Polonius ("A Pole" in Latin). See ISRAEL GOLLANCZ, A BOOK OF HOMAGE TO SHAKESPEARE (1916); also see Filiopowicz, *supra* note 80, at 239-40. Of course, Polonius was an object of ridicule in *Hamlet*. An English Shakespeare scholar has suggested that Shakespeare's intent was also to ridicule Goślicki's work. But a Polish Shakespeare scholar, citing textual similarities between Goślicki's book and *Hamlet*, argues that Shakespeare merely adapted to his own purposes Goślicki's own derogatory description of a common type of inferior counsellor. Compare GEOFFREY BURROUGH ED., VII NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE 44-45 (1973) and CHWALEWIK, *supra* note 80, at 96.

popular among forces opposed to the Tudor monarchy; it was widely quoted and cited in opposition pamphlets and leaflets during the period leading up to the British Civil Wars of the 1640s.⁸⁷

More importantly, *de Optimo Senatore* reflected the prevalent political philosophy of the Polish-Lithuanian Republic in the second-half of the sixteenth century: it affirmed the sovereignty of the “people”⁸⁸ and limited government under the rule of “transcendent” law.⁸⁹ Goślicki’s writings both reflected and propagated Poland’s libertarian constitutional system — a system with well-established institutions and a well-defined political philosophy. Though not embodied in a single document called “Constitution,” sixteenth-century Poland was nonetheless a constitutional Republic.

Poland in the 17th-18th Centuries: Political and Economic Decline, the 1791 Constitution, and Partition

Without doubt the most revered legal/political document in Polish history is the May 3, 1791 Constitution. It represents for most commentators “the blossoming of constitutional government in Poland.”⁹⁰ Its date of adoption continues to be celebrated as Constitution Day in Poland. But this has less to do with the Constitution’s merits

⁸⁷ See Filipowicz, *supra* note 80, at 32.

⁸⁸ On Goślicki’s conception of the “people,” see *supra* note 84.

⁸⁹ BRZEZINSKI, *supra* note 32, at 35-36.

⁹⁰ *Id.* at 39; see also, e.g., Zbigniew Szcząska, *The Fundamental Principles Concerning the Political System of the 3 May, 1791 Government Statute*, in CONSTITUTION AND REFORM IN EIGHTEENTH-CENTURY POLAND 287 (S. Fiszman ed., 1997).

than what it represents for the nation: a statement of the Polish state's principles on the brink of its dismemberment by foreign powers.

On its merits, the 1791 Constitution was, indeed, a remarkable document for its time — the first written constitution in modern European history and the second in modern world history. But it also marked a retreat from many of the civil and religious libertarian principles that had characterized sixteenth-century Poland.

Between the end of the sixteenth century and the enactment of the 1791 Constitution, political and economic conditions in Poland deteriorated. As Mark Brzezinski has written, “the important, but unrefined, constitutional reforms developed in Poland during the thirteenth through sixteenth centuries became distorted in the course of the seventeenth and eighteenth centuries, leading to an inefficient and ineffective Polish government.”⁹¹ According to the standard historical account, the cause of this “distortion” was Poland's increasingly unbalanced power structure, as the nobility curtailed the King's authority and limited state power to such an extent that the Polish-Lithuanian Republic was paralyzed, unable to defend itself against the growing power of foreign aggressors.⁹² From the end of the sixteenth century to the middle of the eighteenth century, Poland lost half its territory to Russia, Prussia, Sweden, and Austria-Hungary. In 1795, Poland “vanished completely” from the map of Europe, not to re-appear as an independent state until the end of World War I.⁹³

⁹¹ BRZEZINSKI, *supra* note 32, at 39.

⁹² *See, e.g., id.*

⁹³ DAVIES, *supra* note 23, at 24.

As the Polish state came under increasing foreign domination during the seventeenth and eighteenth centuries, nationalism emerged as an almost natural defensive mechanism. According to a nineteenth-century adage, a “nation” is a group of people who combine a common mistake about shared ancestry with animosity towards “others.” But there is more than one kind of nationalism. Hans Kohn distinguished two types of nationalism, which he labelled “western” and “eastern.” Western-style nationalism is a relatively benign variety, based on shared political heritage. The eastern variety is a more menacing cultural or ethnic nationalism, based on shared language or, as the old adage has it, “a common mistake about shared ancestry.”⁹⁴ These two forms of nationalism are not different in kind; they represent widely separated points on a single continuum.

Poland moved from the “western” toward the “eastern” end on that continuum between 1650 and the end of the eighteenth century. As it did, traditional civil and religious liberties were eroded. The Polish state grew less tolerant of “non-Poles” (specifically, Jews) and religious dissidents. Freedom of speech and religion were restricted. Ironically, this took place in Poland just as other European countries moved towards the increased liberalism of the Enlightenment.

As Poland entered the Enlightenment era, western-style nationalism developed

⁹⁴ See HANS KOHN, *THE IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND* (1944). Andrzej Walicki has criticized Kohn’s dichotomy between (benign) “western” and (malign) “eastern” nationalism, but he does so by showing how Poland moved from the western to the eastern variety during the seventeenth and eighteenth centuries. ANDRZEJ WALICKI, *THE ENLIGHTENMENT AND THE BIRTH OF MODERN NATIONHOOD: POLISH POLITICAL THOUGHT FROM NOBLE REPUBLICANISM TO TADEUSZ KOSCIUSZKO* (1989).

as a benign attribute of popular sovereignty, *i.e.*, the right of “a people” to govern themselves. This idea had been common currency in sixteenth-century Poland, as exemplified in Goślicki’s *de Optimo Senatore*.⁹⁵ Unfortunately, by the middle of the eighteenth century the Polish state had atrophied and Poland’s neighbors, particularly Russia, asserted ever-increasing influence over its domestic affairs. In this period, with partition of the country looming, Polish nationalism began to take on the more malignant ethnic and xenophobic features of eastern-style nationalism. As we shall see, some of these features are evident in the 1791 Constitution itself.

Meanwhile, many of the 1791 Constitution’s more progressive features, such as legislative superiority, *habeas corpus* (which the 1791 Constitution extended to all property owners), religious liberty, and Article V’s declaration that all power emanates from the will of the people, were rooted in sixteenth-century legislation and the legal/political theories of Frycz Modrzewski, Goślicki, and others.

Even the idea of decentralizing state power was *not* an innovation of Poland’s 1791 Constitution. In the sixteenth and seventeenth centuries, all nobles participated in *sejmiki* (provincial assemblies) which elected deputies to the *Sejm* (National Assembly). They did not send their deputies to Warsaw with plenipotentiary powers, but compelled them to follow instructions that were often quite detailed. Upon returning home from a biennial six-week meeting of the *Sejm*, deputies were required to report to their *sejmiki* on deliberations and actions taken in Warsaw. If a deputy

⁹⁵ See *supra* notes 80-89 and accompanying text.

was found to have deviated from his instructions, the *sejmik* would often refuse to implement the *Sejm's* enactments. “Thus ultimate political control remained at the local level.”⁹⁶ If anything, Poland’s system of government prior to the 1791 Constitution was already overly decentralized.⁹⁷

Ironically, many of the truly novel ideas of the 1791 Constitution — the true products of Poland’s “Enlightenment” — appear regressive in light of Poland’s earlier constitutional history. These regressive ideas included the reinstatement of hereditary monarchy, voting restrictions that disenfranchised hundreds of thousands of nobles, and restrictions on religious freedoms.

The first article of Poland’s 1791 Constitution is often pointed to as a hallmark of progressive liberalism, guaranteeing freedom of religion to all citizens of Poland.⁹⁸ But it often goes unnoticed that article I expressly limited this guarantee to practices “according to the laws of the land.”⁹⁹ Thus, the Constitution guaranteed only as much freedom of religion as state policy sanctioned. Such an empty guarantee was worthy of Poland’s infamous Communist Constitution of 1952.¹⁰⁰ Moreover, the 1791

⁹⁶ Frost, *supra* note 58, at 48.

⁹⁷ As Frost notes, “the representative principle which underlies all modern democratic systems was actively resisted in favor of delegation.” *Id.*

⁹⁸ See, e.g., BRZEZINSKI, *supra* note 32, at 44.

⁹⁹ POL. CONST. [1791], art. 1, *reprinted in* POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 168, 169 (M.B. Biskupski & J.S. Pula eds., C. Kasperek trans., 1990).

¹⁰⁰ On the 1952 Constitution, see *infra* notes 137-149 and accompanying text.

Constitution reversed sixteenth-century Poland's tradition of religious tolerance and, in effect, abrogated the 1573 Warsaw Confederation by prohibiting dissidence. Article I provided: "Passage from the dominant religion [Roman Catholicism] to any other confession is forbidden under penalties of apostasy."¹⁰¹ In addition, article III of the 1791 Constitution incorporated in full the Cities Act, enacted earlier that year by the *Sejm*, which, among other things, limited *habeas corpus* protections, and denied non-Christians (particularly Jews) citizenship in the royal cities. This marked a fundamental change in official Polish-Jewish relations, and reflected the rise of anti-semitism among the higher estates (the Crown and *szlachta*). Once anti-semitism became official state policy — indeed, constitutional law —, Poland quickly became one of the most virulently anti-semitic countries in Europe (which is saying a lot). Finally, the Constitution marked the end of unity among the nobility, as "roughly 400,000 propertyless nobles lost their political rights and declined to the status of free citizens in either the burgher or peasant estate depending on residence and occupation."¹⁰²

These more regressive, anti-democratic, and anti-libertarian features of Poland's 1791 Constitution reflected the domestic political and legal theories of the day, which had grown increasingly nationalistic since the close of the sixteenth century. For example, Father Hugo Kołłątaj, "[a] leading member of the Polish Enlightenment" and

¹⁰¹ POL. CONST. [1791], art. 1.

