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Daniel H. Cole

Indiana University School of Law at Indianapolis

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FROM RENAISSANCE POLAND TO POLAND'S RENAISSANCE

*Daniel H. Cole**

THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND. By *Mark Brzezinski*. New York: St. Martin's Press. 1998. Pp. 276. \$49.95.

INTRODUCTION

Poland is located in Eastern Europe — the “other Europe”¹ — which shares a continent, but seemingly little else, with Western Europe. Most histories of Europe, legal histories included, are actually histories of Western Europe only.² The “euro-centrism” some scholars complain about is, more accurately, a “western euro-centrism.” The eastern half of the continent is ignored like the embarrassing black sheep of the European family.

Economic historians have described Eastern Europe as a “backward” place, where feudal and mercantilist economies persisted as Western European economies modernized and industrialized.³ In geopolitical terms, Eastern Europe has been characterized as a region of “underdevelopment and dependence,” “striving after the ‘modernity’ seemingly embodied in certain of its western neighbours.”⁴ In the popular imagination Eastern Europe is “the old country” — a region populated by poorly educated and xenophobic peasants, ruled first by nationalist despots and later by communists.

The communists are gone now, and the countries of Eastern Europe supposedly are “learning” about constitutional democracy. American and West-European “experts” flocked there after the fall of the Berlin Wall (with mostly good intentions) to teach the na-

* M. Dale Palmer Professor of Law, Indiana University School of Law at Indianapolis. A.B. 1980, Occidental; A.M. 1981, University of Chicago; J.D. 1986, Lewis & Clark; J.S.M. 1991, Stanford. —Ed.

1. See CHRISTOPHER ENGHOLM, *THE OTHER EUROPE* (1996); JACQUES RUPNIK, *THE OTHER EUROPE* (1988); E. GARRISON WALTERS, *THE OTHER EUROPE: EASTERN EUROPE TO 1945* (1988).

2. A notable exception is Norman Davies's magnificent book, *EUROPE: A HISTORY* (1996), which pays equal attention to Eastern Europe's contributions to European history.

3. See *THE ORIGINS OF BACKWARDNESS IN EASTERN EUROPE* (Daniel Chirot ed., 1989); see also DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* 251-53 (1998) (describing Eastern Europe as “another world”).

4. ROBIN OKEY, *EASTERN EUROPE 1740-1985: FEUDALISM TO COMMUNISM* 9 (2d ed. 1986).

tives about democracy and constitutionalism.⁵ In many cases, these teachers were as ignorant of local culture and history as they were condescending. As German constitutional law Professor Hans Mengel has stated, however, "[y]ou cannot come in and prescribe a constitution. . . . It comes out of the cultural background. You have to take care of what the society is like in the moment."⁶

Even internationally renowned legal scholars, such as Richard Posner and Cass Sunstein, have felt obliged to give advice on reforming legal systems to countries about whose histories and cultures they admittedly know little.⁷ Judge Posner has urged the "newly liberated" countries of Central and Eastern Europe to focus on those "universal negative" rights which are relatively inexpensively enforced, such as the right to property.⁸ Other rights, including some "negative" rights that are taken for granted in relatively wealthy democracies, such as rights that protect against the wrongful incarceration of innocents, should be disregarded (or only minimally protected) until they can be better afforded.⁹ Imagine the reception this kind of economism about the rights of criminal defendants would likely receive in a country like Poland, where habeas corpus protections were provided for more than half a mil-

5. See, e.g., Charles-Edward Anderson, *Exporting Democracy: U.S. Lawyers Help Eastern Europe Draft New Constitutions*, A.B.A. J., June 1990, at 18; Clara Germani, *Constitutional Experts in Demand*, THE CHRISTIAN SCIENCE MONITOR, Jan. 14, 1992; John H. Kennedy, *A New US Export: Constitutional Advice to Eastern Europe*, BOSTON GLOBE, May 31, 1990, at 12; Henry J. Reske, *U.S. Constitution Unpopular: Eastern European Countries Prefer Detail of Neighbor Democracies' Documents*, A.B.A. J., Dec. 1991, at 28; Nancy E. Roman, *Democracy Gets U.S. Legal Aid: Lawyers Help Eastern Europe Emerge From Communist Haze*, WASH. TIMES, Apr. 11, 1993, at A1; Herman Schwartz, *Shaping the New Eastern Europe*, LEGAL TIMES, Feb. 10, 1992, at 19; Susanne Sternthal, *Lawyers Live the Spirit of '87 Revolution in E. Europe*, WASH. TIMES, July 4, 1991, at E1; Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, N.Y. TIMES, Feb. 2, 1990, at B6.

6. Jonathan Kaufman, *The Collective Good: As They Write Their Constitutions, Eastern Europeans are Reaching Beyond the Rights of the Individual, Hoping to Guarantee a Sense of Community and Shared Value*, BOSTON GLOBE, Apr. 7, 1991 (Magazine), at 22. To his credit, the American constitutional law scholar Herman Schwartz has recognized this problem. See Schwartz, *supra* note 5 ("Americans . . . usually don't even know the language; many of us can barely find these countries on a map; and we certainly don't know their legal systems.").

7. See Richard A. Posner, *The Costs of Rights: Implications for Central and Eastern Europe — and for the United States*, 32 TULSA L.J. 1 (1996); Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions*, 2 E. EUR. CONST. REV. 35 (1993). Interestingly, Posner asserts that "a nation's political and legal culture affects the extent to which rights are enforced. But, as no one seems to know how to alter a culture, there is not much to be gained from dwelling on the point." Posner, *supra*, at 18. This may be true, but it hardly excuses Posner's failure to consider existing cultural, historical, and institutional influences over the treatment of rights.

One of the "costs of rights" that Posner's article does not examine is the cost of hiring American constitutional consultants to determine which rights to constitutionalize. According to published reports, Rutgers University Law School Professor Albert P. Blaustein, for example, charged "more than \$1,500 a day" for his advice to Poland. See Sternthal, *supra* note 5.

8. See Posner, *supra* note 7, at 5, 8, 10, 18.

9. See *id.* at 13-15.

lennium before the imposition of communism,¹⁰ and where in 1981 as many as 580 of every 100,000 Polish citizens were imprisoned (as compared with 212 per 100,000 in the U.S. and 25 per 100,000 in the Netherlands),¹¹ many of them for no reason other than political dissent.¹²

Professor Sunstein agrees with Judge Posner about the dangers posed by the adoption of costly "positive" rights in Central and East European constitutions. He considers the combination of "[a] chaotic catalogue of abstractions from the social welfare state" with "traditional rights to religious liberty, free speech, and so on" to be "a large mistake, possibly a disaster."¹³ Sunstein is particularly concerned that socioeconomic constitutional rights — such as the right to free medical care and the right to a clean environment — are notoriously difficult to enforce; their lack of enforceability could have a demoralizing effect on society, which could jeopardize the perceived legitimacy of a constitution *in toto*. Consequently, he has counseled Central and East European countries to set their constitutional sights on providing "(a) firm liberal rights — free speech, voting rights, protection against abuse of the criminal justice system, religious liberty, barriers to invidious discrimination, property and contract rights; and (b) the preconditions for some kind of market economy." One does not have to disagree with the merits of Sunstein's prescription, however, to recognize that it had little or no chance of being followed for reasons that have to do with history, culture, and existing institutions, all of which his analysis neglects.¹⁴

A common constitutional prescription would be unlikely (to say the least) to work for all the countries of Central and Eastern Europe. These are not homogeneous societies sharing common histories, cultures, institutions, and values. To the contrary, they are extremely diverse. And it has always been a foregone conclusion that each country would adopt a constitution reflecting its own history, culture, and values, and not necessarily those of western advisers.

10. See *infra* notes 30-31 and accompanying text.

11. See POLAND: A COUNTRY STUDY 289 (Glenn E. Curtis ed., 1994).

12. See generally THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, REPRESSION DISGUISED AS LAW: HUMAN RIGHTS IN POLAND (1987).

13. See Sunstein, *supra* note 7, at 35.

14. *Id.* at 35-36. Interestingly, one of Sunstein's arguments against the inclusion of positive rights in constitutions is that "[c]onstitutions can be understood as *precommitment strategies*, in which nations use a founding document to protect against the most common problems in their usual political processes." *Id.* at 36. Existing cultural, historical, and institutional influences, however, can be understood as creating *preconstitutional precommitment strategies*, which can variously determine the contents of the constitutional precommitment strategies. No constitution has ever been written on a blank slate. See *infra* note 17 and accompanying text.

Moreover, not one of the postcommunist countries was "starting . . . from scratch" in constitution writing, as U.S. Supreme Court Justice Sandra Day O'Connor asserted in a 1995 speech.¹⁵ Constitutions, like other institutions, are not composed on blank slates but are shaped by existing social, historical, intellectual, and institutional forces. As the economist Lee Alston has explained:

Institutions are historically specific, and for this reason it is necessary to be sensitive to historical context. This is particularly true for the dynamics of institutional change. Much of the developmental path of societies is conditioned by their past. Even after revolutions, institution builders do not start off in a historical vacuum. At any moment in time, actions are constrained by customs, norms, religious beliefs, and many other inherited institutions. This is as true for the leaders in Eastern Europe today as it was for Augustus Caesar.¹⁶

Fortunately, some Central and East European countries have endogenous histories of democratic constitutionalism on which to build.

Consider Poland, the first country to cast off communism, and among the last to enact a wholly new constitution.¹⁷ Unbeknownst to most recent would-be advisers, Poland was the second country in the world, and the first in Europe, to adopt a written constitution.¹⁸ Not only did Poles enjoy protection against arbitrary arrest and imprisonment almost 250 years before the English supposedly "invented" habeas corpus, but they elected their Kings by a politically dominant parliament (the *Sejm*) while the rest of Europe still suffered absolute monarchs. Consider Poland in light of Mark Brzezinski's¹⁹ new book, *The Struggle for Constitutionalism in Poland*, which tells the story of how each time the Polish people have been left to their own devices — i.e., between invasions by Germans, Austro-Hungarians, Swedes, and Russians — they have established increasingly democratic institutions and protected civil liberties.

15. See Mack Reed, *Justice Urges Courts to Set Example Abroad; Judiciary: O'Connor, at Reagan Library, Says System Ought to be Model for Emerging Democracies*, L.A. TIMES (Ventura County Edition) Aug. 30, 1995, at B1, available in LEXIS, News Library, Arcnws File.

16. Lee J. Alston, *Empirical Work in Institutional Economics: An Overview*, in EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE 25, 25 (L.J. Alston et al. eds., 1996) (footnote omitted).

17. On the fall of communism in Eastern Europe, see generally TIMOTHY GARTON ASH, *THE MAGIC LANTERN: THE REVOLUTION OF '89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE* (1990). Most of the former communist countries adopted wholly new constitutions between 1991 and 1993. See RETT R. LUDWIKOSKI, *CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE* (1996).

18. Mark Brzezinski & Leszek Garlicki, *Polish Constitutional Law*, in LEGAL REFORM IN POST-COMMUNIST EUROPE 21, 21 (Stanislaw Frankowski & Paul B. Stephen eds., 1995).

19. Attorney, Hogan & Hartson, Wash., D.C. Brzezinski holds his law degree from the University of Virginia and a doctorate in political science from Oxford.

What follows is a review of Brzezinski's book, an assessment of its contribution to a better understanding of the historically and culturally contingent nature of the constitution-making process, and an appraisal of its contribution to a less western euro-centric understanding of legal history. Not only is Poland's history of constitutionalism western in its orientation, but Polish legal and constitutional innovations, particularly those regarding civil and religious liberties, predate similar developments in West European countries. Indeed, during the Renaissance and Reformation eras, Poland's protodemocratic and libertarian legal and political theories and practices significantly influenced efforts to reform absolutist monarchies in Western Europe. And they continue to influence constitutional developments in postcommunist Poland.

