

# Michigan Journal of International Law

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Volume 8 | Issue 1

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1987

## Two Firsts: A Comparative Study of the American and the Polish Constitutions

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### Recommended Citation

Rett R. Ludwikowski, *Two Firsts: A Comparative Study of the American and the Polish Constitutions*, 8 MICH. J. INT'L L. 117 (1987).

Available at: <https://repository.law.umich.edu/mjil/vol8/iss1/6>

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# Two Firsts: A Comparative Study of the American and the Polish Constitutions

Rett R. Ludwikowski\*

## I. INTRODUCTION

The bicentennial of the framing of the American Constitution brings to mind several reflections. The period surrounding the creation of the American Constitution has been profoundly studied: thorough analysis has been provided concerning both the origins and historical development of the American Constitution as well as the intellectual background of the "founding generation".<sup>1</sup> Characteristically, these studies have focused on the "American constitutional tradition," which means that they have been limited to a little over two centuries of colonial experience and several centuries of British experience. European constitutional history, particularly the works of European continental writers, has been studied primarily to determine how European constitutional history impacted on the development of American political institutions.<sup>2</sup> Thus, despite extensive research in the fields of legal history, comparative constitutional studies are rare.

This article is only an introductory study to further inquiry.<sup>3</sup> It focuses on the first two constitutions in the world: the American Constitution of 1787 and the Polish Constitution of May 3, 1791. Furthermore, the emphasis of this essay will be disposed of in a different manner than in the above mentioned studies. The author's purpose is not to add another article to the numerous works already

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1. See generally C. SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* (1943); H. HOCKETT, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826* (1939); C. ROSSITER, *THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION* (1953).

2. The excellent books of P. SPURLIN, *ROUSSEAU IN AMERICA 1760-1809* (1969); P. SPURLIN, *MONTESQUIEU IN AMERICA 1760-1801* (1940) [hereinafter SPURLIN II]; H. JONES, *AMERICA AND FRENCH CULTURE 1750-1848* (1927); and J. PERKINS, *FRANCE IN THE AMERICAN REVOLUTION* (1911) provide only a few examples of this approach.

3. This article is an introduction to the book-length comparative study on the first three constitutions in the world (the American Constitution of 1787, the Polish Constitution of May 3, 1791, and the French Constitution of September 3, 1791) that will be completed at the end of the bicentennial year.

devoted to American Constitutional development; instead, the following remarks will emphasize Polish constitutional history, and treat the American constitutional experience as a background for comparison.<sup>4</sup>

## II. THE POLISH CONSTITUTIONAL TRADITION

The constitutional history of a country begins when some institutions have been established and when procedures have been implemented to limit the power of the government. Restraints on arbitrary use of power can be imposed in several ways: (i) by a single document that sets forth the constitutional framework; (ii) by a series of authoritative documents; (iii) by judicial decisions; or (iv) by recognized conventional rules or practices.

As was noted long ago:

Although every state may be said in some sense to have a constitution, the term *constitutional government* is only applied to those whose fundamental rules or maxims not only define how those shall be chosen or designated to whom the exercise of sovereign powers shall be confided, but also impose efficient restraints on the exercise of power for the purpose of protecting individual rights and privileges, and shielding them against any assumption of arbitrary power. The number of such governments is not as yet great, but is increasing.<sup>5</sup>

Looking at constitutional history from this point of view, the American and Polish constitutional traditions are comparable. In both the United States and Poland, the process of the formation of constitutional governments on the ground of legal principles restrictive of arbitrary power took several centuries and was completed after adopting the first written constitutions.

Because the United States' Constitution arose from the roots of British constitutional experience,<sup>6</sup> the Anglo-American constitutional tradition can be traced back to the adoption of the Magna Carta in 1215, the Petition of Rights in 1628, the Bill of Rights in 1689 and the Act of Settlement in 1700.<sup>7</sup> We can examine the leading ideas of constitutional government by studying the British judicial decisions and constitutional conventions, by analyzing the evolution and the breakdown of a British Imperial Constitution, and by reviewing the American colonial

4. This approach seems to be a matter of course so far as the first chapter of this article is concerned. It deals mostly with the Polish constitutional traditions, so with the period in which the British colonies had not yet been established or when their organization was in embryo. The following chapters offer a more typical comparison of the intellectual background of the framers of both constitutions, main constitutional principles and the impact of both documents. Because of the reasons mentioned above, the emphasis will be placed on the development and execution of the Polish Constitution.