¹⁰² Daniel Z. Stone, *Democratic Thought in Eighteenth Century Poland*, in POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 55, 67 (M.B. Biskupski & J.S. Pula eds., 1990).

“a major architect of the May 3, 1791 Constitution,”¹⁰³ respected the rights of religious minorities to live in Poland but not necessarily to follow their religious practices. He wrote that “[a]ll Jews permanently or temporarily settled in the states of the Commonwealth, without exception, are to shave their beards, cease to wear Jewish robes, and wear those that are used by Christians in the states of the Commonwealth, the supervision of which we entrust to the voivodship (regional) commissions, in the normal term for law, one year from promulgation.”¹⁰⁴ He also proposed compulsory assimilation of Jews. These proposals were not only inconsistent with Kołłątaj’s professed respect for “the rights of Jews as a religious minority”¹⁰⁵ but violated Jewish liberties granted by Polish kings and Diets since the thirteenth century.

In the final analysis, the legacy of the 1791 Constitution is far more complex than most scholars care (or dare, given the almost mythical status of the Constitution in the popular imagination) to admit. Over the centuries, the 1791 Constitution has become a document of great importance for Poland, not so much for the values it incorporated as for what it came to symbolize: Poland’s national identity on the brink of partition. For Poles it represents a legacy of independence, sovereignty, democracy, and what Mark Brzezinski calls a “mature political culture,” which they were unable

¹⁰³ Joan S. Skurnowicz, *Polish Szlachta Democracy at the Crossroads, 1795-1831*, in *POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS* 73, 75 (M.B. Biskupski & J.S. Pula eds., 1990).

¹⁰⁴ *Quoted in* WALICKI, *supra* note 94, at 74.

¹⁰⁵ *Id.*

to recover for 200 years (before 1989).¹⁰⁶ But that same Constitution abandoned some of Poland's most noble principles, including those embodied in the 1573 Warsaw Confederation. Most importantly, the 1791 Constitution accorded constitutional status to anti-semitism (by incorporating the Cities Act), creating a legacy with which Poland continues to struggle.

It is also worth noting, in light of debates over the legitimacy of Poland's new Constitution, that the 1791 Constitution was adopted through extraordinary, legally dubious procedures. Norman Davies and Jacek Jędruch have each referred to it as a "*coup d'état*."¹⁰⁷ Father Kołłątaj's Party intentionally introduced the draft Constitution to the *Sejm* on a day when two-thirds of the deputies were absent on holiday. "Queries about a quorum were quashed."¹⁰⁸ The Constitution was passed, and King Stanisław-August Poniatowski signed it. There was no public referendum to ratify the Constitution. The new supreme law of the land had been approved by less than one-third of the deputies to a legislative body that itself represented no more than 10 percent of the population, plus the King.

The 1791 Constitution remained in effect for only 14 months before Russia invaded Poland. After soundly defeating the vastly outnumbered Polish army, the Russians in January 1793 entered into an agreement with Prussia to partition Poland.

¹⁰⁶ BRZEZINSKI, *supra* note 32, at 45.

¹⁰⁷ DAVIES, *supra* note 23, at 534; JACEK JEDRUCH, CONSTITUTIONS, ELECTIONS AND LEGISLATURES OF POLAND, 1493-1977: A GUIDE TO THEIR HISTORY 212 (1982).

¹⁰⁸ DAVIES, *supra* note 23, at 534.

That marked the end of the *legal* life of the 1791 Constitution but secured that document's place as *the* romantic symbol of Polish independence.

But the story of the 1791 Constitution is not complete without some reference to the 1794 "National Rising" led by Tadeusz Kościuszko (any more than the story of the U.S. Constitution would be complete without reference to the subsequently enacted Bill of Rights). Indeed, Poland's 1794 "National Rising," more than the 1791 Constitution itself, was the "natural culmination of the reformist movement" in Poland.¹⁰⁹

On March 24, 1794 Tadeusz Kościuszko, a hero of the American Revolution (and a Brigadier-General in the U.S. Army), called on the Polish nation to take up arms and liberate itself from the foreign powers that had partitioned the country. The result was not simply an insurrection but a revolution. Even before the battle was joined, the leaders of the Rising had established a Supreme National Council to direct the creation of a new, independent government. But Kościuszko understood that the success of the revolt depended on the full participation of all estates, including the peasantry, which had little reason to fight under the 1791 Constitution. So, on May 7, 1794, Kościuszko issued the Manifesto of Połaniec,¹¹⁰ which "free[d] the peasantry as whole from servitude, halv[ed] their dues, and promis[ed] the help of insurrectionary authorities

¹⁰⁹ *Id.* at 538.

¹¹⁰ *Reprinted in* POLISH DEMOCRATIC THOUGHT FROM THE RENAISSANCE TO THE GREAT EMIGRATION: ESSAYS AND DOCUMENTS 189 (M.B. Biskupski & J.S. Pula eds., E. Hauser trans., 1990).

against the wrath of landowners.”¹¹¹ The Manifesto, in effect, amended the 1791 Constitution, and it brought out the peasantry *en masse*.” Fighting with scythes, they helped Kościuszko’s army rout General Tomasov’s Russian forces at Raclawice. Warsaw and Wilno were liberated. Poland briefly reemerged as an independent and somewhat more democratic country.¹¹²

Poland’s restored independence was short-lived, however. The Russians and Prussians combined to suppress the uprising. They amassed a vast army against Kościuszko’s rag-tag irregulars. By October 1794 the greatly outnumbered Polish forces were virtually surrounded at Maciejowice, near Warsaw. Kościuszko was wounded and taken prisoner by the Russians. The revolution had failed. It was “the end of Poland.”¹¹³ Indeed, the Treaty of Partition signed by Russia, Prussia, and Austria-Hungary at St. Petersburg in 1797 provided (in part) that “the name . . . Kingdom of Poland . . . shall remain suppressed as from the present and forever.”¹¹⁴

The Constitution of Poland’s Second Republic, 1918-39

From the fall of 1794 to the end of World War I in 1918, Poles were subjects of foreign tsars, kings, and emperors. No country named “Poland” appeared on the map

¹¹¹ DAVIES, *supra* note 23, at 539.

¹¹² It should also be noted that alongside the peasantry Jews fought in the “National Rising,” though they too were not citizens of the Polish state under the 1791 Constitution. See Stone, *supra* note 102, at 71; Walicki, *supra* note 94, at 112.

¹¹³ DAVIES, *supra* note 23, at 541.

¹¹⁴ *Quoted in id.* at 542.

of Europe. In November 1918, following the collapse of the partitioning powers, Poland reasserted its sovereignty and re-constituted itself as an independent state.

Re-constituting the Polish state after a century-and-a-quarter of partition proved to be no mean feat. Regions of the newly reunited country were governed by disparate social, cultural, economic, political, and legal norms of three foreign sovereigns: Russia, Prussia (Germany), and Austria-Hungary. Mark Brzezinski illustrates the problem of reunification by pointing out that six different currencies were in use throughout Poland's Second Republic until 1920.¹¹⁵ But currency conversion was hardly Poland's greatest concern. "Unifying the legal system proved even more difficult. The existence of three primary legal systems, combined with recalcitrant provincial jurisdictions, frustrated the achievement of a unified national system."¹¹⁶ Under the circumstances, it is remarkable that the process of adopting a new constitution, which began in 1919, took only two years to complete.

The resulting 1921 Constitution is interesting because it appears to continue many of the traditions of Poland's earlier written and unwritten constitutions. The preamble to the 1921 Constitution proclaimed that it the government of the Second Republic would "adhere to the glorious tradition of the immortal Constitution of May

¹¹⁵ BRZEZINSKI, *supra* note 32, at 48.

¹¹⁶ *Id.* Other analysts have noted four or even five separate legal systems operating in partitioned Poland; in addition to Russian, Prussian (German), and Austrian law, some regions were subject to laws introduced during the Napoleonic wars, and a couple of areas in the South were subject to Hungarian law. See Bronisław Hełczyński, *The Law in the Reborn State*, in POLISH LAW THROUGHOUT THE AGES: 1,000 YEARS OF LEGAL THOUGHT IN POLAND 139, 139 (W.J. Wagner ed., 1970).

3d [1791].”¹¹⁷ But the primary model for the 1921 Constitution was *not* Poland’s 1791 Constitution but the French Constitutional Laws of 1875, which to members of Poland’s Constitutional Commission embodied “the essence of democracy, popular will represented in a directly elected Parliament which stands at the head of the state.”¹¹⁸ The idea of combining a strong, directly-elected Parliament with a (relatively) weak executive certainly was not novel in Polish constitutional thought or practice. What was new was the broader democratic focus: the 1921 Constitution was the first in Poland’s history to reject monarchy altogether and establish participatory democracy based on proportional representation regardless of social class.

Poland’s Constitutional Commission intentionally followed historical precedent in creating a weak executive (labelled “President” rather than King) specifically to avert the prospect of despotism. In the sixteenth and seventeenth centuries, concerns about despotism masked the ruling nobility’s more practical concern to maintain its own liberties. But in 1921 the concern with despotism was more immediate. Poland’s largest political party, the National Democratic Party, led by ardent nationalist and unabashed anti-semite Roman Dmowski, feared that a strong presidency would “allow a single dynamic leader” in the person of Marshal Józef Piłsudski, charismatic hero of Poland’s 1920 war against Russia,¹¹⁹ head of Poland’s provisional government, and self-

¹¹⁷ *Id.* at 196.

¹¹⁸ BRZEZINSKI, *supra* note 32, at 48.