In conformity to Brzezinski's book, this Review proceeds chronologically, beginning with the unwritten Constitution of Renaissance Poland and concluding with a brief glance at Poland's new postcommunist Constitution, adopted in 1997. Along the way, we will learn several things: first, Poland has had a long, sometimes glorious and sometimes tragic, history of constitutionalism; second, Polish constitutionalism has always been decidedly western in its orientation; third, Poland has been — and continues to be — quite innovative in its constitutional theories and practices, especially in the area of civil liberties; and, finally, Polish constitutionalism has at times been influential in Western Europe. Thus, Polish constitutional history challenges the western euro-centrism of most legal historians, as well as the conventional wisdom of western lawyers that postcommunist countries are, in Justice O'Connor's terms, "starting . . . from scratch" in designing constitutional governments.²⁰

BRZEZINSKI'S ANALYTICAL FRAMEWORK: CONSTITUTIONS AND CONSTITUTIONALISM

Brzezinski's historical analysis of constitutionalism in Poland is prefaced with an "analytical framework" for assessing constitutionalism, which he rightly suggests to be inextricably intertwined with democracy and limited government. He discusses (pp. 7-9) definitions of the term "constitution" from Aristotle, Giovanni Satori, Carl Friedrich, and Karl Loewenstein, in order to distinguish constitutions that are so many words on paper (such as Stalinist constitutions) from those that have real normative effect — those whose "written guarantees are actual practices, enforced over political authorities" (p. 10). Brzezinski adopts Bonime-Blanc's list of characteristics denoting "real," "normative" constitutions: constitutional

20. See *supra* note 15 and accompanying text.

institutions exist and function as prescribed; constitutional rules governing political practice are "consistently observed"; constitutional norms, including civil rights and liberties, are enforced against violators; and government power is limited in practice by constitutional institutions such as the separation of powers, checks and balances, and judicial review.²¹

Having asserted that only democratic governments are constitutional in practice, Brzezinski hastens to add that democracies need not have *written* constitutions in order to be constitutional (pp. 10-12). The prime example here, of course, is England.²² At the same time, the existence of a formal, written constitution is no sure sign of constitutionalism, as proven by the former communist regimes in Central and Eastern Europe. Those regimes enacted constitutions that, on paper, were hardly distinguishable from those of western democracies; in some respects, they looked even better. They were not, however, worth the paper they were printed on.²³ The communist countries of Europe may have had constitutions, but their political systems were not constitutional. This point is critical for understanding Poland's history of constitutionalism. Without Brzezinski's distinction between constitutions and constitutional systems, there would be no formal basis for differentiating Poland's communist Constitution of 1952 from other Polish constitutional documents.

THE CONSTITUTION OF LIBERTY IN RENAISSANCE POLAND²⁴

Brzezinski appropriately begins his constitutional history of Poland half a millennium before Poland adopted its first written Constitution in 1791. During the thirteenth century, the Poles began developing institutions to limit arbitrary government. By the sixteenth century those institutions had coalesced into a constitutional system, albeit one based on several fundamental laws rather than a single written constitution. Brzezinski devotes only a few pages to this period, which is unfortunate because, as we shall see, in many respects it was the most remarkable period of Poland's legal and constitutional development. It also provides an important

21. See ANDREA BONIME-BLANC, *SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING* 11-12 (1987).

22. As the great American constitutional scholar, Thomas Cooley, wrote at the end of the nineteenth century, "[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).

23. See *infra* notes 96-98 and accompanying text.

24. Much of the supplementary historical information provided in this Review is adapted from Daniel H. Cole, *Poland's 1997 Constitution in Its Historical Context*, 1998 ST. LOUIS - WARSAW TRANSATLANTIC L.J. (forthcoming).

historical context for assessing subsequent constitutional developments.

Brzezinski too briefly canvasses the fundamental legal and political institutions that constituted Poland's First Republic, but he points out several of the central features of Poland's constitutional system. First, it was a federal system, with regional parliaments (*sejmiki*) that elected representatives to the national Diet (*Sejm*).²⁵ These parliamentary bodies were the political arms of Poland's sizeable nobility (*szlachta*), which constituted between 7 and 14 percent of the country's total population (numbering 7.5 million at its greatest).²⁶ Because only members of the nobility could serve in the regional *sejmiki* or the national *Sejm*, parliamentary policies tended to reflect the *szlachta*'s interests. And the *szlachta* were primarily interested in protecting their own liberties against the distrusted Crown.²⁷

Like England, sixteenth-century Poland was a parliamentary monarchy. Unlike in England, however, the lion's share of power in Poland was held by the national and regional parliaments; the King was decidedly subordinate. His authority was increasingly circumscribed by a series of "privileges" exacted by the *Sejm* beginning in the fourteenth century. First, in 1374 King Louis of Anjou granted the Privilege of Košice, promising not to impose new taxes without nobility's consent. In 1422, Louis's successor, King Jagiełło, promised not to confiscate the property of any member of the *szlachta* without a court order. Eleven years later, he granted the

25. The regional *sejmiki* played a dominant role in this federal system. They deputized representatives to the national *Sejm*, but did not give them plenipotentiary powers; rather, deputies were required to follow detailed instructions. Upon their return from the biennial six-week meeting of the *Sejm*, deputies were required to report to their *sejmiki* on all deliberations and actions taken in Warsaw. If it turned out that a deputy deviated from their instructions, the *sejmik* would often refuse to implement the national *Sejm*'s enactments. "Thus ultimate political control remained at the local level." 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, 48 (M.B. Biskupski & James S. Pula eds., 1990).

26. Brzezinski asserts, p. 34, that the nobility constituted "over 10 percent" of Poland's population. Other estimates run from as low as 7 to as high as 14 percent. Cf. 1 NORMAN DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND* 215 (1982) (estimating that the nobility comprised approximately 7 percent of Poland's total population in 1569 and 9 percent by the late seventeenth century); Wenceslas J. Wagner, *Introduction to 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).

27. It is also important to recognize that, unlike in other European countries, there was no legal hierarchy among Poland's nobility; impoverished "petty nobles" had the same quantum of legal rights as the wealthiest "magnates," including equal rights to vote in the National Assembly. As Field-Marshal Count von Moltke wrote, "[n]o Polish noble was the vassal of a superior lord. . . . [T]he meanest of them appeared at the diet in the full enjoyment of that power which belonged to all without distinction." FIELD-MARSHAL COUNT VON MOLTKE, *POLAND* 3 (E.S. Buchheim trans., 1885).

Privilege of Jedlna (Brzezinski refers to it as the Privilege of Kraków (p. 33)), which proclaimed, "*Neminem captivabimus nisi iure victum* — we will not imprison anyone except if convicted by law."²⁸ As Brzezinski notes (p. 33), this was a revolutionary innovation in civil libertarianism, providing a sizeable percentage of the Polish population with due process-style rights two-and-a-half centuries before England enacted its first Habeas Corpus Act in 1679.²⁹

Additional Crown concessions at the beginning of the sixteenth century decisively shifted the balance of power in Poland in favor of the nobility and their political arm, the *Sejm*. In 1501 the *Sejm* firmly established its supremacy by exacting from King Aleksander the power of legislative initiative. This led directly to the adoption in 1505 of the *nihil novi* "constitution,"³⁰ which prohibited the King from enacting new laws without the *Sejm*'s concurrence. Subsequently, after the death of the last Jagiellonian King, Zygmunt August, in 1572, Poland's nobles completely abolished hereditary monarchy. All subsequent Kings were elected by unanimous vote of all the nobles. Brzezinski points out that "[t]his procedure precluded the King from possessing any notion of 'divine right' or royal privilege and initiated the principle that the national sovereignty belongs to the whole nation, not to one individual" (p. 36).

Newly elected kings, prior to coronation, were obliged 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 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 codified in the first *Pacta Conventa*, the *Acta Henriciana* of 1574.³¹

So, by the sixteenth century the *Sejm* and its constituency, the nobility, were clearly established as the dominant political forces in

28. Quoted in Wenczeslas J. Wagner, *Justice for All: Polish Democracy in the Renaissance Period in Historical Perspective*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 127, 133 (Samuel Fiszman ed., 1988).

29. The fact that the Privilege of Jedlna extended only to Poland's nobility made it no less revolutionary; in fact, Poland's law provided broader coverage than many subsequently enacted habeas corpus statutes because Poland's nobility constituted a relatively large percentage of the total population. See *supra* note 26 and accompanying text. It is also worth noting that social classifications in Poland were not immutable; burghers and Jews were occasionally ennobled. See Józef Siemieński, *Polish Political Culture in the 16th Century*, in *THE POLISH PARLIAMENT AT THE SUMMIT OF ITS DEVELOPMENT (16TH - 17TH CENTURIES)* 53, 60 (W. Czapliński ed., 1985). During the sixteenth century, the Privilege of Jedlna protected the liberty of between five hundred thousand and a million Poles. The privilege was extended to townsmen in the 1791 Constitution.

30. This document is reprinted in *POLISH DEMOCRATIC THOUGHT*, *supra* note 25, at 109.

31. Pp. 36-37. The *Acta Henriciana* (*Pacta Conventa*) is reprinted in English translation in *POLISH DEMOCRATIC THOUGHT*, *supra* note 25, at 137.

Poland. And the nobility exercised its power defensively — to protect its liberties. This is most evident in the ancient and infamous mechanism of the *liberum veto*, which established a rule of unanimity for parliamentary decisions. A single legislator could prevent the 236-member *Sejm* from taking action merely by saying “*nie pozwalam*” (“I do not allow it”). The philosophical basis of this right became the *szlachta*’s credo: “*Nierządem Polska stoi*” (“It is by unrul[e] that Poland stands”).³²

It would be a mistake, however, to conclude that the shift of power from Crown to *Sejm* resulted in an unbalanced power structure, with too much power vested in the Parliament and too little executive authority. In fact, the Crown retained substantial power by several mechanisms, which Brzezinski does not explore. First, the King exercised substantial control 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 ninety-eight weeks. In addition, the King’s estate was by far the country’s largest; he was lord over one-sixth of Poland’s lands and inhabitants.³³ This was a great source of practical power. Moreover, members of the Senate (the upper house of Poland’s National Assembly) were appointed by the King. This served to dilute, to some extent, Crown concessions to the nobility because the King could only be removed from office for violating his loyalty oaths after three warnings from the Senate.³⁴

So Brzezinski is right to conclude (p. 37) that sixteenth-century Poland managed to effect a balance and separation of powers between the *Sejm* and the Crown, making for a constitutional government of limited powers. But sixteenth-century Poland was not a democracy in the modern sense. As Brzezinski points out (p. 34), the *Sejm* directly represented only the interests of the nobility, and the law formally protected only that group’s liberties. Other groups in Polish society — burghers, Jews, and sundry other religious and ethnic minorities — also benefitted from the general atmosphere of liberty and toleration that prevailed in Renaissance Poland. Unfortunately, Brzezinski’s preoccupation with the separation and balance of governmental powers leads him to neglect, to some extent, important Polish innovations in civil and religious liberties during the sixteenth century. Indeed, it was Renaissance Poland’s approach to civil and religious liberties, far more than its balance and separation of governmental powers, that characterized Poland’s First Republic and influenced constitutional theory and practice in other European countries.

32. 1 DAVIES, *supra* note 26, at 321, 345.

33. *Id.* at 335.

34. See Wagner, *supra* note 28, at 137.

Religious liberties were extended to minority groups in Poland as early as the twelfth and thirteenth centuries, when laws were enacted to protect Jewish religious practices.³⁵ The *szlachta* were the guarantors of religious liberty not just for Jews but for virtually all groups in Poland (excepting the peasantry) throughout the Renaissance and into the Counter-Reformation. Poland had been officially Catholic since the tenth century, but while other officially Catholic countries were persecuting dissidents, Poland permitted them to freely pursue their own creeds. And over the centuries Poland's tradition of religious toleration became legendary throughout Europe.³⁶ In addition to Moslems and Jews, Poland welcomed millions of Christian dissidents of various persuasions, including Uniates (Greek Catholics of the Slavonic Rite), Russian Orthodox, Lutherans, Calvinists, Czech Brethren (the Hussites), Polish Brethren (the Arians), Menonites, Schwenkfeldians, and Anabaptists.³⁷

The religious toleration that prevailed in sixteenth-century Poland was a function of the nobility's struggle to maintain its political predominance. The *szlachta* resisted calls for religious persecution for fear that legally sanctioned intolerance might result in increased royal authority at its expense.³⁸ This concern was legitimate because the nobility was divided among itself on the subject of religion. During the Reformation many Polish nobles converted to Calvinism, Lutheranism, Polish Antitrinitarianism, and the Czech Brethren.³⁹ In fact, so many converted that at one point in officially Catholic Poland, Roman Catholics were a minority in the *Sejm*.⁴⁰

35. In 1264, King Bolesław the Pious placed the Jews under royal protection, assuring their right to settle in Poland without fear of persecution. See BERNARD D. WEINRYB, *THE JEWS OF POLAND: A SOCIAL AND ECONOMIC HISTORY OF THE JEWISH COMMUNITY IN POLAND FROM 1100 TO 1800*, at 1212 (1973). By a law of 1367, Jewish communities (Kahaly) were granted autonomy to establish their own parliaments and courts. See Jerzy Kłoczowski, *Some Remarks on the Social and Religious History of Sixteenth-Century Poland*, in *THE POLISH RENAISSANCE*, *supra* note 28, at 96, 106. These legal protections encouraged Jews, who were persecuted elsewhere in Europe, to emigrate to Poland. During the sixteenth century, Poland's Jewish population swelled to more than 150,000. See WEINRYB, *supra*, at 114, 157.