5. T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 21 (1891).

6. See Kirk, *Edmund Burke and the Constitution*, 21 *INTERCOLLEGIATE REV.* 3, 4 (1985).

7. See Poole, *The Publication of Great Charters by the English Kings*, 28 *ENG. HIST. REV.* 444 (1913).

experience concluding with the formation of the American constitutional movement at the end of the eighteenth century.<sup>8</sup> As pointed out above, this constitutional tradition has been studied repeatedly and, in this article, does not warrant long reconsideration.

Poland's Constitution of 1791 was the product of the Poles' four-and-a-half century struggle to both restrain the king's power and to create institutions fundamental to a constitutional government. Poland's process of emerging as a constitutional monarchy is not well known in the West, and its main phases should be called to mind before beginning a comparison of the primary principles of both constitutions.

In trying to trace the origins of the Polish constitutional government, one finds that the process of limiting the king's power began in Poland as early as the fourteenth century, and that Poland emerged as a constitutional monarchy in a period when other major European countries were reinforcing their absolutism.<sup>9</sup>

Almost since the beginning of its existence Poland was within the Christian cultural sphere. The Christianization of Poland around 966 not only converted the country to Christianity, but also established a church administration, and brought Poland into the Roman family of civilization. The geopolitical location exposed Poland to the incessant menace from Germany and Russia and raids of the barbarian neighbors like Mongols, Lithuanians and Prussians.<sup>10</sup> In the eleventh century, in the struggles with the neighbors, the international position of Poland and significant authority of Polish monarchs had been established.<sup>11</sup> In the next three centuries, the disunity of Germany and the weakness of Russia under the Mongolian yoke lessened the danger of foreign intervention and let Poland survive the period of feudal disintegration (1138-1314). Poland outlasted the successive Mongol invasions and reunited the divided Polish principalities under the reign of King Wladyslaw I, the Short. Under his son, Casimir the Great, the Polish monarchy reached its maturity. The prestige of the king grew abroad and the state became one of the most powerful members of the European community. This process endangered the privileged position of the gentry which became conscious of its military and social importance in the country. The considerable privileges obtained by the gentry as the result of the attempts to limit the king's

8. For a more detailed analysis of the American Constitutional traditions, see, e.g., H. HOCKETT, *supra* note 1; C. SWISHER, *supra* note 1.

9. See Wagner, Coleman & Haight, *Laurentius Grimaldus Goslicius and His Age—Modern Constitutional Law Ideas in the Sixteenth Century*, in *POLISH LAW THROUGHOUT THE AGES* (W. Wagner ed. 1970), at 98.

10. Poland was situated between the Carpathian Mountains in the South and the Baltic Sea in the North. The eastern and western borders, however, did not have a natural protection and were exposed to infiltration of neighbors who attempted to destroy the new state which became an obstacle to their expansion.

11. The position of Poland was particularly enhanced by the result of the successful wars conducted with the German Empire by the Polish king Boleslaw the Brave from 1004 to 1018. In 1018 Boleslaw also led a successful raid on Kiev. In 1025, he, as the first Polish ruler, assumed the royal crown.

power contributed to the process of the establishment of a unique political structure, the Commonwealth of the Gentry.

One of the first major privileges which significantly restrained the king's power was granted by Louis d'Anjou of Hungary who was designated as a successor of Casimir the Great (the last king of the Polish Piast dynasty).<sup>12</sup> Louis did not rule Poland in person, and, having no male descendants, he was afraid that Poles would try to overthrow the foreign dynasty. Attempting to reinforce his daughter's right as successor to the Polish throne, he granted in 1372 in Kosice the privilege through which he hoped to gain the support of the Polish nobles. This privilege reduced the taxes paid by the nobility and conditioned that higher taxes could be imposed, but only with the nobles' consent. The nobles were bound to military service within the boundaries of the country yet were paid only for serving beyond the frontiers of Poland. The liberties granted by the privilege bore some resemblance to the provisions of the British Magna Carta Libertatum (of 1215) that subjected the imposition of *scutagium* and *auxilium* (taxes levied on a tenant of a king's estate in place of military service) to the consent of *Commune Consilium Regni* (the Royal Council).<sup>13</sup>