¹¹⁹ In 1919, following Germany’s withdrawal from the Ober-Ost region, the Polish Army, led by Marshal Piłsudski, reclaimed Wilno (today, Vilnius, Lithuania, which was Piłsudski’s birthplace) and Minsk. This irked the Russian Bolsheviks, who were still

styled (non-Marxist) socialist, “to dominate the government.”¹²⁰

In the opinion of some analysts, concerns about Piłsudski led the framers of the 1921 Constitution to create an unbalanced power structure that placed too much authority in the hands of a fragmented Parliament and too little in the hands of the executive. Mark Brzezinski has written that the 1921 Constitution created “an impotent ‘sejmocracy,’” with the *Sejm* possessing “virtual supremacy in the public policy-making process.”¹²¹ Indeed, the *Sejm* had exclusive responsibility under the Constitution for the national budget, constitutional amendments, the army, and taxation; “a simply majority vote of the *Sejm* could force a single minister, the entire cabinet, or even the President, to resign.”¹²² The President, by contrast, could not

enmeshed in domestic military struggles to consolidate their rule throughout greater Russia. They were not too busy with those domestic struggles, however, to rebuke Poland’s eastward advances. Moreover, the Soviets had designs of their own to expand communist rule to the West. By January 1920, the Red Army had amassed more than 700 thousand troops along a line that stretched from Latvia south to Romania. Piłsudski’s Polish Army, in a series of “sharp” attacks and “daring” marches delayed for several months a Soviet advance. But by the beginning of August 1920 the Red Army had advanced as far west as the suburbs of Warsaw. Denied military assistance by Britain and France, the Poles were on their own. However, “[a]t the very moment when the enemy was pausing to deliver the final blow, the Polish Army reformed in a maneuver of daring complexity.” Piłsudski’s Army managed to encircle the Russian forces and routed the Red Army. “A hundred thousand Russians were taken prisoner. Forty thousand fled into East Prussia. Three Soviet Armies were annihilated. The rest struggled eastwards in total disarray. This was the ‘Miracle on the Vistula.’” By the time the war ended with the signing of the Treaty of Riga on March 18, 1921, the Polish Army had pushed the Bolsheviks half way back to Moscow. The eastern borders of Poland’s Second Republic were secured (at least for the time being). NORMAN DAVIES, *II GOD’S PLAYGROUND: A HISTORY OF POLAND* 396-403 (1982)..

¹²⁰ BRZEZINSKI, *supra* note 32, at 50.

¹²¹ *Id.* at 48.

¹²² *Id.* at 49.

dissolve the *Sejm*; he did not even possess the authority to veto legislation. In time of war, the President could not serve as Commander-in-Chief of the armed forces but could only appoint one upon the recommendation of the Council of Ministers (the Prime Minister's Cabinet), which was directly answerable to the *Sejm*, not to the President.¹²³ In sum, the President's role was purely formal. For that reason, Marshal Piłsudski refused to accept the post, which he derided as a "gilded cage."¹²⁴

It has been argued that the power structure of the 1921 Constitution destabilized Poland politically at the very moment the country most required stabilization. Thus, Brzezinski concludes that the 1921 Constitution "provided a political structure that sowed the seeds of ineffective government, reminiscent of pre-1791 Poland."¹²⁵ But it is not at all clear that the Constitution itself was a significant cause of Poland's travails during the inter-war period. The 1921 Constitution certainly cannot be said to have caused the economic crisis that discredited successive Polish governments and ultimately led to Piłsudski's *coup d'état* in 1925. Poland might well have been better off with a stronger executive. A strong President might have been able to ameliorate Poland's economic difficulties at least marginally. Indeed, it is entirely possible that outright dictatorship would have provided Poland with greater stability than Poland's democratic constitution. But that would hardly provide cause

¹²³ *Id.* at 50.

¹²⁴ *Quoted in id.*

¹²⁵ *Id.* at 51.

to criticize the 1921 Constitution.

What must be remembered is that Poland was attempting to rebuild (more accurately, to build for the first time) a modern state and economy after a century-and-a-quarter of foreign rule, in post-war circumstances of massive geographic and ethnic dislocation and differentiation, high inflation, internal ethnic strife, as well as military hostility from Russia, the Ukraine, and Lithuania. That Poland managed to reconstitute itself at all is remarkable enough. And, when viewed in its historical context, Poland's 1921 Constitution was a remarkable document. It was an entirely modern and democratic constitution, which subordinated

the executive government to a bicameral Sejm elected by universal suffrage, guaranteed the legal equality and protection by the State of all citizens irrespective of 'origin, nationality, language, race or religion'; the abolition of hereditary and class privileges and titles; the rights of property, whether private or collective; the regulation of land-owning with a view to creating 'private farming units capable of adequate productivity'; the rights of free expression, freedom of the press, freedom of assembly, freedom of conscience, and religious practice; the right to unemployment and sickness benefit, to protection against the abuses of child, female, and injurious employment, to education at the expense of the state; and the retention by Minorities of their specific nationality, language, and character.¹²⁶

Unfortunately, this liberal-democratic constitution, with its promise of a welfare state, was implemented in a political climate of nationalism and radicalisms of all

¹²⁶ DAVIES, *supra* note 119, at 403-04.

stripes. Beyond the passage of the Constitution itself, disparate political parties could not agree on the nature or direction of state policies. Economic conditions, meanwhile, were horrific. Already high rates of unemployment and inflation were growing ever higher; investment capital was in short supply; and Poland's economy was under-industrialized to say the least. Norman Davies does not exaggerate when he suggests that "[i]n the first years of the Republic's existence, the entire economic system had to be constructed from scratch."¹²⁷ In such circumstances, no constitution, however perfect, could ensure stability. Indeed, the first governments of Poland's post-partition era may well have faced greater challenges than those that confronted the first post-communist government of Prime Minister Tadeusz Mazowiecki in 1989.

The political and economic problems that hampered successive governments in post-partition Poland, along with the perceived lack of necessary institutional reforms, led Marshal Piłsudski to stage a *coup d'état* in 1926 "against the system he himself had initiated."¹²⁸ Denying any intention to set himself up as a dictator, Piłsudski did not assume office in the new government he established — he created a political party, the *Bezpartyjny Blok Współpracy z Rządem* (BBWR),¹²⁹ to do that. Piłsudski preferred to operate behind the scenes, but there was no question who called the shots.

¹²⁷ *Id.* at 415.

¹²⁸ *Id.* at 421.

¹²⁹ In the early 1990s, Polish President Lech Wałęsa recreated the BBWR. Like Piłsudski before him, Wałęsa was motivated by a perceived lack of executive authority under the 1989 amendments to Poland's 1952 Constitution; in his view, that lack of executive authority obstructed efficient government.

The 1921 Constitution was amended after Piłsudski's *coup* to broaden the powers of the executive in order to provide for more effective and efficient government. Specifically, the 1926 Amendments authorized the president to issue decrees when the *Sejm* was not in session and gave the president, for the first time, the power to dissolve Parliament. This did not mean the end of parliamentary government in Poland, however. The *Sejm* still had to approve all presidential decrees issued between sessions.¹³⁰ Mark Brzezinski has suggested that, despite its undemocratic origins, the 1926 Amendments improved the 1921 Constitution by better balancing the respective powers of the legislative and executive branches, which provided greater stability to the structure of government.¹³¹ This may have been true as a formal, legal matter. But, in reality, the Amendments did not stabilize anything.

After Piłsudski's 1926 *coup* and the 1926 Constitutional Amendments, his regime, known as the *Senacja*, held power until the Nazi's invaded Poland in 1939. But its rule was hardly stable. Its short-lived governments came and went just like those before the *coup*. The 1926 Constitutional Amendments certainly did not stabilize Poland's economy, which continued to struggle, particularly after 1928-29, when the agricultural sector "fell into a decline from which it never fully recovered."¹³² Obviously, matters were not helped by the general economic decline that gripped all

¹³⁰ See BRZEZINSKI, *supra* note 32, at 53.

¹³¹ *Id.*

¹³² DAVIES, *supra* note 119, at 411.

of Europe in the wake of America's Great Depression.

By 1928 Piłsudski and his party had already grown dissatisfied with the balance of power under the 1926 Amendments to the 1921 Constitution; they called for a complete constitutional rewrite to provide even greater executive authority, so that the president could “act effectively and decisively” to solve the nation's economic problems.¹³³ His party submitted a new constitutional draft for parliamentary consideration in 1931. The final version, signed into law on April 23, 1935, was designed for a strong ruler. It declared that “the one and undivided power of the state was concentrated in the person of the President of the Republic and that the government, the *sejm*, the senate, the armed forces, the tribunals, and the state audit were subordinate to him.” The president, meanwhile, was answerable only to “God and history.”¹³⁴ The 1935 Constitution thus marked “a decisive break with liberal parliamentarianism.”¹³⁵

The 1935 Constitution was tailor-made for Marshal Piłsudski, but ironically he died just three weeks after its enactment. Piłsudski was entombed in Kraków's Wawel Cathedral, the final resting place of Polish kings. After his death Poland was left essentially leaderless. In the new constitutional system, the *Sejm* was institutionally too weak to run the country; the President held the lion's share of power. But Piłsudski

¹³³ BRZEZINSKI, *supra* note 32, at 53.

¹³⁴ POL CONST. [1935], arts. 2 and 3.

¹³⁵ BRZEZINSKI, *supra* note 32, at 55-56.

had been the only man in Poland popular and charismatic enough to wield that power effectively. In his place sat a collection of colonels who ruled Poland by martial committee. Their petty infighting led to inconsistent policies that left the Polish state and economy adrift — easy pickings for yet another partition by Germany and Russian, this time under the secret Molotov-Ribbentrop Pact of 1939. As Norman Davies concluded, Poland's Second Republic was “destined for destruction.”¹³⁶

When Hitler's Germany attacked Poland in August 1939, starting World War II, the Polish government went into exile, first to Paris, and then after Paris fell to the Germans, to London. This effectively terminated the 1935 Constitution. Any hope the government-in-exile had of returning to Poland after the war and re-establishing the pre-existing system proved to be wishful thinking. The Soviets had other plans for post-war Poland — plans that were in essence ratified by the allied powers at Yalta.