36. For example, in the eighteenth century the French Catholic Rulhiere wrote about Poland, "[t]his 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." Quoted in WACŁAW LEDNICKI, *LIFE AND CULTURE OF POLAND AS REFLECTED IN POLISH LITERATURE* 47 (1944) (citing H. GRAPPIN, *HISTOIRE DE LA POLOGNE DES ORIGINES À 1922*, at 43 (1922)). Indeed, in 1616 there were more than 100 mosques in Poland, serving a sizeable Moslem (mostly Tartar) population.

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

38. See *id.* at 122.

39. See *id.* at 54. Calvinism was especially attractive to the Polish nobility because it "admitted the right of opposition against royal authority . . . [but] not by individuals, [only] by their lawful representatives." *Id.* at 56. Thus, Calvin supported the nobles against both King and peasantry.

40. See Wagner, *supra* note 28, at 138.

Religious conflict inevitably would have pitted noble against noble, to the advantage of the Crown.

The nobility's motivations, however, were not purely instrumental; a real streak of libertarianism runs through their writings. For example, Jan Zamoyski, Chancellor of the Polish Crown during the sixteenth century, wrote, "I would give half of 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."⁴¹ King Zygmunt August reflected the religious tolerance of the 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."⁴² Even the Catholic polemicist Piotr Skarga acquiesced in the general atmosphere of tolerance. His writings lashed out against heretics but repudiated violence: "Heresy is bad, but our neighbors and good brothers sharing our love of the country know that nothing won by force is durable, that anything secured under duress does not last long."⁴³

Not only was religious toleration state policy in sixteenth-century Poland; it was the law, codified in the 1573 Warsaw Confederation, a sublime but little-known statute reputed to be the first document in European history to constitutionalize religious toleration.⁴⁴ 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 [Roman Catholic] religion 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 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

41. Quoted in LEDNICKI, *supra* note 36, at 47 (citing GRAPPIN, *supra* note 36, at 89).

42. *Id.* at 47 (citing PAUL SUPER, *EVENTS AND PERSONALITIES IN POLISH HISTORY* (1936)).

43. P. SKARGA, *UPOMINANIE DO EWANGIELIKÓW* 33 (1592) quoted in TAZBIR, *supra* note 37, at 149.

44. See James Miller, *The Sixteenth-Century Roots of the Polish Democratic Tradition*, in *POLISH DEMOCRATIC THOUGHT*, *supra* note 25, at 21.

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.⁴⁵

These guarantees applied officially only to the nobility but promised a degree of religious freedom in Poland found virtually nowhere else in Europe. Throughout the sixteenth century, only two persons in Poland lost their lives for their religious beliefs as a result of legal proceedings.⁴⁶

Along with (or perhaps as a consequence of) religious freedom came substantial freedom of expression. Throughout the sixteenth century, European intellectuals flocked to Poland, where they could freely express and publish their views. As one immigrant wrote from Poland to a colleague back in Italy in 1561, "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."⁴⁷ This was an exaggeration. There was official censorship in Poland, but it was most often recognized in the breach. Dissident publishing houses flourished in the Polish-Lithuanian Republic. The Polish government published an index of banned books for the first time in the seventeenth century, and it too was rarely enforced. When it *was* enforced, books were not destroyed but placed in a special closed section of the Jagiellonian University library in Kraków.⁴⁸ Before 1627, no Polish nobleman was punished for publishing a banned book; and no writer or publisher ever forfeited his life.⁴⁹

The pervasive freedom of religion and expression was a central and unique virtue of Poland's Renaissance Constitution, which Brzezinski's analysis underappreciates. The extent of civil and religious freedom was virtually unmatched anywhere else in the world at the time. And Polish libertarianism became a source of Polish political influence in Western Europe. For not only did West European intellectuals flock to Poland to take advantage of its freedoms

45. Quoted in BASIC SOURCES RELATED TO THE HISTORY OF CENTRAL AND EASTERN EUROPE: A SELECTION 44-46 (Waclaw W. Soroka ed., 1966). A complete English translation of the 1573 Warsaw Confederation appears in POLISH DEMOCRATIC THOUGHT, *supra* note 25 at 131 (M.B. Biskupski trans.).

46. See TAZBIR, *supra* note 37, at 117, 122. To the extent there was religious persecution in sixteenth-century Poland, it was mostly *unofficial*. And in virtually every case when 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. See *id.* at 42. In 1552 the King granted the Catholic clergy jurisdiction over cases of heresy, but he immediately suspended the grant of jurisdiction and later abrogated it entirely (in 1562-63). See *id.* at 65, 68, 82.

47. *Id.* at 133.

48. See *id.* at 143.

49. See *id.* at 144.

but native Polish thinkers, such as Wawrzyniec Goślicki⁵⁰ and Andrzej Frycz Modrzewski⁵¹ exported Polish libertarian and humanist ideas abroad.

Brzezinski briefly discusses Goślicki and his theory of government limited by the rule of law (pp. 35-36). But Goślicki's writings did much more than exemplify Poland's democracy of the gentry; they were highly influential in exporting Polish democratic ideas throughout Europe. Goślicki intended his *De optimo Senatore*⁵² as a primer on good government,⁵³ but it was also to be an original and influential work of political philosophy. Presaging the Enlightenment, Goślicki equated godliness with reason and reason with law.⁵⁴ He argued for the rule of law as a constraint on both Parliament and the Crown. And he asserted the ultimate sovereignty of the people in no uncertain terms:

50. Wawrzyniec Goślicki was of noble lineage, born near Płock, and educated in Kraków, Padua, and Bologna, from whose university he received a doctorate in civil and canon law in 1566. After completing his education, he travelled to Rome, where he wrote the book that brought him fame across Europe: *De optimo Senatore* ("The Accomplished Senator"). Later, Goślicki served as Chancellor of the Polish Crown and Bishop of Poznań, which position he held at the time of his death in 1607. For more on Goślicki's life and work, see Wenceslas J. Wagner et al., *Laurentius Grimaldus Goslicius and His Age — Modern Constitutional Law Ideas in the Sixteenth Century*, reprinted in *POLISH LAW THROUGHOUT THE AGES*, *supra* note 26, at 97.

51. Andrzej Frycz Modrzewski was born in Wolborz, in central Poland, in 1503. His family was of noble origins but modest means. They sent Andrzej at age 11 to study at the Jagiellonian University in Kraków, which was then at the height of its prestige as the center for humanistic learning in Europe. After completing his education there, in 1523 Frycz Modrzewski entered the service of Primate Jan Łaski. This led to a life-long relationship with the Łaski family, who served as Frycz Modrzewski's protectors in Poland after he began publishing his legal and political tracts. Like Frycz Modrzewski, the Łaskis were reform-minded; unlike him, they were immensely powerful.

Under Primate Łaski's auspices, the young Frycz Modrzewski travelled abroad extensively, particularly to France and Germany, where he studied for some time at the University of Wittenberg. While there, he served as the Primate's emissary to the German protestants. After returning to Poland, in 1547 Frycz Modrzewski became secretary to King Zygmunt August and carried out several diplomatic missions on his behalf. It was only toward the end of his career that Frycz Modrzewski began to write and publish tracts concerning the nature of government and international law.

52. First published in Latin in Venice in 1568. For an English translation from the original Latin, see LAURENCE GRIMALD GOZLISKI, *THE ACCOMPLISHED SENATOR* (Oldisworth trans., 1733). A facsimile of the first English translation (1598) is included in *ANGLO-POLISH RENAISSANCE TEXTS* (Witold Chwalewik ed., 1968). However, the accuracy of that first translation has been disputed. See W.J. STANKIEWICZ, *THE ACCOMPLISHED SENATOR OF LAURENTIUS GOSLICIUS* 11-12 (1946); Teresa Bałuk-Ulewiczowa, *The Senator of Wawrzyniec Goślicki and the Elizabethan Counsellor*, in *THE POLISH RENAISSANCE*, *supra* note 28, at 258, 265-72. Most ironically, Goślicki's book was not translated into Polish before the second half of the twentieth century. See H.E. Tytus Filipowicz, *The Accomplished Senator*, Remarks at the Twenty-Sixth Annual Meeting of the American Society of International Law, in 26 *PROCEEDINGS OF THE AMER. SOC. INTL. L.* 234, 234 (1932). Filipowicz was Poland's first (ever) Ambassador to the United States.

53. Such primers, known as *specula* or "mirrors" were quite popular during the Renaissance (Machiavelli's *The Prince* being another prime example of the genre). See Bałuk-Ulewiczowa, *supra* note 52, at 258.

54. See GOZLISKI, *supra* note 52, at 7-8.

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 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 Hands⁵⁵

These words might have been written 200 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.⁵⁶ Although a direct connection remains elusive, there is no disputing that Goślicki's work was popular and influential in England at the turn of the seventeenth century.⁵⁷ Queen Elizabeth herself may have been acquainted with the book,⁵⁸ and William Shakespeare certainly read it.⁵⁹ The Polish

55. *Id.* at 32-33. According to Filipowicz, *supra* note 52, at 238, this was the "earliest statement in a political treatise of the right of revolution."

56. Supporters of this theory include Filipowicz, *supra* note 52, and Wagner et al., *supra* note 50.

57. Two English translations of *De optimo Senatore* appeared in London in 1598 (reprinted in 1607) and 1733, respectively. By all accounts, the 1598 translation (which hardly deserves to be called a "translation" for all of its "politically correct" editorial changes and errors) was widely read.

58. In 1597 England was at war with Spain, and domestic conflict was increasing between the English Crown and the opposition, leading ultimately to civil war in 1642. The English Crown feared that Poland might ally militarily with Spain because the Polish and Spanish Kings were related by marriage and English pirates had been intercepting and confiscating Polish shipments of food and building materials bound for Spain. Any Polish political tract published in England at that time was bound to find an interested audience. With respect to England's domestic political turmoil, Goślicki's book, which denied absolute monarchy and the divine right of Kings, was hardly favorable to Queen Elizabeth or the early Stuarts (who reigned from 1603). In particular, Goślicki's assertion of popular sovereignty directly contradicted the absolutist claims of the early Stuarts, James I and Charles I. See, e.g., James I, A Speech to the Lords and Commons of the Parliament at White-Hall (1609), reprinted in 1 THE POLITICAL WRITINGS OF JAMES I 306, 307 (Charles Howard McIlwain ed., 1918) (asserting that the monarch is the sole fount of the constitution, law, and justice). And his assertion of a right of resistance against tyrannical kings supported the antiroyalist movement that arose in opposition to the early Stuarts and their assertions of absolutism; Goślicki's book was widely quoted and cited in antiroyalist pamphlets and leaflets. See Filipowicz, *supra* note 52, at 239.

59. In fact, Shakespeare scholars in both England and Poland have acknowledged an important connection between the appearance of Goślicki's book in England in 1598 and Shakespeare's masterpiece, *Hamlet*.