After Louis's death in 1382, his youngest daughter, Hedvige (Jadwiga), was raised to the Polish throne. In 1386 she married the Grand Duke of Lithuania, Jagiello, who promised to unite his Lithuanian and his Ruthenian lands under the Polish Crown forever and to convert himself and his nation to Catholicism.<sup>14</sup> After Hedvige's death, Jagiello faced the same problem as King Louis. To secure the rights of his sons to the Polish throne, Jagiello further limited his power by granting several new privileges to the nobility and clergy.<sup>15</sup> The most important privileges that Jagiello granted were: the Privilege of Brzesc in 1425, the Privilege of Jedlnia in 1430, and the Privilege of Cracow in 1433.<sup>16</sup> These privileges

12. King Casimir did not have any male successors and promised the Polish throne to the Hungarian dynasty of D'Anjou. Casimir's sister Elizabeth married the Hungarian king Karl Robert in 1320 and the crown was designated to Casimir's nephew, Louis D'Anjou.

13. See MAGNA CARTA, arts. XII and XIII; K. KORANYI, *POWSZECHNA HISTORIA PANSTWA I PRAWA* (GENERAL HISTORY OF THE STATE AND LAW) 180–81 (1966). Even earlier (in 1355, in Buda) Louis granted another privilege in which he promised not to demand the hospitality of Knights for the King's army. For the more extended analysis of the privileges granted by the Polish Kings, see also 2 HISTORIA POLSKI (HISTORY OF POLAND) (S. Arnold & T. Manteuffel eds. 1963); DZIEJE POLSKI (HISTORY OF POLAND) (1976), at Ch. 5 (J. Topolski ed. 1976) [hereinafter Topolski]. For sources published in English, see A. GIEYSZTOR, S. KIENIEWICZ, E. ROSTWOROWSKI, J. TAZBIR & H. WERESZYCKI, *HISTORY OF POLAND* (1968) [hereinafter A. GIEYSZTOR & S. KIENIEWICZ]; Kos-Rabecwicz-Zubkowski, *Polish Constitutional Law*, in *POLISH LAW THROUGHOUT THE AGES* (W. Wagner ed. 1970); O. HALECKI, *HISTORY OF POLAND* 65–130 (1976).

14. O. HALECKI, *supra* note 13, at 69. See also J. DABROWSKI, *KORONA KROLESTWA POLSKIEGO W XIV WIEKU* (THE CROWN OF THE POLISH KINGDOM IN THE FOURTEENTH CENTURY) (1955).

15. See S. KUTRZEBA, *UNIA POLSKI Z LITWA W STOSUNKU DZIEJOWYM* (THE POLISH-LITHUANIAN UNION IN HISTORICAL APPROACH) (1913).

16. See *VOLUMINA LEGUM: PRAWA, KONSTITUCJE Y PRZYWILEY KROLESTWA POLSKIEGO Y WIELKIEGO XIESTWA LITEWSKIEGO* (THE LAWS, CONSTITUTIONS AND PRIVILEGES OF THE KINGDOM OF POLAND AND THE GRAND DUCHY OF LITHUANIA), vols. 1–10 (1733–1952).

bound the king to appoint the local officials from the noblemen *possessioati* (in possession) of the land. The most important, the Privilege of Brzesc, proclaimed in a famous clause that except when caught *inflagranti*, in murder, rape or abduction of a woman or robbery, noblemen could not be arrested without the court's judgment.

In England the writ of habeas corpus was originated at common law by a similar clause in the Magna Carta, which proclaimed that "no man should be punished except by the judgment of his peers or the law of the land". But this famous English provision was not made effective until the Habeas Corpus Acts of 1679 and 1816.<sup>17</sup> As Professor Wagner wrote,

at the beginning of the fifteenth century, Poland already had its due process clause, because the King's right to arrest any full-fledged citizen without a judicial warrant had been abolished. In most other continental countries, this was achieved three or four centuries later; for example in France, it was not until the end of the *ancien regime*, that the French king could no longer incarcerate anyone who displeased him, or distribute the ill-famed *lettres de cachet* as a token of a special favor to his subjects. (These *lettres* were royal orders of arrest that were blank, and by filling in a name, the possessor could have any of his personal enemies placed in jail.)<sup>18</sup>