The Constitution of the Polish People's Republic, 1944-1989

Poland was re-constituted, yet again, following World War II. But this time it was not allowed to re-constitute itself; an outside power, the Soviet Union, dictated its political, economic, and constitutional system. Consequently, Poland's 1952 Constitution (the “Communist Constitution”) cannot really be considered part of Poland's endogenous constitutional history. And yet, it is undeniably part of Poland's constitutional *heritage*. At some level a constitution is a constitution regardless of its

¹³⁶ DAVIES, *supra* note 119, at 434.

pedigree or political legitimacy or, for that matter, its lack of real legal authority.¹³⁷

Poland's 1952 Constitution was "patterned on the Soviet Constitution of 1936, retaining much of the original language from that document and reflecting major inputs by Soviet constitutional theorists."¹³⁸ It was, indeed, "a Polish language equivalent of the Soviet Constitution."¹³⁹ Despite its liberal-democratic pretenses — provisions ostensibly guaranteeing universal suffrage and freedom of speech, religion, and assembly — Poland's 1952 Constitution created a power structure, through institutions such as "socialist democracy" and "socialist legality," that vested all political power in the Communist Party.¹⁴⁰

Actually, the 1952 Constitution did not so much *create* as *reflect* the reality of communist hegemony. To claim that the 1952 Constitution vested power in Poland's

¹³⁷ On this argument, I might be criticized for not discussing the Constitution of the Kingdom of Poland that Tsar Alexander of Russia imposed on partitioned Poland in 1815. Still, I sense that the Communist Constitution, perhaps only because of longevity, is more a part of Poland's Constitutional heritage than the 1815 Constitution of the Kingdom of Poland, which was in effect for only 15 years. On the 1815 Constitution, see, e.g., Ludwik Kos-Rabcewicz-Zubkowski, *Polish Constitutional Law*, in *POLISH LAW THROUGHOUT THE AGES: 1,000 YEARS OF LEGAL THOUGHT IN POLAND* 215, 252-53 (W.J. Wagner ed., 1970).

¹³⁸ BRZEZINSKI, *supra* note 32, at 63.

¹³⁹ *Id.*

¹⁴⁰ Article 7 of Poland's 1952 Constitution, as amended in 1976, provided that "[t]he Polish People's Republic realizes and develops a socialist democracy." 1976 DZ.U. No. 7, item 36. This concept of "socialist democracy" has been described as "[t]he paramount feature of the Constitution," the sum total of all its goals. MICHAŁ SAĐOWSKI, *THE POLITICAL SYSTEM OF PEOPLE'S POLAND* 81 (1976). It became a euphemism for anything the Party leadership chose to do because, as the bearers of ideological truth, any policies they instituted furthered "socialist democracy." At the same time, any political activities that deviated from Party policy, by definition, violated the principle of "socialist democracy." See DANIEL H. COLE, *INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND* 90 (1998).

Communist Party would be to invert cause and effect. It was not the Constitution that gave power to the Party but the Party that gave power to the Constitution. The Party already had power, which it used to foist the Constitution on a disaffected population.

Moreover, to the extent that the Constitution was intended merely to create an *illusion* of democracy in Poland, it was a spectacular failure. From its inception, no one inside or outside Poland seriously believed that the Party/state would deliver on its promises of democratic and liberal institutions because those promises were expressly contradicted by other constitutional provisions, such as article 70, which “made it a criminal act to ‘abuse freedom of conscience and religion for purposes of undermining the interests of the Polish People’s Republic.’”¹⁴¹ But since liberal-democratic institutions were promised, the people kept demanding them until the very end of the communist era.

Not only was the Constitution intended to create the mere illusion of democracy, it was itself a legal illusion. The 1952 Constitution was *not* a constitution in the liberal-democratic sense of “the highest law of the land.” In fact, it was hardly a *legal* document at all. The various powers it created and the rights and liberties it purportedly guaranteed were not self-executing but had to be implemented by “ordinary statutes and other normative acts.”¹⁴² Meanwhile, the Constitution did not

¹⁴¹ See BRZEZINSKI, *supra* note 32, at 71.

¹⁴² *Orzeczenie z dnia 4 czerwca 1955 r., Orzecznictwo Sądu Najwyższego* 93 (1955), quoted in translation in BRZEZINSKI, *supra* note 35, at 66. See also Mark Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AMER. J.COMP. L. 153, 168 (1993) (suggesting that ordinary statutes had greater legal status than constitutional

require the enactment of implementing legislation. So, it was entirely without legal force, except to the extent the Party/state *chose* to enforce it. And that, of course, was a matter of policy rather than law. Consequently, in People's Poland there was no constitutional *law*, only constitutional *policy*. And that policy was determined, and subject to change at any time, exclusively by the Polish United Workers' Party (PZPR) in consultation with its "fraternal ally" in Moscow.

The Constitution was amended in 1976, in part to better reflect this reality. The Amendments "formally recognized the Party's political monopoly" by institutionalizing its "leading role" in the building of socialism.¹⁴³ And they "enshrined Poland's fraternal ties with the Soviet Union."¹⁴⁴ In the eyes of many Poles, this implicit subordination of national sovereignty to a historical foe constituted an act of treason by the PZPR. Thus, the 1976 Amendments accomplished what was seemingly impossible: they further discredited Poland's Communist Constitution. They also catalyzed opposition to the communist regime.¹⁴⁵ Within a year after the 1976 Amendments were enacted (without any effort at popular ratification), the Party was "confronted by a united and nationally-based organization making fundamental political and economic demands. . . ."¹⁴⁶ Within three years, this organization evolved into the national movement

provisions in Poland).

¹⁴³ BRZEZINSKI, *supra* note 32, at 73.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 73-74.

¹⁴⁶ *Id.* at 74.

known as Solidarity, which ultimately toppled the PZPR from power. Ironically, the 1976 Amendments may have hastened the downfall of the system they were designed to shore-up.

The 1952 Constitution was amended again in 1982. Those Amendments introduced two new institutions: a Constitutional Tribunal to adjudicate the conformity of statutes and regulations to constitutional standards; and a Tribunal of State, “a quasi-judicial ‘impeachment’” court designed to hold state officials criminally responsible for official misconduct.¹⁴⁷ The first of these institutions made little sense in a country where ordinary statutes had greater legal authority than the Constitution.¹⁴⁸ Nevertheless, they both contributed significantly to the development of constitutional law in Poland. For one thing, they subjected the executive to greater parliamentary control, which in itself was a significant achievement. For another, they “introduced [or more appropriately re-introduced] into Polish political life the notion that governmental authority derives legitimacy from its adherence to the rule of law.”¹⁴⁹ Most importantly, they tacitly repudiated a fundamental tenet of communism: that a communist state would be devoid of social and political discord.¹⁵⁰ And, after the fall of communism, they evolved into truly powerful forces for instituting the rule of

¹⁴⁷ *Id.* at 78.

¹⁴⁸ *See supra* note 142 and accompanying text.

¹⁴⁹ BRZEZINSKI, *supra* note 32, at 77.

¹⁵⁰ This was also reflected in other institutional developments of the 1980s, including the creation in 1980 of a High Administrative Court to adjudicate disputes between citizens and administrative agencies. On this institution, *see id.*, at 139-40.

law and inculcating respect for the law.

Communism disintegrated in Poland in stages the first of which occurred on January 1, 1989, when a new Law on Economic Activity took effect.¹⁵¹ That statute, in effect, ended the socialist experiment in Poland by freeing most sectors of the Polish economy from central planning and centralized resource allocation.¹⁵² A few months later, in April 1989, the Communist government negotiated the “Round Table” Accords with the (still outlawed) Solidarity trade union. Those Accords called for (semi-)free elections, held in July 1989, which led directly to the demise of Communist Party rule. Election rules (under the “Round Table” Accords) reserved 65 percent of seats in the *Sejm* for Party-backed candidates. But Solidarity-backed candidates managed to win every seat available to them but one (won by an independent candidate). Even more humiliating for the Party, many of its own unopposed candidates failed to win election; they were defeated by Polish voters who simply crossed their names off the ballot. As a referendum on Communist Party rule, the result of the July 1989 election was beyond dispute; it exposed for the whole world to see the illegitimacy of Communist Party rule in Poland.¹⁵³ Indeed, the election results made it impossible for a new Communist-dominated government to gain parliamentary approval. Eventually, in

¹⁵¹ 1988 Dz.U. No. 41, item 324.

¹⁵² Indeed, as I argue elsewhere, the changes wrought by the 1988 Law on Economic Activity may have been more radical than those resulting from the “Balcerowicz Plan” of shock-therapy reforms instituted at the beginning of 1990. See COLE, *supra* note 140, at 183-84.

¹⁵³ See *id.* at 185.

September 1989, then-President Jaruzelski (the same man who outlawed Solidarity and declared Martial Law in 1981) asked Solidarity-activist Tadeusz Mazowiecki to put together Poland's first non-communist government in more than 50 years. A few months later, Poland's Communist Party quietly dissolved itself.

Precursors to the 1997 Constitution in Post-Communist Poland

After the fall of communism in 1989, everyone agreed that Poland required a new constitution. But there was scarce consensus about the structure of government or the nature of rights (*e.g.*, positive versus negative) under a new constitution. There was also widespread disagreement about the process for adoption and ratification. It took post-communist Poland eight years, three different Parliaments, and (depending on how one counts) six different governments to resolve these difficulties. At its smallest the *Sejm* included six different political parties, ranging from the post-communist SLD and social-democratic UP to the pro-reform, pro-business UW and the ultra-nationalist KPN; at its largest the Parliament contained 38 parties, representing an even broader spectrum of (often radical) interests. That such disparate parties could ever come to agree on a constitution is remarkable in itself. To some extent, their task was made easier by the exigencies of circumstances following the fall of communism. Poland's 1952 Constitution required major surgery just to facilitate the legal development of markets and democratic institutions. Three sets of major amendments were enacted after 1989 before the 1952 Constitution was finally completely replaced in 1997.