In 1904 Professor Israel Gollancz of Cambridge University first suggested that Shakespeare not only read Goślicki but actually met him when Goślicki served, for a brief time, as emissary to the Court of St. James. See Israel Gollancz, *Bits of Timber: Some Observations on Shakespearean Names — 'Shylock'; 'Polonius'; 'Malvolio'*, in A BOOK OF HOMAGE TO SHAKESPEARE 170, 174-77 (Israel Gollancz ed., 1916); see also Filipowicz, *supra* note 52, at 239-40. This is speculative. What is not speculative, however, is that Shakespeare greatly expanded the role of the King's counsellor in the second edition of *Hamlet*, which appeared after the publication of Goślicki's book in England, and Shakespeare renamed the counsellor Polonius (Latin for "a Pole"). See 7 NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE 44-45 (Geoffrey Bullough ed., 1973); Filipowicz, *supra* note 52, at 239-40; Gollancz, *supra*, at 174.

Polonius was, of course, a figure of derision and ridicule in *Hamlet*, described by the prince as "a foolish prating knave." WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET

democratic and libertarian constitutional ideas it exported helped to fuel the antiroyalist opposition movement in the decades leading up to the civil war of 1642.

Equally influential were the political/constitutional writings of Frycz Modrzewski. In 1543, at the age of forty, he published his first two treatises: *Lascius sive de poena homicidii*, an indictment of class-based inequality in Polish criminal law, and *Oratio Philaletis Peripetici*, in which he defended the political rights of Poland's townspeople. Then, in 1551 Frycz Modrzewski wrote the work which brought him fame throughout Europe, *Commentariorum de Republica emendanda libri quinque*. Initially suppressed by the Catholic clergy, the complete book was first published in Basel in 1554. It became widely available in Poland the same year. Its theme was the improvement of church and state through reform of customs, laws, the church, schools, and methods of warfare.⁶⁰ Strongly influenced by Erasmus, whose entire library the Łaskis

PRINCE OF DENMARK act 3, sc. 4. (Jack Randall Crawford ed., 1917). Was this also Shakespeare's commentary on Goślicki's book? Or was Shakespeare merely ridiculing a common type of courtier who Goślicki himself caricatured? Not surprisingly, English and Polish commentators have interpreted the role of Polonius in *Hamlet* differently.

The English Shakespeare scholar, Geoffrey Bullough, interprets Shakespeare's treatment of Goślicki this way:

The verbose style of the [1598] translation and the somewhat commonplace worldly wisdom of the contents make it almost certain that Shakespeare enlarged the part of the spying courtier in the light of it, mocking where it praised the statesman's wariness, sententiousness and gravity, and making Hamlet take the side of that objector to the counsellor's 'philosophy' who declares, 'that arte of thine is rather to be teamed the science of prating, then a knowledge whereby men attaine unto felicitie'. . . . The name 'Polonius' attached to such a character would have comic point only after the publication of Goślicki's book and when the dispute with Poland was still fresh, i.e., 1598-1602.

7 NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE, *supra*, at 46.

The Polish Shakespeare scholar, Witold Chwalewik, provides a very different interpretation of Goślicki's effect on Shakespeare:

The objection equally obvious and seemingly crushing is that the figure Shakespeare has drawn, clearly with a critical intention, does not at all resemble the ideal portrait Goślicki is concerned to present. And it has to be admitted that the two are, in fact, quite unlike. What has been overlooked, however, is that Goślicki's work, besides the ideal norm, contains also a sketched-in caricature, and that this fits the facts of the case perfectly.

ANGLO-POLISH RENAISSANCE TEXTS, *supra* note 52, at 33-34; see also Laurentius Grimaldus Goslicius, *The Counsellor*, reprinted in ANGLO-POLISH RENAISSANCE TEXTS, *supra* note 52, at 45, 93. What Bullough neglects, according to Chwalewik's interpretation, are important textual similarities between the 1598 translation of *De optimo Senatore* and *Hamlet*. For example, just as Hamlet castigates Polonius for being a "following prating Knave," Goślicki derides common courtiers (in contrast to his ideal counsellor) as "prattling Orators and witless Philosophers." *Id.* at 93. Chwalewik points to this and other textual similarities between *De optimo Senatore* and *Hamlet* to argue that Shakespeare was not ridiculing Goślicki's political philosophy but was simply adapting (or appropriating) Goślicki's portrayal of a common type of inferior counsellor.

Whichever (if either) interpretation is correct, the important point for present purposes is that Goślicki's book made a significant impression in England when it was first translated and published there in 1598.

60. See Waldemar Voisé, *Polish Renaissance Political Theory: Andrzej Frycz Modrzewski*, in THE POLISH RENAISSANCE, *supra* note 28, at 174, 175.

had purchased and brought to Poland, in *de Republica emendanda* Frycz Modrzewski attacked the unwise, inane, 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 Modrzewski became the first among the humanists to call for secular control of schools and education directed toward public service.

While the most influential parts of *de Republica emendanda* were those that dealt with war and its resolution,⁶¹ Frycz Modrzewski's book was at least equally concerned with internal state conflicts. Believing that all social classes were necessary for the efficient and virtuous functioning of the state, he condemned any oppression, especially of the peasantry, and called for the abolition of serfdom. Frycz Modrzewski argued that the peasant should own his land, free from seizure by his lord, and be free to leave at all times.

Frycz Modrzewski also believed strongly in equality before the law. Echoing his earlier pamphlet, *Lascius sive de poena homicidii*, he argued in *de Republica emendanda* that all citizens, be they noblemen or peasants, should be entitled to justice. If the law must discriminate, he contended, then it should punish more severely the magnates and governors who commit crimes though they have less reason to do so. Moreover, Frycz Modrzewski championed freedom of expression, especially the freedom to criticize the ruling classes, including the King: "Rulers who are not prepared to tolerate freedom of speech," he argued, "should govern over 'dumb animals' and not over intelligent men."⁶²

By the beginning of the seventeenth century, *de Republica emendanda* had appeared in Spanish and German translations; it

61. Frycz Modrzewski believed that the only way one state could convince its neighbors of its peaceful intentions was to resist war at all costs. Presaging the 1573 Warsaw Confederation by a generation, he argued that religious differences should never serve as grounds for war. For international disputes, he recommended specific procedures for mediation: each party to a conflict would choose a "judge" who, released from his oath of loyalty to his own King during the period of mediation, might secure a timely and just settlement. Each nation would then be bound by the judges' ruling, as by a treaty. In case negotiations failed, Frycz Modrzewski maintained, like Grotius after him, that a just war could not be lost and an unjust war could not be won. See Grotius' *VIA AD PACEM ECCLESIASTICAM* (1642) (expressing the same attitude and frequently citing Modrzewski). A war was just only if undertaken as a last resort to avenge pernicious wrongs. Thus, for Frycz Modrzewski, war was "an act designed to administer justice in international relations." Voisé, *supra* note 60, at 184.

62. Quoted in OSKAR HALECKI, *A HISTORY OF POLAND* 61 (1977). Paradoxically, Frycz Modrzewski called for tough sedition laws — in a virtuous and just Republic such as his, whoever might engage in sedition would, presumably, be unjust.

was later translated into English and Russian. Frycz Modrzewski's work was esteemed by the likes of Grotius, Bayle, and de Real, but was condemned by some who opposed Frycz Modrzewski's progressive views.⁶³ Besides Frycz Modrzewski and Goślicki, a number of other Polish intellectuals contributed works of great value to sixteenth-century Polish constitutional development and, more generally, to European legal and political thought.⁶⁴ Their writings propagated the very libertarian constitutional system in Renaissance Poland that facilitated them, and influenced, if only indirectly, the move from absolute monarchy toward constitutional governance in other European countries.

THE DECLINE OF POLAND'S FIRST REPUBLIC: 1600-1791

Between the end of the sixteenth century and the enactment of Poland's landmark Constitution of 1791, political and economic conditions deteriorated. As Brzezinski puts it, "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" (p. 39). The balance of powers that had existed during the sixteenth century tilted increasingly toward the nobility, which curtailed the King's authority and limited state power to such extents that the Polish-Lithuanian Republic grew too weak to defend itself against increasingly powerful foreign aggressors (p. 39). As a result, from the end of the sixteenth to the middle of the eighteenth century, Poland lost half its territory to Russia, Sweden, Prussia, and Austria-Hungary.

The chief institutional villain in Brzezinski's story, which reflects the standard account of the demise of the balance of power in Poland during the seventeenth and eighteenth centuries, is the *liberum veto*. As noted earlier,⁶⁵ the veto required unanimity for legislative action; a single dissenting member of the *Sejm* could block legislative action and even dissolve an entire session of Parliament. Indeed, according to Brzezinski, the *liberum veto* caused the adjournment without action of forty-eight out of fifty-five biennial

63. In 1576, the Frenchman Jean Bodin wrote in *Six Books of the Republic*: "The Polish writer Andreas Fricus even writes that it is an allegedly great mistake not to apply the same punishment to patricians and plebeians, the rich and poor, citizens and foreigners; nothing more absurd could have been written by anyone who, like him, wishes to shape the laws and customs of his Republic." Quoted in Voisé, *supra* note 60, at 186. But then, as Frycz Modrzewski's biographer, Waldemar Voisé has observed, critics in the same era also condemned as absurd the ideas of the Polish astronomer Copernicus. *Id.* at 187.

64. These included the King's Chancellor Jan Zamoyski, the Protestant Andrzej Wolan, and Stanisław Sokołowski, who wrote of the strict correlation between liberty and equality.

65. See *supra* note 32 and accompanying text.

meetings of the *Sejm* held after 1652 (p. 39). But abuse of the veto was as much a symptom as a cause of Poland's political problems.

According to Wenceslas J. Wagner, the general repudiation of the veto is historically myopic: "[H]istory shows that for many long years there was no abuse of the veto in Poland." Before 1652 "the deputy who had an opinion different from the others was giving up his point of view if he knew that he was isolated and his approach was contrary to that of the others — and did not use his right to the veto."⁶⁶ Wagner's view is not wholly accurate, however. As Norman Davies has explained, the *liberum veto* created several "difficulties in the early decades of the Republic, including one in 1580 which blocked all taxation for that year."⁶⁷ Davies concurs, however, in Wagner's general assessment of the veto, noting that before the mid-seventeenth century it "[u]sually . . . produced nothing more than a temporary delay," as the marshal of the *Sejm* worked to negotiate a resolution to the conflict.⁶⁸ It is also important to remember that the *liberum veto* existed during the period when the Polish-Lithuanian Republic blossomed into the largest and most powerful country in Europe. So it could not have been the very existence of the institution that caused the state to weaken substantially during the seventeenth and eighteenth centuries.

What did change between the sixteenth and eighteenth centuries was the way in which the *liberum veto* was used and its consequences. Before the 1652 *Sejm* the veto was used only to block individual legislative initiatives; in that year it was used for the first time to negate the Diet's entire agenda and dissolve the session.⁶⁹ As Wagner explains, the *liberum veto* changed into a "*liberum rumpo* . . . causing the dissolution of the Diet and the annihilation of all its decisions, making its deliberations fruitless."⁷⁰ This was to the great advantage of the Republic's foreign enemies, who "retained magnates who could break the *Sejm* at the drop of a ducat."⁷¹ Consequently, as Brzezinski notes (p. 39), most subsequent meetings of the *Sejm* were broken, causing the Polish state to grow ever weaker, less able to defend itself against foreign influence and, ultimately, incursion.

Whether the *liberum veto* was a cause or merely a symptom of the demise of the first Polish Republic is unclear. Without doubt it

66. Wenceslas J. Wagner, *Some Comments on Old "Privileges" and the "Liberum Veto,"* in *CONSTITUTION AND REFORM IN EIGHTEENTH-CENTURY POLAND: THE CONSTITUTION OF 3 MAY 1791*, at 51, 59 (Samuel Fiszman ed., 1997).

67. 1 DAVIES, *supra* note 26, at 346.

68. *Id.* at 345.

69. *See id.* at 346.

70. Wagner, *supra* note 66, at 58.

71. 1 DAVIES, *supra* note 26, at 347.

was, like so many liberal-democratic institutions, inefficient. Without it Poland might have forestalled invasion and partition, but even that is not certain. What is certain is that the *veto* evolved into a useful tool by which foreign powers could gain control of domestic Polish political affairs.