Constitutional Amendments of April and December 1989 and the “Small Constitution” of 1992 effectively converted Poland from a communist-totalitarian system to a constitutional *Rechtstaat*. The April 1989 Amendments, enacted to implement the “Round Table” Accords, altered the system of elections to introduce (real) political pluralism, and “marked the end of the authoritarian phase of Polish political life.”¹⁵⁴ But these Amendments were not intended to eliminate communist rule entirely; to the contrary, they were intended to shore-up the PZPR’s control by ensuring that the Party would maintain an electoral majority in the *Sejm*.

In addition, the April 1989 Amendments greatly strengthened the role of the president in the Polish constitutional system. By increasing the authority of then-President Jaruzelski, the Amendments counterbalanced the reduction in Party control of the *Sejm*. Apparently, the Communists felt that this trade-off — less power in the *Sejm* but more power for their president — would help them maintain control. But this proved to be wishful thinking. Once the Party agreed to political pluralism and (semi-)free elections, their days in power were numbered.

The April 1989 Amendments also freed the judicial branch from political (*i.e.*, Party) control. They didn’t just *promise* judicial independence — that had been done in the 1952 Constitution — but ensured it by giving Supreme Court justices life tenure and “precluding direct contacts between political officials and members of the

¹⁵⁴ BRZEZINSKI, *supra* 32, at 83.

judiciary.”¹⁵⁵ The state’s courts were finally divorced from its prosecutors’ offices.

In sum, the April 1989 Amendments “contributed to the restoration of basic elements of the doctrine of separation of powers” and a system of checks and balances; they “signified the demise of the Soviet-style governmental system of entirely centralized state authority.”¹⁵⁶ But a great deal of reformation remained to be done. The 1952 Constitution still retained remnants of Stalinism, and did not yet provide a framework within which democratic and libertarian institutions could take root.

The next significant step toward that end occurred in December 1989. By then, the Communist Party had been swept aside in (semi-)free elections, and Solidarity had gained a working majority in Parliament (even though 65 percent of the seats in the lower house, the *Sejm*, were held by PZPR-backed candidates). The first Solidarity government was in power, and though General Jaruzelski was still President, he was, for all practical purposes, a president without a party. As a consequence of the sudden collapse of communism, which occurred much faster than anyone had dared to imagine, the April 1989 Amendments to the 1952 Constitution were already obsolete. A brand new constitution was needed to reflect the new political realities in Poland. In recognition that this would take some time, the *Sejm* enacted another round of interim amendments to the 1952 Constitution.

The December 1989 Amendments obliterated virtually all remnants of

¹⁵⁵ *Id.* at 85.

¹⁵⁶ *Id.* at 86.

communism from the Constitution. They

deleted the Constitution's preamble and first two chapters on the political and socioeconomic system of the Polish People's Republic. They also eliminated the anachronistic clause declaring the Party's 'leading role', expunged reference to Poland's alliance with the Soviet Union, deleted the clause describing Poland's economy as based on 'socialized means of production' and introduced the principle of the equality of diverse forms of ownership, thus providing a constitutional foundation for private property and the emerging market economy.¹⁵⁷

The December 1989 Amendments also changed the country's name from the Polish People's Republic to the Republic of Poland. Most importantly, article 1 evoked the *Rechtstaat* clause of (West) German constitution law in proclaiming Poland "a democratic state ruled by law, implementing principles of social justice."¹⁵⁸

So, by the end of 1989, Poland was no longer constituted as a communist country. Its constitutional framework was already far closer to those of the liberal-democratic countries of the West than to that of the Soviet Union. Poland's transition to market-democracy was underway. Still, no one assumed that the task of constitutional revision was anywhere near complete. The December 1989 Amendments were stop-gap measures intended to buy time for a thorough constitutional re-write. Hardly anyone expected, however, that a wholly new constitution would take another

¹⁵⁷ *Id.* at 88.

¹⁵⁸ This provision was later engrafted into article 2 of Poland's 1997 Constitution. See *infra* 176 and accompanying text.

seven years to complete.

In the interim, successive Polish parliaments further amended the 1952 Constitution. In September 1990, in the wake of the demise of the Communist Party, the office of the president was strengthened again and made subject, for the first time, to direct, popular election. This gave the president independent legitimacy and autonomy from the *Sejm*. However, the president's powers and prerogatives remained ambiguous. After the election of Lech Wałęsa as president in 1991, those ambiguities led to constant disputes between the President, who interpreted his powers broadly, and the *Sejm*, which interpreted the President's powers more conservatively (*i.e.*, to maintain its own supremacy). Meanwhile, two more governments — led, respectively, by Prime Ministers Jan Krzysztof Bielecki and Jan Olszewski — came and went.

The Olszewski government, in particular, precipitated something of a constitutional crisis in Poland, as it continually challenged the President's prerogatives, particularly in the realm of national defence. According to contemporary public opinion polls, 65 percent of respondents deplored the resulting “political chaos.”¹⁵⁹ Further constitutional amendments were needed to delineate more clearly the balance of powers between president, government, and parliament. In February 1992 the *Sejm* established a Constitutional Commission to draft a replacement for the 1952 Constitution (as amended). But before it could even begin drafting a replacement, the Commission had to deal with the immediate political/constitutional

¹⁵⁹ Quoted in BRZEZINSKI, *supra* note 32, at 96.

crisis, which it did by drafting the “Small Constitution” of 1992.

The Small Constitution was intended to resolve the existing “political paralysis” caused by disputes between President Wałęsa and Prime Minister Olszewski by providing “a formula for productive cooperation and equilibrium among the three top state authorities.”¹⁶⁰ It eliminated the *Sejm’s* constitutional status as the “highest institution of state authority,” and balanced power more equitably between the office of the president, the government, and the Parliament. As Mark Brzezinski has written, the Small Constitution established “a compromise between presidential and parliamentary systems of government.”¹⁶¹

What made the Small Constitution a provisional measure rather than a complete replacement for the 1952 Constitution was its exclusive focus on the state’s power structure. No attention was paid to other important aspects of the constitutional system, such civil and religious liberties. Provisions of the 1952 Constitution (as amended) respecting civil and religious rights were left intact. President Wałęsa attempted to resolve this problem and, for all practical purposes, complete the task of constitutional reform in November 1992, when he introduced in Parliament a “Charter on Rights and Freedoms,”¹⁶² which would have become part of the “Small Constitution” (in much the same way that the Bill of Rights became part

¹⁶⁰ *Id.* at 98.

¹⁶¹ *Id.*

¹⁶² The Charter is reprinted in English translation in 1996 SAINT LOUIS-WARSAW TRANSATLANTIC L.J. 73.

of the earlier enacted U.S. Constitution). Wałęsa's proposal took everyone by surprise, especially those who suspected him of harboring dictatorial ambitions.¹⁶³ The Charter seemed to contradict his political image — the populist conservative who fancied himself another Piłsudski had suddenly become Poland's "leading representative of social liberalism."¹⁶⁴

Wałęsa's proposed Charter of Rights and Freedoms was based on the European Convention on Human Rights. It contained 22 "basic civil and religious rights common to all liberal democracies," including the freedom of religion, the right to privacy, and freedom from government censorship.¹⁶⁵ It also included (in chapter 5) a "catalogue of wishes, in particular those with which every social identifies, but rather unfeasible and difficult to materialise."¹⁶⁶ These "economic, social and cultural targets" were not actually *legal* rights because citizens could not enforce them. But the government was

¹⁶³ Wałęsa himself fueled such suspicions. He often pointed out that Marshal Piłsudski was his personal hero; he recreated Piłsudski's party, the BBWR, in an effort to consolidate his political base; and on several occasions he averred that he would intervene personally to protect Poland should the ex-communists attempt to retake power, even by democratic means. On the relationship between Wałęsa and Piłsudski, *see, e.g.*, Neal Acherson, *The Great Electrician is playing a game with Poland's faith in democracy*, *The Independent* (London), Feb. 12, 1995, *available in* LEXIS, World library, Allwld file; Roger Boyes, *Walesa draws strength from dictator idol*, *The Times*, Feb. 6, 1995, *available in* LEXIS, World library, Allwld file; and Adam Michnik, *The Worship of Walesa*, *The Guardian* (London), June 25, 1993, *available in* LEXIS, World library, allwld file.

¹⁶⁴ Dawid Warszawski, *Belvedere Charter*, *Polish News Bulletin*, Dec. 8, 1992, *available in* LEXIS, World library, Allwld file.

¹⁶⁵ BRZEZINSKI, *supra* note 32, at 107.

¹⁶⁶ Warszawski, *supra* note 164.

responsible for attaining them “according to economic abilities.”¹⁶⁷

Parliament warmly welcomed President Wałęsa’s proposed Charter, but never had the chance to enact it before the President dissolved the *Sejm* and called for new elections. After those elections Wałęsa resubmitted the Charter as part of a larger draft constitution. It was referred to the new Constitutional Commission, where it lingered, vying for attention with six other draft constitutions, for the next three years. In the meantime, the need to enact a new constitution grew less pressing because of “the hybrid framework created by the April and December Amendments and by the Small Constitution,” which “provided the groundwork for a modern Polish polity as well as institutional stability during a period of extraordinary politics.”¹⁶⁸

In the years that followed the enactment of the 1992 Small Constitution, a variety of contentious issues plagued the *Sejm*’s constitution-making efforts. There were questions of process: Who should draft a new constitution and how? On what basis and according to what procedures would the Parliament consider constitutional proposals? Would a new constitution be subject to popular ratification or, like all previously enacted constitutions in Poland’s history, would it be enacted simply by vote of the people’s representatives in Parliament? Related to these questions of process were questions about legitimacy: Was the Constitutional Commission a legitimate body to draft a constitution even though it did not include representatives of all different

¹⁶⁷ *Id.*

¹⁶⁸ BRZEZINSKI, *supra* note 132, at 129.

political viewpoints in the country?¹⁶⁹ And supposing a new constitution would be subject to popular ratification, how would a referendum be structured? Specifically, how would popular approval be determined? By a simple majority of votes cast? By a majority of votes cast but with an additional requirement that a majority of eligible voters cast ballots? Above all, there were substantive questions about how state power should be divided between president, government, and parliament; about the nature of civil and social rights (e.g., positive versus negative); and about the role of the Catholic Church in a liberal-democratic state.

Not surprisingly, it took the Constitutional Commission a few years to resolve these various issues. And, needless to say, its determinations did not please everyone. But it did finally approve a completely new constitution for consideration by the full

¹⁶⁹ This question particularly plagued the *Sejms* elected in 1989 and 1993. The “Round Table” *Sejm* elected in 1989 arguably lacked legitimacy because it was not elected freely; the electoral rules of the “Round Table” Accords reserved 65 percent of the seats in the lower house of the National Assembly for (ex-)Communist Party candidates. The next round of parliamentary elections in 1991 solved that problem, but resulted in 28 parties with seats in the *Sejm*. Consequently, that Parliament was fractured by political and ideological conflicts. Those conflicts did not, however, prevent the 1991 *Sejm* from enacting important legislation, including the Small Constitution of 1992, which altered the electoral rules once again in an effort to prevent future fractured parliaments. Under the Small Constitution, only parties that received five percent or more of the popular vote (and coalitions of parties that received eight percent or more of the popular vote) would be admitted to Parliament. In the first parliamentary elections held under these rules in 1993, only six parties crossed the five (or eight) percent threshold. The new electoral rules had achieved their purpose, which did not necessarily mean, however, that the *Sejm* was any less fragmented or any more productive. Indeed, in at least one respect, the five (or eight) percent rule made the new *Sejm* less productive: the work of its Constitutional Commission was hampered by questions of legitimacy because so many parties (and the constituencies they represented) were excluded from the deliberations (because of the five/eight percent threshold).

Parliament on January 16, 1997, by a vote of 45 to two, with one abstention.¹⁷⁰ The National Assembly (comprised of the *Sejm* and Senate sitting together) enacted it on April 2, 1997 by a vote of 451 to 40, with six abstentions.¹⁷¹ The new Constitution was subsequently approved in a public referendum by 52.7 percent of those voting on May 25, 1997.¹⁷² President Aleksander Kwaśniewski signed it into law on July 16, 1997;¹⁷³ and it took effect on October 17, 1997.¹⁷⁴

Poland's 1997 Constitution

The 1997 Constitution is, in most respects, a fairly typical example of a modern democratic European constitution.¹⁷⁵ Like the Small Constitution of 1992, it declares the Republic of Poland to be “a democratic state governed by law and implementing the

¹⁷⁰ *Constitution Bill Clears Committee*, Polish News Bulletin, Jan. 17, 1997, available in LEXIS, World library, Allwld file. However, the Committee took another two months to agree on a preamble to the draft constitution. On March 14, 1997, the Committee voted 32 to five, with two abstentions, to approve a compromise preamble authored by former Prime Minister Tadeusz Mazowiecki. *Compromise Preamble to Draft Constitution*, PAP News Wire, Mar. 16, 1997, available in LEXIS, World library, Allwld file. For more on that preamble and the controversy surrounding it, see *infra* notes 195-211 and accompanying text.

¹⁷¹ *Constitution adopted*, Polish News Bulletin, Apr. 3, 1997, available in LEXIS, World library, Allwld file.

¹⁷² See *supra* note 8 and accompanying text.

¹⁷³ See *supra* note 12 and accompanying text.

¹⁷⁴ See *supra* note 13 and accompanying text.

¹⁷⁵ An English language translation of Poland's 1997 Constitution is available in 1997 ST. LOUIS - WARSAW TRANSATLANTIC L.J. 5.

principles of social justice.”¹⁷⁶ Article 7 provides that all state bodies must “operate on the basis of and within the limits of the law.” The new Constitution bases Poland’s political system on “the division and balance of power” among four branches of government: the legislative branch, comprised of the *Sejm* and Senate,¹⁷⁷ the executive branch under the Prime Minister,¹⁷⁸ the office of the president, who is primarily responsible for foreign affairs,¹⁷⁹ and a truly independent judiciary.¹⁸⁰ The 1997 Constitution provides a framework for a liberal democratic society by guaranteeing traditional personal and political rights and freedoms in articles 30-63.¹⁸¹ And it establishes the basis for a free market economy by guaranteeing “the freedom of economic activity.”¹⁸² In addition, Poland’s new Constitution “cater[s] to popular sentiment” by providing “several economic and positive rights,”¹⁸³ including the right to safe and hygienic working conditions,¹⁸⁴ the right “to elementary health care

¹⁷⁶ POL. CONST. [1997], art. 2.

¹⁷⁷ *See id.*, ch. IV.

¹⁷⁸ *See id.*, ch. VI.

¹⁷⁹ *See id.*, ch. V.

¹⁸⁰ *See id.*, ch. VIII. *See also Constitution Takes Effect*, Polish News Bulletin, Oct. 17, 1997, available in LEXIS, World library, Allwld file.

¹⁸¹ *See id.*, ch. II.

¹⁸² *Id.*, art. 22.

¹⁸³ BRZEZINSKI, *supra* note 32, at 125. *See* POL. CONST. [1997], arts. 64-76.

¹⁸⁴ *Id.*, art. 66.1.

financed out of public funds,”¹⁸⁵ the “right to education,”¹⁸⁶ and “the right to be informed of the quality of the environment and its protection.”¹⁸⁷

Such social and economic “rights” have become a commonplace in recent European (and European-style) constitutions.¹⁸⁸ Some (particularly American¹⁸⁹) constitutional law experts deplore the combination of positive and negative rights because positive rights, such as the right to social security (guaranteed in article 67.1 of Poland’s new Constitution) are notoriously difficult to ensure; that is, they tend to be unenforceable. And if *some* constitutional rights are unenforceable, that may undermine the enforceability of other (presumably more important) negative rights in the constitution, such as freedom from “cruel, inhuman, or degrading treatment or punishment” (enshrined in article 40 of Poland’s new Constitution).¹⁹⁰

¹⁸⁵ *Id.*, art. 68.2.

¹⁸⁶ *Id.*, art. 70.1.

¹⁸⁷ *Id.*, art. 74.3.

¹⁸⁸ Compare, for example, South Africa’s new constitution, in XVII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (G.H. Flanz ed., 1997) (binder).

¹⁸⁹ But not exclusively American. Consider, for example, Professor Ewa Łętowska’s recent characterization of the problems that can arising from guaranteeing positive rights:

A hungry traveler walks into a shady restaurant in Moscow. He sits down and inspects the menu. “I’ll have the pork chops,” he says. “We don’t have any,” answers the waiter. “Well then, I’ll have the meat balls.” “We don’t have those either.” “How about liver then?” “Nope,” answers the waiter. The annoyed customer finally asks: “Am I reading the menu or our constitution?”

Łętowska, *supra* note 14, at 76.

¹⁹⁰ See, e.g., Jon Elster, *Constitution-making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 PUB. ADMIN. 169, 198 (1993); Cass Sunstein, *Against Positive Rights: Why*

Poland's 1997 Constitution attempts to resolve this difficulty in a unique and innovative way (which some critics of the new Constitution have, unfortunately, overlooked¹⁹¹). Article 8.2 provides: "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise." The drafters of this provision evidently were conscious of the danger posed by combining positive and negative rights in a constitutional document, and they, in effect, bifurcated the Constitution to ameliorate the danger.

Those rights (predominantly negative) that are capable of self-execution are self-executing; other rights (predominantly positive) requiring affirmative state action are explicitly made subject to legislative determination. Thus, "freedom of the press," under art. 14 of Poland's 1997 Constitution, is self-executing, as is the right to be free from "cruel, inhuman, or degrading treatment or punishment" under art. 40.¹⁹² On the other hand, art. 67.1 provides that "scope and forms" of the right to social security "shall be specified by statute." Similarly, the state's actual obligations with respect to

Social and Economic Rights Don't Belong in the Constitutions of Post-Communist Europe, 2 E.EUR. CONST. REV. 35 (1993). Oddly, Sunstein has written elsewhere that the traditional distinction between "positive" and "negative" rights is not particularly meaningful. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 70 (1993).

¹⁹¹ See, e.g., Wojciech Sadurski, *Rights and Freedoms Under the New Polish Constitution: Reflections of a Liberal*, 1997 SAINT LOUIS-WARSAW TRANSLANTIC L.J. 91.

¹⁹² But, interestingly, many of the traditional "negative" rights are expressed in positive terms in Poland's 1997 Constitution. Thus, rather than constitutionally restricting state interference with freedom of the press, art. 14 states that "[t]he Republic of Poland shall ensure freedom of the press."

the right of education “shall be specified by statute.”¹⁹³

So, at least with respect to civil rights and liberties, Poland has not one but two new constitutions: one is a traditional bill of rights (American-style), including self-executing and directly applicable rights to be free *from* some interference, public or private. The other is a contemporary (Euro-style) “wish-list” of non-self-executing and not directly applicable “rights” to certain services from the government. One implication of this bifurcation between self-executing and non-self-executing rights is that Poland learned well one lesson from its Communist Constitution of 1952: to be worth the paper they are printed on, the most important constitutional rights must be self-executing and directly applicable; they cannot depend on legislation to put them into effect.