But the *liberum veto* was hardly the only cause of Poland's demise at the end of the eighteenth century. In fact, abuse of the *veto* coincided with a general erosion of civil and religious liberties in Poland, which gave way before a burgeoning and increasingly malevolent Polish nationalism that itself was a symptom of foreign agitation. Throughout the seventeenth and eighteenth centuries, the Polish state grew less and less tolerant of "non-Poles" (especially Jews) and religious dissidents. Freedom of speech and religion were restricted. Ironically, this took place in Poland just as other European countries were moving towards the increased liberalism of the Enlightenment.

THE 1791 CONSTITUTION: APOGEE OF POLISH CONSTITUTIONALISM?

Brzezinski views Poland's 1791 Constitution as "the blossoming of constitutional government in Poland" (p. 39). This reflects the conventional wisdom both inside and outside of Poland.⁷² Poland's 1791 Constitution was, after all, the world's second written constitution (after the U.S. Constitution of 1787), and Europe's first. And it was, in many respects, a remarkable legal document for its time, combining some of the libertarian political philosophy of Renaissance Poland with more recent constitutional ideas from home and abroad. For Poles, the 1791 Constitution remains to this day an object of veneration — Poland celebrates Constitution Day on May 3rd each year. But this has less to do with the document's contents than with what the 1791 Constitution represents for the Polish nation: a statement of the Polish state's principles on the brink of its dismemberment by foreign powers.

Once again, Brzezinski's analysis of the 1791 Constitution (pp. 39-44) focuses on the way it separated powers between branches of government. But many of the most progressive ideas it contained — federalism, decentralized state power, legislative supremacy, 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

72. See, e.g., Zbigniew Szczaska, *The Fundamental Principles Concerning the Political System of the 3 May, 1791 Government Statute*, in CONSTITUTION AND REFORM, *supra* note 66, at 287. The 1791 Constitution is reprinted in English translation in POLISH DEMOCRATIC THOUGHT, *supra* note 25, at 168 (Christopher Kasperek trans.).

Gościński, Frycz Modrzewski, Sokołowski, and Myszkowski. Ironically, many of the truly novel ideas found in the 1791 Constitution — the true products of the Polish “Enlightenment” — appear regressive in light of Poland’s earlier constitutional history. These regressive ideas included the reinstitution of hereditary monarchy and restrictions on religious freedom.

Brzezinski applauds the 1791 Constitution for ostensibly creating “a clear right to religious freedom” (p. 44), but the extent of the right was anything but clear. In fact, Article I of the Constitution expressly limited religious freedom to practices “according to the laws of the country.”⁷³ In other words, the Constitution guaranteed only as much religious freedom as state policy sanctioned. Such an empty guarantee was worthy of Poland’s infamous Communist Constitution of 1952.⁷⁴ Moreover, the 1791 Constitution outlawed dissidence by prohibiting conversion from Roman Catholicism to any other creed, thus abrogating religious liberties agreed to by the 1573 Warsaw Confederation.⁷⁵ The 1791 Constitution also adopted in full the Cities Act, enacted earlier that year by the *Sejm*, which, among other things, limited habeas corpus protections and denied Jews citizenship in cities. Thus, 1791 marked a sea-change in official Polish-Jewish relations. The Cities Act and the Constitution reflected the rise of anti-Semitism among the higher estates. 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.”⁷⁶

These more regressive, antidemocratic, and antilibertarian features of Poland’s 1791 Constitution reflected a burgeoning Polish nationalism. Despite professions of respect for religious minorities, the authors of the 1791 Constitution proved themselves to be less than tolerant. For example, Father Hugo Kołłątaj, “[a] leading member of the Polish Enlightenment” and “major architect” of the 1791 Constitution,⁷⁷ proposed compulsory assimilation of Jews and declared that “[a]ll those 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.”⁷⁸ Not

73. POL. CONST. (1791) art. 1.

74. On Poland’s 1952 Constitution, see *infra* notes 93-102 and accompanying text.

75. See *supra* notes 44-45 and accompanying text.

76. Daniel Z. Stone, *Democratic Thought in Eighteenth Century Poland*, in POLISH DEMOCRATIC THOUGHT, *supra* note 25, at 55, 67.

77. Joan S. Skurnowicz, *Polish Szlachta Democracy at the Crossroads, 1795-1831*, in POLISH DEMOCRATIC THOUGHT, *supra* note 24, at 73, 75.

78. ANDRZEJ WALICKI, THE ENLIGHTENMENT AND THE BIRTH OF MODERN NATIONHOOD: POLISH POLITICAL THOUGHT FROM NOBLE REPUBLICANISM TO TADEUSZ

only were these proposals inconsistent with Kołłątaj's professed respect for "the rights of the Jews as a religious minority"⁷⁹ but they contradicted Jewish liberties granted by Polish Kings and Diets since the thirteenth century.⁸⁰

Thus, the meaning of Poland's 1791 Constitution is more complex than Brzezinski admits. There is no denying its symbolic status for the Polish nation. As Brzezinski suggests, it has represented for Poles a legacy of independence, sovereignty, democracy, and "mature political culture" that they were unable to recover for 200 years (p. 45). That same Constitution, however, abandoned many of Poland's most noble principles, including those embodied in the 1573 Warsaw Confederation. And by according constitutional status to anti-Semitism, the 1791 Constitution created a disgraceful legacy with which Poland struggles to this day.

Finally, Brzezinski neglects Tadeusz Kościuszko's 1794 Uprising, which had virtually as much significance for Poland's 1791 Constitution as the Bill of Rights had for the U.S. Constitution. As Norman Davies has suggested, the 1794 "National Rising" rather than the 1791 Constitution itself was the "natural culmination of the reformist movement."⁸¹

The 1791 Constitution was in effect for only fourteen months when Russia invaded Poland. In January 1793, the victorious Russian army entered into an agreement with Prussia to partition Poland. This marked the end of the legal life of the 1791 Constitution, but secured its place as the romantic symbol of Polish independence. On March 24, 1794 Tadeusz Kościuszko, hero of the American Revolution (and Brigadier General in the U.S. Army), led an all-out effort to regain that independence. It was not simply an insurrection but a revolution. Even before the battle was joined, Kościuszko and the other leaders of the Polish army established a Supreme National Council to direct a new, independent government. Kościuszko knew full well, however, that the success of his venture depended on the full participation of all classes, including the peasants, who had little reason to fight under the 1791 Constitution, which kept them in serfdom. So, on March 24, 1794 he issued the "Act of Insurrection of the Citizens and Inhabitants of the Palatinate of Cracow," which promised to free the peasantry as a whole from servitude. This, in effect, amended the 1791 Constitution and brought out the peasantry *en masse*. Fighting with scythes,

KOŚCIUSZKO 74 (1989) (quoting 1 HUGO KOLŁATAJ, LISTU ANONIMA: PRAWO POLITYCZNE NARODU POLSKIEGO 296 (B. Lesnodorski & H. Wereszycka eds., 1954)).

79. *Id.*

80. See *supra* note 35 and accompanying text.

81. See Jercy Kowecki, *The Kościuszko Insurrection: Continuation and Radicalization of Change*, in CONSTITUTION AND REFORM IN EIGHTEENTH-CENTURY POLAND, *supra* note 66, at 497.

they helped Kościuszko's army rout General Tormasov's Russian forces at Racławice. Warsaw and Wilno were liberated, and Poland reemerged, if only briefly, as an independent and far more democratic country.⁸² On May 7, 1794, Kościuszko issued the Manifesto of Polaniec which freed the peasantry from servitude.⁸³

The Russians and Prussians managed to suppress the uprising before the end of 1794. In 1795, "Poland ceased to exist as an independent state" (p. 45), and in January 1797, the Russians, Prussians, and Austro-Hungarians signed a final Treaty of Partition at St. Petersburg. From that time until the end of World War I, Poland was ruled from abroad without even a patina of constitutional legality.⁸⁴

THE CONSTITUTION OF POLAND'S SECOND REPUBLIC, 1921-39

At the end of World War I the Allied forces jointly guaranteed the "'restoration of Poland in its historical and geographic limits.'"⁸⁵ This was easier said than done. Different regions of the newly reunited country had been subject for more than a century to the disparate social, cultural, economic, political, and legal norms of three foreign sovereigns: Russia, Prussia, and Austria-Hungary. Under the circumstances, it is remarkable that the process of constitution-drafting, which began in 1919, took only two years to complete.

Brzezinski is critical of the final product, the 1921 Constitution, because, in his view, the legislative branch it created was too strong and the executive was too weak (pp. 48-49). Consequently, the Constitution "provided a political structure that sowed the seeds of ineffective government, reminiscent of pre-1791 Poland" (p. 51). What the newly reborn Polish state needed most was stability, which the 1921 Constitution failed to provide.

Brzezinski's assessment of the 1921 Constitution is overly harsh. In Poland's circumstances, it is doubtful that any constitution, no matter how well structured and balanced its system of governmental powers, could have provided sufficient stability. There were simply too many political and, especially, economic problems that could not be resolved by constitution writing. And, to its credit, the 1921 Constitution was an entirely modern and democratic constitution, far closer in letter and spirit to Poland's new 1997 Constitution

82. See 1 DAVIES, *supra* note 26, at 538-39.

83. See *id.* at 539.

84. See *id.* at 540-42.

85. 2 *id.* at 388 (1982).

than the 1791 Constitution or any other constitutional document in Polish history.⁸⁶

The 1921 Constitution continued many of the traditions of Poland's earlier constitutions, including legislative supremacy but with a 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. In the king's place sat a weak president, clearly subservient to Parliament. The *Sejm* had sole responsibility for the national budget, constitutional amendments, the army, and taxation. "[A] simple majority vote of the Sejm could force a single minister, the entire executive cabinet, or even the President, to resign" (p. 49). The president, by contrast, could not dissolve the *Sejm*; he did not even possess 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). And, as Brzezinski points out, the Council of Ministers was directly answerable to the *Sejm*, not to the president (p. 50). In sum, the president's role was purely formal.

This was by design. Poland's constitution drafters feared that a strong presidency might "allow a single dynamic leader," specifically Marshal Józef Piłsudski, "to dominate the government" (p. 50). Piłsudski was the charismatic hero of Poland's 1920 war against Russia, the head of Poland's provisional government, and a self-styled (non-Marxist) socialist. By creating a weak presidency, Piłsudski's opponents managed to dissuade him from participating in the government. Was the cost of this an "impotent 'sejmocracy,'" as Brzezinski (following Piłsudski) alleges (p. 48)?

It is not at all clear that the unbalanced political structure created by the 1921 Constitution was a significant cause of Poland's travails during the interwar period. It 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 1926. Would Poland have been better off with a stronger executive from the beginning? Almost certainly. Would it have averted Poland's postwar economic difficulties? At best it might have ameliorated their impact marginally. Would outright dictatorship have provided greater "stability" than Poland's democratic constitution? It is entirely possible. Even so, would that be reason for criticizing Poland's 1921 Constitution?

86. The 1921 Constitution was codified at 1921 DZIENNIK USTAW ("Journal of Laws") [hereinafter Dz. U.] No. 44, item 267. For an English translation of the 1921 Constitution see POLSKIE KONSTITUCJE (Constitution, 1921) located at <<http://www-personal.engin.umich.edu/~zbigniew/Constitutions/k1921.E.html>>.

Consider the circumstances. Poland was attempting to rebuild (or more accurately, to build for the first time) a modern state and economy after a century-and-a-quarter of foreign rule, in postwar circumstances of massive geographical and economic dislocation and differentiation, high inflation, internal ethnic strife, as well as military hostility from Russia, the Ukraine, and Lithuania. That Poland managed to rebuild itself at all is remarkable enough. And, when viewed in its historical context, Poland's 1921 Constitution is a remarkable document. It 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.⁸⁷

Unfortunately, this liberal-democratic constitution with its promise of a welfare state was implemented in a political climate of nationalism and radicalisms of all 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 horrendous. Already high rates of unemployment and inflation were growing ever higher; investment capital was in short supply; and Poland's economy was underindustrialized. 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."⁸⁸ What constitution in the world could have ensured stability under such circumstances? Arguably, Poland's first postpartition governments faced greater challenges than those that confronted the first postcommunist government of Prime Minister Tadeusz Mazowiecki in 1989.

The political and economic problems that plagued successive governments in postpartition Poland, along with the perceived need for institutional reforms, led Marshal Piłsudski to stage a *coup* in 1926.⁸⁹ Afterwards, he established a new political party, the *Bezpartyjny Blok Współpracy z Rządem* (The Nonparty Block for Cooperation with the Government, or BBWR), to govern the coun-

87. 2 DAVIES, *supra* note 26, at 402-04.

88. *Id.* at 415.

89. *See id.* at 421.

try.⁹⁰ At Piłsudski's behest, the 1921 Constitution was amended 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. Despite their "undemocratic origin," Brzezinski suggests, these Amendments improved the 1921 Constitution by better balancing the powers of the legislative and executive branches of government, thus providing greater stability to Poland's political system (p. 53). In reality, however, the Amendments did not stabilize much of anything.

Piłsudski's regime, the *Senacja*, held power until the Nazis invaded Poland in 1939. Its rule, however, was hardly stable. Its governments were just as short-lived as those before the *coup*. Certainly, the 1926 Constitutional Amendments 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."⁹¹ Nor did the Amendments prevent or alleviate the general economic decline that gripped Poland and the rest of Europe in the 1930s in the wake of America's Great Depression.

Piłsudski and his party soon grew dissatisfied with the 1926 Amendments to the 1921 Constitution; they called for a completely new constitution to provide even more executive authority, so that the President could "act effectively and decisively" to solve the nation's economic problems (p. 53). The result was the 1935 Constitution, which 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 made answerable only to "God and history."⁹² Brzezinski quite rightly labels the 1935 Constitution "undemocratic" (p. 55). It marked "a decisive break with liberal parliamentarism" (p. 56), which had been a consistent feature of Polish constitutions since the sixteenth century.

Ironically, Piłsudski died just three weeks after the 1935 Constitution was enacted, leaving Poland leaderless. In the new constitutional system the *Sejm* was too weak to run the country; the President held the lion's share of power. Piłsudski, however, had been the only man in Poland popular and charismatic enough to

90. *See id.* at 421. Interestingly, almost 70 years later, then Polish President Lech Wałęsa recreated the BBWR because he thought the lack of executive authority under the 1989 Amendments to Poland's 1952 Constitution hampered effective government. *See infra* note 109.

91. 2 DAVIES, *supra* note 26, at 411.

92. POL. CONST. (1935), 1935 Dz. U. No. 30, item 227, arts. 2, 3.

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 Russia, this time under the secret Molotov-Ribbentrop Pact of 1939.

When Hitler's Germany attacked Poland in August 1939, the Polish government went into exile, first to Paris, and then, when 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 to re-establish constitutional government was wishful thinking. The Soviets had other plans for postwar Poland, plans that were in essence ratified by the Allied powers at Yalta.

THE CONSTITUTION OF THE POLISH PEOPLE'S REPUBLIC, 1944-1989

All of Poland's constitutional history to this point is covered in one brief chapter of Brzezinski's book. Ironically, he subsequently devotes an entire chapter to constitutional theory and practice in communist Poland, where constitutional law mattered less than Party policy, and where both were largely dictated from Moscow. Yet Poland's Communist Constitution of 1952 is undeniably part of Poland's constitutional heritage. At some level a constitution is a constitution regardless of its pedigree, its political legitimacy, or even its legal status.

Brzezinski is plainly ambivalent about the constitution of Poland under communism. Indeed, his title for the chapter, "From Constitutionalism to Totalitarianism," implies that constitutionalism and communism are antithetical. And Brzezinski notes, "the promulgation of a communist constitution in 1952 resulted in the rejection of the fundamental themes of constitutionalism" (p. 72). Indeed, the very notion of communist constitutionalism is paradoxical.

More important than the paradox of communist constitutionalism for Brzezinski's purposes is to understand that constitutional developments in postcommunist Poland have not been *sui generis*,⁹³ but have evolved within preexisting institutional and historical contexts. An important theme of Brzezinski's book appears for the first time in the chapter on People's Poland: the continuity of institutions across historical epochs.⁹⁴ In order to understand constitu-

93. Justice O'Connor has suggested as much. See *supra* note 15 and accompanying text.

94. This theme of continuity amid change has become familiar in works about post-communist Poland. See, e.g., DANIEL H. COLE, *INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND* (1998) (stressing the importance of systemic changes in Poland since 1989, but also recognizing the continuity of Polish environmental policies from

tional developments in postcommunist Poland, one must understand what Poland was transitioning *from*.

Poland's 1952 Constitution was, in Brzezinski's words, "patterned on the Soviet Constitution of 1936, retaining much of the original language of that document and reflecting major inputs by Soviet constitutional theorists."⁹⁵ It was, indeed, "a Polish language equivalent of the Soviet Constitution" (p. 63). 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," which vested all power in the Communist Party.

Actually, the Constitution did not so much *create* as *reflect* the reality of Communist hegemony. To claim that the 1952 Constitution vested power in Poland's Communist Party would be to invert cause and effect. The Party already had power, which it used to foist the Constitution on a disaffected population. It was not the Constitution that gave power to the Party but the Party that gave power to the Constitution.

Poland's 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 supposedly guaranteed were not self-executing but had to be implemented by "ordinary statutes and other normative acts."⁹⁶ And the Constitution did not 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, by the PZPR in consultation with its "fraternal ally" in Moscow.

In 1976 the Constitution was amended, in part to better reflect this reality. The Amendments "formally recognized the Party's political monopoly" by institutionalizing its "leading role" in the

the communist era to the postcommunist era); KAZIMIERZ Z. POZNANSKI, *POLAND'S PROTRACTED TRANSITION* (1996) (claiming that Poland's transition to market democracy had its roots in economic and institutional reforms of the early 1980s).

95. P. 63. The 1952 Constitution is codified at 1952 Dz. U. No. 33, item 232. For an English-language translation of the Constitution (as amended in 1954, 1957, 1960, 1961, and 1963), see III AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* 709 (1968).

96. P. 66 (quoting in translation *Orzeczenie z dnia 4 czerwca 1955 r., Orzecznictwo Sądu Najwyższego* 93 (1955)); see also Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AMER. J. COMP. L. 153, 168 (1993) (arguing that ordinary statutes had greater legal status than constitutional provisions).

building of socialism.⁹⁷ And they “enshrined Poland’s fraternal ties with the Soviet Union.”⁹⁸ 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 (pp. 73-74). Within a year after the 1976 Constitutional Amendments were enacted, the Party was “confronted by a united and nationally-based organization making fundamental political and economic demands” (p. 74). Within three years, this organization evolved into the national movement known as Solidarity, which ultimately toppled the PZPR from power.

The 1952 Constitution was amended again in 1982, during the period of martial law. These Amendments are quite significant for Brzezinski’s history of constitutionalism in Poland because they include two provisions that exemplify his theme of institutional continuity across historical epochs. The 1982 Amendments authorized the creation of two organizations “characteristic of Western democratic constitutionalism”: a Constitutional Tribunal and a Tribunal of State. Although scholars have debated the value of these organizations within the communist system,⁹⁹ there is no denying that they have evolved into important institutional components of Poland’s postcommunist constitutional democracy.

The 1982 Constitutional Amendments created a nominally independent Constitutional Tribunal to replace the Tribunal of State as arbiter of the Constitution.¹⁰⁰ The Tribunal was charged with reviewing the constitutionality of statutes and executory regulations. Unlike the Supreme Court of the United States, though, it was not the *final* arbiter of Poland’s Constitution; Tribunal decisions could be overruled by a simple majority vote of the *Sejm*. As Brzezinski notes, “[t]hroughout its existence, the Tribunal’s practice of judicial review has been curbed by limitations included in the

97. P. 73. The 1976 Constitutional Amendments are codified at 1976 Dz. U. No. 7, item 36.

98. P. 73. Ironically, it was in the same year that Poland constitutionalized its subordination to the Soviet Union that Gerald Ford made his famous blunder in the 1976 Presidential debates (against Jimmy Carter), declaring Poland free and independent of Soviet influence.

99. For an example of the debate, compare Leszek Garlicki, *Constitutional Developments in Poland*, 32 St. Louis U. L.J. 713 (1988) with Stanisław Frankowski, *A Comment on Professor Garlicki’s Article “Constitutional Developments in Poland”: The Lyrics Sound Familiar, But Are They Really Playing Our Song?*, 32 St. Louis U. L.J. 737 (1988).

100. The 1982 Constitutional Amendments are codified at 1982 Dz. U. No. 11, item 83. As with all constitutional provisions, those creating that Tribunal of State and Constitutional Tribunal had to be implemented through ordinary legislation. The *Sejm* did not actually institute the Constitutional Tribunal until 1985. See *Ustawa z dnia 29 kwietnia 1985 r. o Trybunale Konstytucyjnym* [Act of Apr. 29, 1985 on the Constitutional Tribunal], 1985 Dz. U. No. 22, item 98.

1985 Act to ensure that the Tribunal would not emancipate itself nor overstep politically acceptable limits" (p. 158). The very existence of a Constitutional Tribunal, however, seemed at odds with communist constitutional practice. The notion that statutes *should* have to conform to the Constitution was absurd in a system where, as already noted, ordinary legislation had higher legal status than constitutional provisions.

Ironically, the creation of the Constitutional Tribunal itself exemplified the higher legal status of ordinary legislation. The Tribunal existed only on constitutional paper for three years before the *Sejm* enacted legislation actually instituting it in 1985. (One wonders whether the Tribunal had jurisdiction to adjudicate the constitutionality of its own enabling statute.) The question begs answering: What could it mean for a statute to be unconstitutional in a system where ordinary statutes possessed higher legal authority than constitutional provisions? Brzezinski does not provide an answer to this question but notes: "[F]rom 1986 until 1989 . . . the very existence of the Tribunal conflicted with the fundamental assumptions of the communist regime" (p. 158).

Nevertheless, Brzezinski argues, the Constitutional Tribunal marked an important first step toward the institution of meaningful judicial review in People's Poland. Its activities, he claims, "during the final years of the communist era resulted in greater observance of basic principles of good government and legal norms by organs of the executive branch" (p. 77). Factual support for this claim is thin.¹⁰¹ And even if the Party/state *did* better observe principles of good government and legal norms in the second half of the 1980s, what was the basis for comparison? The immediately preceding period of martial law? The Gierek Administration of the 1970s? Brzezinski is nevertheless correct in concluding that the Tribunal "introduced into Polish political life the notion that governmental authority derives legitimacy from its adherence to the rule of law" (p. 77).

101. Brzezinski supports this claim by pointing to cases wherein the Tribunal limited agency powers to those expressly delegated by statutes. P. 159. On the other hand, as he also notes, of the 33 cases the Tribunal reviewed between 1986 and the fall of communism in 1989, only three concerned the constitutionality of legislative enactments, and only one of those was held "partially inconsistent" with the Constitution. P. 158. It is also worth noting that although the Constitutional Tribunal could pass judgment on the constitutionality of statutory enactments and administrative regulations, neither it nor any other court in the land had the authority to require administrators to promulgate or enforce regulations under statutory directives. See, e.g., COLE, *supra* note 94, at 151 (describing how administrators could not be sued for failing to promulgate or enforce environmental regulations). This would seem to be a prerequisite to the observance of law and practice of good government. I think the most that can accurately be said for the Constitutional Tribunal in the first stage of its existence under communism is that it subjected, to some extent, the executive branch of government to greater parliamentary control. Of course, this in itself was no mean feat.

The 1982 Constitutional Amendments also authorized a new Tribunal of State, “a quasi-judicial ‘impeachment court’” designed to hold state officials criminally responsible for official misconduct (p. 77). Before the fall of communism, this organization proved to be even less significant than the Constitutional Tribunal. As Brzezinski explains (p. 78), its jurisdiction was limited; neither members of Parliament nor party members who did not hold state offices could be indicted for corruption. And when the Tribunal of State indicted a former Prime Minister and other state officials in 1984, the *Sejm* passed a General Amnesty Law barring further proceedings. Thus, “the Tribunal of State did not contribute to any substantial modification of communist political arrangements” (p. 78). Like the Constitutional Tribunal, however, this organization has evolved in postcommunist Poland to provide an important check on government abuse of power and corruption.