Some of the drafters’ decisions in categorizing rights as self-executing or not are questionable. For example, article 51 provides that “[n]o one may be obliged, except on the basis of statute, to disclose information concerning his person.” By making this right subject to legislated exceptions, Poland’s Constitution fails to ensure protection against self-incrimination. On the other hand, article 74.2 provides that “[p]rotection of the environment shall be the duty of public authorities.” This governmental duty is self-executing, and it is not subject to any legislative determination of the extent of the duty. Presumably, anyone can sue the government for failing to *adequately* protect the environment for any amount of pollution that is left uncontrolled. This may please

¹⁹³ POL. CONST. [1997], art. 69.1.

environmentalists, but it is patently unrealistic.

To some extent, disagreements over the categorization of constitutional rights — as directly enforceable or subject to legislative determination — reflect the significant grey area that exists between “positive” and “negative” rights. To take an American example, we might wonder whether the right of “due process” enshrined in the 5th and 14th Amendments is a “positive” or a “negative” right. The 5th Amendment’s Due Process Clause is written in the negative — “No person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁹⁴ But it operates as a positive requirement for government action — some process must affirmatively be provided. But how much?

More important than whether Poland’s constitutional drafters got every right *right* is that they made clear to citizens what to expect with respect to each civil and social right provided for in the Constitution. By explicitly distinguishing rights that are self-executing and directly enforceable from those that are not, the framers reduced the risk that the legal force of *all* constitutional rights might be devalued — as they were under the Communist Constitution of 1952. This is a significant innovation that attempts to resolve one of the more important problems of constitution-writing in the era of welfare states. Other countries should pay close attention as the Polish Constitution is implemented to observe whether its bifurcated approach to rights works; if it does, they should consider adopting similar approaches in their

¹⁹⁴ U.S. CONST., Amend. V.

constitutional documents.

The 1997 Constitution's Place in Polish Constitutional History

From an historical perspective, the legitimacy of Poland's new Constitution can hardly be doubted. Virtually all of its structural features — the institutions and organizations it establishes, the way it balances power among the various units of national government, its provisions regarding civil and religious liberties — have roots in constitutional documents of Poland's past, both recent and distant. This is true even for the most controversial aspects of the new Constitution, including its preamble and the method by which it was enacted and ratified. From top to bottom, the new Constitution fits comfortably into Poland's history of constitutionalism.

The Preamble

Starting at the top: the preamble has been among the most controversial features of Poland's new Constitution. It provides, among many other things,

We, the Polish nation — all citizens of the Republic,
Both those who believe in God as the source of truth, justice,
good and beauty,
As well as those not sharing such faith but respecting those universal
values as arising from other sources. . .¹⁹⁵

¹⁹⁵ POL. CONST. [1997], preamble.

Critics have complained that the reference to God in this statement is ambiguous and, therefore, insufficient. For example, Solidarity senator Alicja Grzeskowiak “charged that God was introduced to the constitution through the back door, as it were, and a classical *invocatio Dei* was still missing, while the mention of believers and non-believers is a sign of respect for the non-believing minority but offends the feelings of the Catholic majority.”¹⁹⁶ Others have argued that the reference to non-believers constitutes a tacit repudiation of the supremacy of natural over positive law.¹⁹⁷

The intensity of the debate over this clause of the preamble is somewhat surprising in view of the fact that there was almost no preamble at all to the 1997 Constitution. In January 1996, the Constitutional Committee of the National Assembly decided against including any preamble in the new Constitution. That decision was “censured” by the Polish Episcopal Conference. Eight months later, the Committee reversed itself and decided to include a preamble after all.¹⁹⁸

Taduesz Mazowiecki authored the reference to believers and non-believers in the preamble as a compromise between those, including the Church, that demanded a traditional *invocatio Dei*, and liberal forces, including ex-communists, who preferred no reference to God. When Mazowiecki first proffered his preamble to the

¹⁹⁶ *Constitution Preamble Agreed On*, Polish News Bulletin, Dec. 12, 1996, available in LEXIS, World library, Allwld file.

¹⁹⁷ See, e.g., *New Constitution: No End in Sight*, Polish News Bulletin, Dec. 5, 1996, available in LEXIS, World library, Allwld file.

¹⁹⁸ See *Discussion on Constitutional Preamble Resumed*, Polish News Bulletin, Sept. 19, 1996, available in LEXIS, World library, Allwld file.

Constitutional Committee, Bishop Tadeusz Pieronek, Secretary General of the Polish Episcopate, reportedly “welcomed the initiative” and stated that Mazowiecki’s “wording of the preamble . . . (which contained a reference to God) satisfied the criteria of a democratic and pluralistic state.”¹⁹⁹ Contemporaneous news reports noted that Poland’s 1791 and 1921 Constitutions had included preambles making reference to God. The 1935 Constitution included no preamble at all, though it made the country’s president accountable “before God and history.” The Communist Constitution of 1952 did include an elaborate preamble but, not surprisingly, made no reference to God.²⁰⁰

So, is the preamble’s reference to God consistent or inconsistent with Poland’s constitutional heritage? The issue is debatable. It can at least be argued that it is *sufficiently* consistent, and not only with the 1952 and 1935 Constitutions (which are probably the two least valued of Poland’s previous constitutions and the two least acceptable as models). It is also consistent, in a general sense, with the tradition of toleration that existed in Poland’s First Republic through the end of the sixteenth century, as exemplified in constitutional documents such as the 1573 Warsaw Confederation²⁰¹ and in the libertarian expressions of, among others, Jan Zamoyski,²⁰² King Zygmunt August,²⁰³ and particularly Piotr Myszkowski, who appealed to the *Sejm*

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

²⁰¹ *See supra* notes 62-63 and accompanying text.

²⁰² *See supra* note 58 and accompanying text.

²⁰³ *See supra* note 59 and accompanying text.

in 1565: “Let not the different understanding of the [Sacred] Scripture shatter the love between us.”²⁰⁴ This is not to say that these men would have approved of the reference to “those not sharing such faith” in God in the 1997 Constitution’s preamble. There is no evidence that atheists would have been tolerated in sixteenth-century Poland on the same basis as dissidents and Jews. And yet, even the preamble’s humanistic reference has strong roots in Poland’s history, for example in the sixteenth-century writings of Andrzej Frycz Modrzewski.²⁰⁵

But is the unwritten constitution of sixteenth-century Poland a valid reference point for determining the historical legitimacy of the preamble or Poland’s new Constitution generally? The preamble appears to answer this question directly and unambiguously:

Recalling the Best traditions of the First and the Second Republic,
Obliged to bequeth to future generations all that is valuable
from our over one thousand years’ heritage.

There is no question that many of Poland’s “best traditions” were established in the First Republic, and many of them remain “valuable” to this day.

There is yet another aspect of the preamble to the 1977 Constitution that is worth noticing because it *appears* to mark a significant change in Polish conceptions of nationality and citizenship. Unlike previous constitutional documents in Polish

²⁰⁴ See *supra* note 69 and accompanying text.

²⁰⁵ See *supra* notes 76-77 and accompanying text.

history, and in contrast to persistent public perceptions, the preamble seems to equate citizenship with membership in the Polish nation in stating, “*We, the Polish Nation — all citizens of the Republic, . . .*” Compare this statement, for example, with the 1921 Constitution, which states that “[s]overignty in the Republic of Poland belongs to the nation,”²⁰⁶ and enumerates the rights of citizens,²⁰⁷ but never indicates whether all citizens comprise the Polish “nation.” In fact, article 110 of the 1921 Constitution refers to “Polish citizens belonging to national . . . minorities,” implying that citizenship is *not* equivalent with membership in the Polish nation.

The distinction between citizenship and membership in the Polish nation in the 1921 Constitution is consistent with modern conceptions of Polish nationalism (dating from the nineteenth and twentieth centuries). But it is not consistent with all historical conceptions of the Polish nation. For example, Kościuszko's “concept of the Polish nation . . . embraced all the inhabitants of the partitioned Commonwealth, irrespective of their estate, property, religion, or ethnic origin.”²⁰⁸ As Norman Davies has written,

In the old Republic, prior to 1795, Polish nationality could indeed be defined in terms of loyalty to the state. The ‘Polish nation’ was usually reserved as an appellation for those inhabitants who enjoyed full civil and political rights, and thus for the nobility alone. It did not refer to a man’s

²⁰⁶ POL. CONST. [1921], art. 2.

²⁰⁷ *See id.*, arts. 12 - 14.

²⁰⁸ WALICKI, *supra* note 94, at 112.

native language, his religion, or ethnic origin. Hence, in this context, there were many ‘Poles’, who in modern terms might not be so described.²⁰⁹

It was only later that “the word ‘nation’ shed its former political connotation and increasingly assumed its modern cultural and ethnic overtones.”²¹⁰ Thus, to the extent the 1997 Constitution equates citizenship with membership in the Polish nation, it harkens back to a first-republican conception of “nation,” but with a more democratic scope.

But does the 1997 Constitution *really* equate citizenship with membership in the Polish nation? Despite the language of the preamble, various provisions of the 1997 Constitution refer to “national minorities.”²¹¹ suggesting that citizenship and nationality are not the same after all. Consequently, the relation between citizenship and nationality remains ambiguous under the new Constitution.

Civil and Political Rights

Beyond the preamble itself, most provisions in the body of the 1977 Constitution are not very controversial, possessing clear ties to Poland’s constitutional history. For instance, article 41.2, which guarantees the right of *habeas corpus*, is a direct

²⁰⁹ DAVIES, *supra* note 119, at 11.

²¹⁰ *Id.* at 12.