One more seed of liberal-democracy was sown before the end of the communist era when, in 1987, the *Sejm* created the office of the Ombudsman for Citizens’ Rights, which Brzezinski calls “the first independent position in the communist bloc designed to protect citizens from abuses of government power and violations of their constitutional rights by state officials” (p. 79). Although the Ombudsman was created not by constitutional amendment but by ordinary legislation, it was an immensely important development for Polish constitutionalism. The *Sejm* gave the Ombudsman power to receive citizens’ complaints of human rights and constitutional violations; to petition the *Sejm* for legislative remedies; to petition the Constitutional Tribunal to review state actions that allegedly violate constitutional rights; and to bring criminal, civil, or administrative court actions on behalf of citizens or organizations (p. 79).

Together, the three new organizations instituted by constitutional amendment or legislation during the 1980s — the Constitutional Tribunal, the Tribunal of State, and the Ombudsman — had great significance for communism in Poland. In particular, they constituted tacit repudiation of certain of its fundamental tenets, including the conception of a communist state devoid of social and political discord.¹⁰² On a more practical — that is, legal — level, their significance in the Polish People’s Republic was dubious. Brzezinski focuses on the successes of the Constitutional Tribunal and Ombudsman during the second half of the 1980s. He notes (p. 73) that “the Tribunal issued a number of important decisions addressing bureaucratic and executive branch arbitrariness.” Meanwhile, Poland’s first Ombudsman, the respected legal scholar Ewa

102. This was also reflected in other institutional changes in the 1980s, including the creation in 1980 of a High Administrative Court to adjudicate disputes between citizens and administrative agencies. See pp. 139-40.

Łętowska, "aggressively push[ed] for constitutional and political reforms," including Polish government acceptance of international human rights standards (p. 80). She also "vigorously challenged unconstitutional state acts before the Constitutional Tribunal" (p. 80). Brzezinski realizes, however, that these successes were necessarily limited because the Constitutional Tribunal and Ombudsman were inherently at odds with the political system in which they operated. The Polish state was still very much a Party/state, with the PZPR tightly grasping the reins of power. As Brzezinski concludes, "up to 1989 Party structures and not the constitution provided the key to understanding politics and state policy-making in Poland" (p. 81).

The various constitutional and legal, not to mention economic, reforms of the 1980s after the end of martial law signified the slow demise of the communist system. They also, however, marked the first steps of transition to a new, more liberal, and more democratic political system. When the system changed in 1989, these and other organizations and institutions that had been marginal at best under communism became fundamental.

THE EIGHT-YEAR STRUGGLE FOR A NEW CONSTITUTION IN POSTCOMMUNIST POLAND

The best and biggest part of Brzezinski's book is his detailed account of Poland's efforts after the fall of communism to establish a constitutional order that, at once, respected Poland's legacy of constitutionalism and recognized that old formulations are often unsuited to modern problems of government. Poland's circumstances and constitutional ambitions at the end of the communist era were obviously not the same as in 1791, 1921, or 1952. A new Polish Republic required a new constitution — virtually everyone agreed about that. On all other matters, however, from the structure of government to the nature (positive vs. negative) of constitutional rights, to the process for adopting a new constitution, there was no consensus. Consequently, it took Poland eight years following the fall of communism to adopt a wholly new constitution.

After the fall of the Berlin Wall, while western economists argued for the quickest possible privatization of economic activity and the creation of market institutions, political scientists and sociologists urged the rapid development of institutions promoting civil society, and liberal legal scholars promoted the immediate adoption of new constitutions to organize state power around liberal-democratic institutions. Yale Law School Professor Bruce Ackerman argued forcefully for the primacy of constitution writing:

Neither the privatization of the economy nor the construction of civil society should preoccupy revolutionaries first and foremost. However much liberals may want to think about such things, the organiza-

tion of state power deserves immediate concern. The window of opportunity for constitutionalizing liberal revolution is open for a shorter time than is generally recognized. Unless the constitutional moment is seized to advantage, it may be missed entirely. In contrast, constructing a liberal market economy, let alone a civil society, requires decades, perhaps generations, and the project can easily be undermined without the timely adoption of an appropriate constitutional framework.¹⁰³

Accepting, for the sake of argument, Ackerman's claim of the primary importance of constitutionalizing a framework within which market institutions and civil society can develop, the question remains: Precisely how long does the window of opportunity remain open? Ackerman says it remains open only for a short time. How short? Two years? Five years? Ten? It took the American revolutionaries/framers five years following the end of the Revolutionary War to adopt a viable constitutional framework for national government.¹⁰⁴ Postcommunist Poland took eight years. In both cases, it was far from an easy process.

Brzezinski tells the story of Poland's "democratic rebirth and constitutional reform," relating in detail the various political machinations, false starts, and crises of legitimation that dogged the process. This is the most valuable part of his book because much of the story has not been told before. And it is a story Brzezinski knows and tells well. He lived in Warsaw from 1991 to 1995 as a Fulbright Scholar and Soros Lecturer, and, as one reviewer explains, Brzezinski "was a friend to and an intellectual resource for many of the writers of the new Polish constitution."¹⁰⁵ His book vividly portrays the political travails of constitution writing, illustrating an old adage that it is easier for disparate parties to unite *against* a common foe than *for* a common good. As various Solidarity-based governments in postcommunist Poland discovered, it was far easier to fight together against communism than to rule.

Under the circumstances, the remarkable thing is not that it took Poland eight years to adopt a new constitution but that it took Poland *only* eight years to adopt a new constitution. In those eight years, Poland had three different parliaments and, depending on how one counts, at least six different governments. At its smallest,

103. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46-47 (1992).

104. They began with a protoconstitution, the Articles of Confederation, in 1787 (ratified in 1781). This scheme, however, created a national government so weak as to be unviable. In a sense, America under the Articles of Confederation was like Poland under the "Small Constitution" adopted in 1989. In both cases, they were temporary documents needed to buy time for the slower process of developing a more permanent framework for government. And, as Ackerman puts it, the American Articles of Confederation "led to a pervasive political malaise comparable to the feeling in Poland today." *Id.* at 56.

105. Frederick Quinn, *From Communism to Constitutionalism*, CONN. L. TRIB., Apr. 6, 1998, at 25 (reviewing *The Struggle for Constitutionalism in Poland*).

the *Sejm* included six different political parties, ranging from the postcommunist SLD and social-democratic UP to the proreform, probusiness UW and the ultranationalist KPN; at its largest, it contained twenty-nine parties that represented an even broader spectrum of (often radical) interests (pp. 91-93). That such disparate parties could ever come to agree on a single constitutional draft is remarkable in itself. To some extent, they made their own task easier by taking their time and going about constitution drafting in a piecemeal fashion. Poland's 1952 Constitution underwent three sets of major amendments after 1989 before it was completely replaced in 1997. Many of the interim changes foreshadowed the new constitutional framework that emerged in 1997.

As Brzezinski explains (pp. 110-11), constitutional amendments of April and December 1989 and the "Small Constitution" of 1992 effectively converted Poland from a communist totalitarian system to a constitutional *Rechtsstaat*. Among other things, the April 1989 Amendments freed the judicial branch of government from political (i.e., Party) control. They didn't just *promise* judicial independence — the 1952 Constitution did *that* — but ensured it by giving Supreme Court justices life tenure and "precluding direct contacts between political officials and members of the judiciary" (p. 85). The state's prosecutors' offices were finally divorced from the courts. In this and other ways, Brzezinski concludes, 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 (p. 86). They "signified the demise of the Soviet-style governmental system of entirely centralized state authority" (p. 86).

Between the April 1989 and December 1989 Constitutional Amendments, a great deal changed in Poland. In June the Communists were swept aside in (semi-) free elections, and Solidarity gained an "effective majority" in the new Parliament, though sixty-five percent of the seats in the lower house, the *Sejm*, were held by PZPR-backed candidates. By September a Solidarity activist, Tadeusz Mazowiecki, had become Poland's first noncommunist Prime Minister in more than half a century. Communism in Poland was disintegrating much faster than anyone had dared imagine. As a consequence, 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 communism from the Constitution. As Brzezinski explains:

The December Amendments deleted the Constitution's preamble and its 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 the 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.¹⁰⁶

The December Amendments also changed the country's name from the Polish People's Republic to the Republic of Poland. Most importantly, Article One proclaimed Poland "a democratic state ruled by law, implementing principles of social justice."¹⁰⁷ As Brzezinski notes, this provision evoked the *Rechtstaat* principle of (West) German constitutional law (p. 88).

After 1989, Poland was no longer a communist country. Its constitutional framework was far closer to those of liberal-democratic countries than to the Soviet Union's. Its economy was no longer socialist. Even before the Mazowiecki government introduced the so-called "shock therapy" package of economic reforms in January 1990, socialism had ended with the introduction of the Law on Economic Activities in January 1989.¹⁰⁸ That law freed most sectors of the economy from centralized planning and resource allocation. Poland's transition to market democracy was underway.

Still, no one believed that the task of constitutional revision was anywhere near complete. As Brzezinski notes, "[d]espite the substantial changes, the 1952 Constitution as amended was never intended by those on the forefront of Poland's political renewal to be the nation's final constitutional structure" (p. 89). The April and December 1989 Constitutional Amendments were stop-gap measures intended primarily to buy time for a more thorough constitutional rewrite.

In the interim, Poland went through something of a constitutional crisis. In 1992, the government of Prime Minister Janusz Olszewski continually challenged then President Lech Wałęsa's constitutional prerogatives, particularly in the realm of national defense. Brzezinski refers to a 1992 public opinion poll in which "65 per cent of respondents expressed dissatisfaction with the 'political chaos'" (p. 96). Further constitutional amendments were needed to delineate more clearly the balance of powers between president,

106. P. 88. The December 1989 Amendments are codified at 1989 Dz. U. No. 75, item 444.

107. P. 88 (quoting POLSKIE KONSTYTUCJE (Dec. 1989 constitutional amendments) art. 1). This provision was later engrafted into Article 2 of Poland's 1997 Constitution, which finally replaced completely the 1952 Constitution (as amended). See *infra* note 116 and accompanying text.

108. See 1988 Dz. U. No. 41, item 324. For a more detailed discussion of this law and its consequences, see COLE, *supra* note 94, at 183-84.

government, and parliament. In February 1992, the *Sejm* established a Constitutional Committee to draft a replacement for the 1952 Constitution. Before it could begin drafting a wholly new constitution, however, the Committee had to deal with the immediate political/constitutional crisis. It did so by enacting the "Small Constitution" of 1992.

From the start, the Small Constitution was viewed as "a 'provisional measure' until a full constitution could be agreed upon" (p. 98). It was intended to resolve the existing "political paralysis" caused by disputes between President and Parliament by providing "a formula for productive cooperation and equilibrium among the three top state authorities" (p. 98). The Small Constitution "eliminat[ed] . . . the *Sejm*'s former status as the 'highest institution of state authority,'" and created a more balanced power structure between the presidency, the government, and the parliament (p. 99). Thus, Brzezinski concludes, the Small Constitution represented "a compromise between presidential and parliamentary systems of government" (p. 98).

What made the Small Constitution a "provisional measure" rather than a complete replacement for the 1952 Constitution was its exclusive focus on the state power structure. No attention was paid to constitutional rights and liberties. Provisions of the 1952 Constitution (as amended in 1976) concerning civil and religious rights were left unchanged. President Wałęsa attempted to resolve this problem and, for all practical purposes, complete the task of constitutional reform in November 1992, when he introduced into Parliament his "Charter of Rights and Freedoms," which would have become part of the Small Constitution in much the same way that the Bill of Rights became part of the previously adopted American Constitution. Wałęsa's proposal took everyone by surprise, especially those who suspected him of harboring dictatorial ambitions.¹⁰⁹ 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."¹¹⁰

Wałęsa's proposed Charter contained "twenty-two basic civil and political rights common to all liberal democracies," including

109. Wałęsa himself fueled these suspicions. He often pointed out that Marshal Piłsudski was his personal hero; he recreated Piłsudski's political party, the BBWR, in an effort to consolidate his political base; and he averred on several occasions that he would protect Poland should the ex-communists attempt to retake power, even by democratic means. On the relationship between Wałęsa and Piłsudski, see, for example, Neal Ascherson, *The Great Electrician is Playing a Game with Poland's Faith in Democracy*, THE INDEPENDENT (LONDON), Feb. 12, 1995, at 22; Roger Boyes, *Walesa Draws Strength From Dictator Idol*, THE TIMES, Feb. 9, 1995, at 14; Adam Michnik, *The Worship of Walesa*, THE GUARDIAN (LONDON), June 25, 1993, at 15.

110. Dawid Warszawski, *Belvedere Charter*, POLISH NEWS BULL., Dec. 8, 1992.

freedom of religion, the right to privacy, and freedom from government censorship.¹¹¹ It also included a "catalogue of wishes, in particular those with which every social liberal identifies, but rather unfeasible and difficult to materialise."¹¹² These "economic, social and cultural targets" were not rights; citizens could not bring suit in court to enforce them, but the government was responsible for attaining them "according to economic abilities."¹¹³

Wałęsa's proposed Charter of Rights and Liberties received a warm welcome in Parliament, but it never became part of Poland's constitutional law. Before it could be enacted Wałęsa dissolved the *Sejm* (for unrelated reasons) and called for new elections. After those elections Wałęsa resubmitted the Charter as part of a larger draft constitution. It was referred to the Constitutional Committee, where it languished, vying for attention with six other draft constitutions, for the next three years.

In the meantime, Brzezinski suggests, the need for a complete constitutional rewrite became less pressing because "the hybrid framework created by the April and December Amendments and by the Small Constitution provided the groundwork for a modern Polish polity as well as institutional stability during a period of extraordinary politics" (p. 129). Some of that institutional stability came from organizations that predated the fall of communism in Poland, in particular the Ombudsman and the Constitutional Tribunal.

Brzezinski demonstrates in Chapter Six of his book how the Tribunal, after 1989, "assumed an active role in constitutional matters, instilling normative characteristics into Polish constitutionalism and developing constitutional doctrine in accordance with its understanding of the suprapositive principles of a state ruled by law" (p. 158). In spite of substantive limitations on its jurisdiction that carried over into the early 1990s, the Tribunal established independent judicial review as a fundamental trait of Polish constitutionalism. Several of its decisions in the early 1990s enforced constitutional provisions against nonconforming statutes, thereby reinforcing the *Rechtstaat* clause of the Constitution. The Tribunal also supported the separation of powers by preventing the *Sejm* from delegating to the President the power to remove regular court judges for political reasons. As Brzezinski suggests, the Tribunal's assertion of autonomy and its active defense of the Constitution as

111. P. 107. For a complete English translation of the Draft Charter of Rights and Freedoms see 1996 ST. LOUIS - WARSAW TRANSATLANTIC L.J. 73.

112. Warszawski, *supra* note 110.

113. See *id.* For more on the Draft Charter, see Stanisław Frankowski, *Lech Wałęsa's Draft of the Charter of Rights and Freedoms: An Overview*, 1996 ST. LOUIS - WARSAW TRANSATLANTIC L.J. 65.

the highest law of the land "symbolized Poland's transition out of the Soviet-style governmental system of entirely centralized state power to a system of separated powers" (p. 163). Still, the Tribunal was not the final arbiter of Poland's Constitution; a majority of the *Sejm* still could overrule its decisions. For that and other reasons — especially the need for a new "bill of rights" — additional constitutional reforms remained necessary.

Brzezinski comprehensively canvasses the political problems that plagued Poland's efforts to adopt a completely new constitution in the years following the enactment of the Small Constitution. There were questions of process as well as substance. Some questioned whether the *Sejm's* Constitutional Committee was a legitimate body to draft a constitution even though it did not represent the political viewpoints of all Poles.¹¹⁴ But ultimately, in June 1996, the Constitutional Commission presented a completely new draft constitution for parliamentary approval. The National Assembly approved it on April 2, 1997. Six weeks later, it was ratified in a public referendum by a majority of Poles who cast ballots. It entered into force on October 17, 1997.

POLAND'S NEW CONSTITUTION

Brzezinski writes little about Poland's 1997 Constitution, which became effective just a few months before his book was published. He provides only a short overview of its main features, including its parliamentary system of government, presidential prerogatives in foreign affairs, the process for enacting constitutional amendments, and its civil rights provisions.¹¹⁵ This is unfortunate because the

114. This question plagued constitution-writing efforts not only in the "Round Table *Sejm*" elected in 1989 but also in the *Sejm* elected in 1993. The "Round Table *Sejm*" 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 Parliament for (ex-)Communist Party members. See p. 83. The next round of parliamentary elections in 1991 solved this problem but resulted in a *Sejm* comprised of 29 parties, which were able to agree on almost nothing because of political and ideological divides. See pp. 91-93. As Brzezinski notes, p. 104, this did not prevent the 1991 *Sejm* from completing important legislative tasks, including the Small Constitution and new electoral criteria that would likely prevent such a fractured *Sejm* in the future by limiting entry to those parties that received 5 percent or more of the popular vote (8 percent was required for coalitions of parties). In the subsequent parliamentary elections of 1993, only 6 parties managed to cross the 5 (or 8) percent threshold for entry into Parliament. Thus, the new electoral criterion had achieved its purpose: fewer parties were represented in the *Sejm*, which did not necessarily mean the *Sejm* was less fragmented or more productive. Indeed, in at least one respect, the 5 (or 8) percent rule made the new *Sejm* less productive: the work of its Constitutional Committee was slowed by questions of legitimacy because so many parties were excluded from its deliberations. See pp. 112-18.

115. See pp. 123-27. The 1997 Constitution is codified at 1997 Dz. U. No. 78, item 483. For an official English-language version of the 1997 Constitution, see POL. CONST. (1997) reprinted in 1997 ST. LOUIS - WARSAW TRANSATLANTIC L.J. 5 [hereinafter POL. CONST. (1997)].

new Constitution continues Poland's tradition of innovative constitutionalism.

Poland's 1997 Constitution is, in most respects, a fairly typical example of a modern democratic European constitution. Like the Small Constitution of 1992, the 1997 Constitution declares the Republic of Poland to be "a democratic state ruled by law and implementing the principles of social justice."¹¹⁶ Article 7 provides that all state bodies must "function on the basis of, and within the limits of, the law."¹¹⁷ The new Constitution bases Poland's political system on "the separation of and balance [of power]" between four branches of government: the legislative branch, comprised of the *Sejm* and the Senate, the executive branch of the government under the Prime Minister, the presidency (primarily responsible for foreign affairs), and a truly independent judicial branch.¹¹⁸ The 1997 Constitution provides a framework for a liberal democratic society by guaranteeing traditional personal and political rights and liberties in Articles 30-63. And it establishes the basis for a free market economy by guaranteeing "the freedom of economic activity."¹¹⁹ Presumably, western constitutional law "experts" would not find any of these provisions objectionable.

But Poland's 1997 Constitution would surely disappoint Judge Posner, Professor Sunstein, and other western advisers who deplore the inclusion of "positive" rights in constitutions.¹²⁰ An entire section of the Constitution (comprising Articles 64-76) is devoted to "Economic, Social and Cultural Freedoms and Rights." These include the right to "safe and hygienic conditions of work,"¹²¹ "[e]qual access to health care services, financed from public funds,"¹²² the right to "education in public schools . . . without payment,"¹²³ and the right to information about "the quality of the environment and its protection."¹²⁴

Given Poland's history of progressive constitutionalism, it was entirely predictable that the new Constitution would include such "positive" rights, regardless of the objections of western constitutional law "experts."¹²⁵ Indeed, some of the "positive" rights found in Poland's new Constitution have roots in earlier Polish constitu-

116. POL. CONST. (1997), *supra* note 115, art. 2, at 6.

117. *Id.*, art. 7, at 7.

118. *See id.*, arts. 10, 173, at 7, 41.

119. *See id.*, arts. 20, 22, at 8.

120. *See supra* notes 7-14 and accompanying text.

121. POL. CONST. (1997), *supra* note 115, art. 66, at 17.

122. *Id.*, art. 68.

123. *Id.*, art. 70.

124. *Id.*, art. 74, at 18-19.

125. For a discussion of the historical legitimacy of Poland's 1997 Constitution, see Cole, *supra* note 24.

tional history, and not only in the discredited 1952 Stalinist Constitution.¹²⁶ For example, Poland's liberal-democratic Constitution of 1921 included rights to unemployment and sickness benefits and state-funded education.¹²⁷ Moreover, such positive social and economic rights have become a commonplace in recent European (and euro-style) constitutions.¹²⁸ And given Poland's hopes of joining the European Union, it was simple common sense for its Constitutional Commission to pay closer attention to contemporary European, rather than American, constitutional practice.

This should not be understood as an argument in favor of including "positive" rights in Poland's (or any other country's) Constitution. Even some Polish constitutional law experts, such as Ewa Łętowska, have expressed concern that the inclusion of more difficult to enforce "positive" constitutional rights could undermine the enforceability of all constitutional rights. Łętowska tells a story about a hungry traveler who walks into a Moscow restaurant:

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?"¹²⁹

Apparently, the drafters of Poland's new Constitution were aware of the danger arising from the combination of "negative" and "positive" rights because they came up with an innovative mechanism to avoid that danger. Article 8.2 of the Constitution provides: "The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise."¹³⁰ This Article in effect bifurcates Poland's Constitution so that, 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 government action. The other is a contemporary (European-style) "wish list" of rights *to* certain services from the government. 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 de-

126. In any case, one should not make too much of the fact that Poland's 1952 Constitution is held in such low esteem. The fact that socio-economic rights were promised but never delivered under communism may, ironically, explain why Polish society demands that they be promised *and delivered* in postcommunist Poland.

127. See *supra* note 87 and accompanying text.

128. See, for example, South Africa's new constitution. S. AFR. CONST., reprinted in 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (G.H. Flanz ed., 1997).

129. Ewa Łętowska, *A Constitution of Possibilities*, E. EUR. CONST. REV., Spring-Summer 1997, at 76; see also Wojciech Sadurski, *Rights and Freedoms Under the New Polish Constitution: Reflections of a Liberal*, 1997 ST. LOUIS - WARSAW TRANSATLANTIC L.J. 91.

130. POL. CONST. (1997), *supra* note 115, art. 8, at 6.

termination. Thus, the constitutional right to be free from cruel treatment and punishment (from Article 40) is self-executing and directly applicable against state authorities, but the constitutional right to social security (from Article 67) is subject to the following proviso: "The scope and forms of social security shall be specified by statute."¹³¹ Similarly, the state's actual obligations with respect to the "right to education" (contained in Article 70) "shall be specified by statute."¹³²

Some of the drafters' decisions in categorizing rights as directly enforceable or requiring implementing legislation are questionable.¹³³ Most importantly, however, the Constitution makes clear to citizens what to expect with respect to each civil and social right. This reduces the risk that the legal force of *all* constitutional rights might be reduced by the combination of (more difficult to enforce) "positive" rights and (more easily enforced and possibly more important) "negative" rights. Poland's significant innovation in constitution writing, if it proves successful in implementation, should influence how other countries draft constitutional rights.¹³⁴

CONCLUSION

Mark Brzezinski's analysis of Polish constitutional history in *The Struggles for Constitutionalism in Poland* serves a number of valuable purposes. On the most basic level, it expands our knowledge of an important aspect of one of the most important historical events of the twentieth century: how Poland managed to rebuild constitutional government after more than four decades of communist totalitarianism. And it does so in a nuanced way. It was not a simple story of casting off communist shackles and "starting from scratch" in designing constitutional institutions. There was a great deal of historical and institutional baggage, some of which has proved quite useful in postcommunist Poland. Indeed, Poland's constitutional history demonstrates the culturally and historically contingent nature of constitution making.

Brzezinski's historical analysis also adds, though less than it might have, to our understanding of Poland's longer constitutional history, something about which Americans and West Europeans are woefully ignorant. This ignorance is unfortunate because, as I hope to have shown in this review essay, Poland's history of constitutionalism has, overall, been quite innovative and interesting, decidedly western in its orientation, and sometimes internationally influential.

131. *Id.*, art. 67, at 17.

132. *Id.*, art. 70.

133. For some examples, see Cole, *supra* note 24.

134. Many other features of Poland's 1997 Constitution are worth discussing. I address several of them in *id.*

A better understanding of Polish legal and constitutional history might lead us to a different conception of Eastern Europe's largest country and its proper place in European history.