²¹¹ POL. CONST. [1997], arts. 27 & 35.

descendent of the 1433 Privilege of Jedlna.²¹² It states: “Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation.” Article 53, which ensures freedom of religion without exception, is more closely analogous to the 1573 Warsaw Confederation than to the 1791 Constitution, which expressly authorized statutory limitations on religious freedom.²¹³ More controversially, unlike the 1921 Constitution the 1997 Constitution does *not* establish the Roman Catholic Church in “the chief position among enfranchised religions.”²¹⁴ Indeed, the new Constitution’s only reference to the Catholic Church is in article 25.4, which merely states that “[r]elations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.” Meanwhile, article 24.4 establishes a clear separation between church and state, promising that each will retain “autonomy and . . . independence . . . in its own sphere.” It remains to be seen whether this constitutional separation can be operationalized in a country that is 95 percent Roman Catholic. But, from an historical point of view, the separation of church and state is consistent with the spirit and the laws of Poland’s First Republic.

²¹² *See supra* notes 33-34 and accompanying text.

²¹³ *See supra* notes 62-63 and accompanying text.

²¹⁴ POL. CONST. [1921], art. 114.

Socio-Economic Rights

Some have argued that the list of “socio-economic” rights in the 1997 Constitution is an unfortunate legacy of Poland’s Communist [1952] Constitution, which enunciated many such rights that the Party/state either could not or would not enforce. As Wojciech Sadurski has written, “in a system where a nihilist tradition of treating a constitution as a purely decorative instrument is strongly embedded, and where the fundamental notions of constitutionalism and rule of law have a weak place in the collective consciousness, everything that undermines a strict construction of constitutional limits upon discretionary governmental action is to be regarded with concern.”²¹⁵ Implicit in this argument is a sense that the 1952 Constitution was not really a constitution in the sense of being the supreme law of the land; and even if it was a real constitution, it was not a real *Polish* constitution but a Soviet import. Thus, it can provide nothing of value for constitutional drafters in post-communist Poland.

It would be a mistake, however, to claim that Poland’s 1952 Constitution is the only historical source of the socio-economic rights found in Poland’s 1997 Constitution. Poland’s 1921 Constitution provided several such socio-economic rights. For example, article 102 provided that “[e]very citizen has the right to state protection for his labor, and in case of lack of work, illness, accident, or debility, to the benefits of social insurance which will be determined by a special statute.” And article 103 guaranteed “state care and aid” for “[c]hildren without sufficient parental care.” So, there is a

²¹⁵ Sadurski, *supra* note 191, at 98.

historical basis beyond the 1952 Constitution for constitutionalizing socio-economic rights in Poland. Moreover, such rights are commonly found in many constitutions throughout the world today.

To be fair, Sadurski's argument is not really about the historical legitimacy of socio-economic rights in the Constitution. His concern is with the dangers that socio-economic rights pose for the enforceability of (supposedly more important) civil and political rights — particularly rights that protect the individual from government interference. That danger exists whether or not socio-economic rights are based on legitimate models. And, Sadurski suggests, the danger is especially great in countries such as Poland, which are only just establishing liberal-democratic institutions and inculcating respect for the rule of law.²¹⁶ It would, indeed, be disastrous for Poland if the inclusion of socio-economic “rights” in the 1997 Constitution “water[ed] down the effectiveness of *other* rights, including those that have a determinate meaning as limits on state action.”²¹⁷

But Sadurski neglects Poland's novel effort to minimize the danger by expressly distinguishing (in article 8.2) those rights that are self-executing and directly enforceable from others, the scope of which must be determined in subsequent legislation. If this provision is to have any significance at all, reviewing courts will have to adopt different approaches and standards when construing different “rights”

²¹⁶ *Id.*

²¹⁷ *Id.*

under the Constitution. If they do, this should prevent the inclusion of difficult-to-enforce socio-economic rights from eroding the enforcability and actual enforcement of civil and political rights. However, it remains to be seen whether the courts will adopt an appropriately bifurcated approach to enforcing the Constitution's bifurcated system of rights.²¹⁸

The Process of Enactment and Ratification

Finally, what is the historical legitimacy of the process by which the 1997 Constitution was enacted and ratified? As we saw in the Introduction, opponents of the new Constitution objected not only to the process by which it was enacted and ratified but actually filed an (unsuccessful) lawsuit to have that process declared null and void.²¹⁹ They claimed that a constitution approved by less than 25 percent of eligible voters (a 52.7 percent majority of the 46 percent of eligible voters who participated) could not legitimately constitute the supreme law of the nation.²²⁰ But if that is the case, then no constitution in Polish history, including the revered 1791 Constitution, was legitimate.

In fact, the 1997 Constitution is the first in Poland's history to be subject to a public referendum of any kind. All previous Polish constitutions were simply enacted

²¹⁸ See *id.* at 97, citing Ewa Łętowska, *Co to znaczy 'bezpośrednie stosowanie konstytucji'* ["What is Meant by 'Direct Applicability of the Constitution'"], *Rzeczpospolita*, Aug. 13, 1996, at 5.

²¹⁹ See *supra* notes 9-10 and accompanying text.

²²⁰ See *id.*

into law by National Assemblies, all of which, by the way, were far less democratic than the Assembly that enacted the 1997 Constitution. As we saw earlier,²²¹ the 1791 Constitution was not even enacted by the full National Assembly; it was pushed through Parliament surreptitiously while two-thirds of all *Sejm* deputies were away on vacation. Compared to any other constitution in Polish history, the 1997 Constitution has a stronger claim to democratic legitimacy.

Conclusion

Contrary to the assertions of its opponents, Poland's new Constitution does not defy "Poland's history, heritage and traditions."²²² Virtually all of its provisions, including the controversial preamble, have roots in Poland's long history of constitutionalism, extending back to the sixteenth century and beyond.

This conclusion will not likely stem the criticism of Poland's new Constitution, however, because many of its critics are either ignorant of Poland's constitutional history (beyond blind reverence of the 1791 Constitution) or they consider historical arguments irrelevant. Indeed, many of their complaints about the new Constitution have been personal — "The drafters of the Constitution did not pay attention to me and my views" — or ideological — "Any constitution that (a) does not recognize the supremacy of the Church and natural law and (b) was drafted by (among others)

²²¹ See *supra* notes 107-108 and accompanying text.

²²² See *supra* note 1 and accompanying text.

former communists cannot be legitimate.” Against such personal and ideological complaints, no counter-arguments can possibly persuade. And, after all, the legitimacy of any constitution is inherently a political question and, therefore, always contestable.

Still, there does seem to be some fact-of-the-matter concerning constitutional legitimacy: at least it should be possible to determine the factual/historical basis for claims of legitimacy or illegitimacy. Indeed, that has been the aim of this article. To the extent history and fact matter, Poland’s 1997 Constitution appears “legitimate” enough. It fits into Poland’s indigenous — sometimes glorious and sometimes tragic — history of constitutionalism.

However, the legitimacy of a constitution is not determined by historical pedigree alone. When critics deny the legitimacy of Poland’s new Constitution, they are (explicitly or implicitly) making a prediction that Polish society will not respect the Constitution in daily conduct.²²³ Whether this prediction turns out to be true or false ultimately will not depend on legal/constitutional theories of the sixteenth-century, the 1791 Constitution, or any other document in Polish constitutional history. Rather, as Ewa Łętowska has suggested,²²⁴ it will depend on the political climate in which the new Constitution is implemented. Whether Poland’s political climate proves too hot for the new Constitution to survive remains to be seen. But so far, even after

²²³ In this respect, Paweł Śpiewak, *supra* note 18 and accompanying text, was quite right to tie in his criticisms about Poland’s new Constitution with a prediction about the future of the Constitution.

²²⁴ *Supra* note 14 and accompanying text.

important national elections which significantly altered the balance of political power in Parliament and the government,²²⁵ the Constitution seems safe from imminent annulment or replacement. Perhaps ordinary Poles have simply had enough of constitutional politics for the time being. If so, it would signify the end of Poland's most recent "constitutional moment" and its return to (relatively speaking) "normal politics."²²⁶

²²⁵ In parliamentary elections held on September 21, 1997, the ruling SLD (former communist) and PSL (peasant) parties were, in essence, defeated by the AWS (a coalition of parties led by Solidarity trade union-leader Marian Krzaklewski). Consequently, SLD and PSL's governing coalition was replaced by a coalition between the AWS and the UW (the centrist, pro-reform party led by Leszek Balcerowicz). See Christine Spolar, *Moderate Coalition Forms Government in Poland; Solidarity; Center-Left Party to Share Power*, The Washington Post, Oct. 30, 1997, available in LEXIS, News library, Curnws file. Prior to the elections, the AWS announced that it would seek to amend the 1997 Constitution. Indeed, some of the coalition-partners argue that the elections themselves constituted a second, and more legitimate referendum on the Constitution. However, the AWS won too few seats to force through its constitutional amendments without support from other parties. See *Coalition: New Conflicts Ahead*, Polish News Bulletin, May 29, 1998, available in LEXIS, World library, Allwld file. Consequently, if the elections were a second referendum on the Constitution, the results were, at best, inconclusive. In any case, the AWS has so far only attempted to enact one minor amendment that would limit the immunity from prosecution of members of Parliament. See *AWS Seeks to Amend Constitution*, Polish News Bulletin, Jan. 7, 1998, available in LEXIS, World library, Allwld file. This hardly represents the kind of large-scale amendment party-leaders promoted during the 1997 election campaign. Interestingly, there has been virtually no mention of large-scale amendments to the Constitution since the AWS-UW coalition government took office (under terms of the 1997 Constitution) in mid-November 1997.

²²⁶ See generally BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991). See also *Poland's Political Scene: Stable at Last?*, Polish News Bulletin, Aug. 3, 1998, available in LEXIS, World library, Allwld file; Elizabeth Pond, *Miracle on the Vistula*, 21(3) WASH. Q. 209 (1998), available in LEXIS, News library, Curnws file (noting how the AWS, whose leader Marian Krzaklewski referred to the UW as "traitors" for failing to include strong Catholic language in the Constitution, is now "cohabiting with these 'traitors.'").