So, in fact Polish nobility got their "Habeas Corpus Act" much earlier than did nobility in other European countries. Thanks to the concessions of the Polish Kings, the Polish nobles gained an unprecedented position which enabled them in the future to suppress their kings' absolutist aspirations. In addition, the nobles began to control two important areas of domestic politics: the process of succession and the budget of the kingdom. The relatively weak bargaining position of King Louis and King Jagiello, who both attempted to set up new dynasties in Poland, resulted in the transformation of Poland from a hereditary monarchy into an elective kingdom in which the kings were at first elected within the Jagiellonian dynasty and later (since 1573) elected for life mostly from various foreign, royal households. After the death of the last king of the Jagiellonian dynasty, Sigismundus Augustus, the Polish noblemen adopted the system called *electio viritim*. It meant that the king was elected directly by all the nobles who gathered in a special meeting place designated for this purpose.<sup>19</sup>

Each new king had to negotiate an agreement, *pacta conventa*, which was a kind of an "expose" setting forth the principles of the king's foreign, financial, and military policies. He also had to swear to respect and protect fundamental

17. See E. WADE & A. BRADLEY, CONSTITUTIONAL LAW 7, 74 (1970).

18. Wagner, Coleman & Haight, *supra* note 9, at 98; see also Kos-Rabcewicz-Zubkowski, *supra* note 13, at 225.

19. The legal basis for that mode of holding elections was provided by the young and still little known magnate Jan Zamoyski. He advanced the principle of an election *viritim* contending that in accordance with the established rules of the gentry's democracy all nobles of whatever rank had the right and the obligation to participate directly in choosing their king. The principle was accepted by the Convocation Sejm held in Warsaw in January, 1573. See A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 190.

governmental principles, such as protecting free elections, the legislative power of Parliament and the nobles' right to refuse obedience to the king if he broke fundamental principles of government (*de non praestanda oboedientia*).<sup>20</sup> The exemption of the noblemen from all taxes, except a small levy on the land they owned, imposed serious restraints on the king's power. On the one hand, the king was responsible for the maintenance of the army and state apparatus; yet on the other hand, he had to obtain the consent of the nobility for the imposition of higher taxes.<sup>21</sup> The nobles' consent was also required for calling a general mobilization (*pospolite ruszenie*).

The necessity of negotiating important decisions with the nobles' representatives elevated the role of the general and provincial assemblies which, during the thirteenth and fourteenth centuries, were convoked irregularly. At the end of the fourteenth century and in the fifteenth century, the general assemblies (*conventio magna* or *conventio solempna*) were convened once a year, generally in Piotrkow, a town located in central Poland.<sup>22</sup> Provincial diets were called separately for "Little Poland" and "Great Poland" which were the more important country districts. The king's privileges particularly enhanced the role of land diets (*convention particulares—sejmiki*) which had to approve all extraordinary taxes. The activity of *sejmiki* grew significantly after the new liberties were granted to the nobility by King Casimir of the Jagiellonian dynasty in 1454 (the Law of Nieszawa). Since the end of the fifteenth century, the nobles' representatives met with the King's Council in one place annually (later six weeks every two years) for a general diet (*Sejm Walny* or *Wielki*). Ludwik Kos-Rabcewicz-Zubkowski, in his article on Polish constitutional law, pointed out that the Polish Sejm used to convene more frequently than any other Western European parliament.

For example, in England during the 24 year reign of Henry VII there were only seven sessions of Parliament, and during the thirty-year reign of Henry VIII there were only nine sessions of Parliament, of which one, elected in 1528, held eight sessions. The Estates General did not convene in France between 1484 and 1561, after which time it only met in 1576-1577, 1588-1589 and 1593.<sup>23</sup>

None of the nobles of Western European countries were as successful as the Polish nobility at gaining a higher position and greater power.<sup>24</sup> The position of

20. See A. AJENKIEL, POLSKIE KONSTITUCJE (POLISH CONSTITUTION) 21-22 (1983).

21. This privilege was granted in Piotrkow in 1496.

22. A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 145-46.

23. Kos-Rabcewicz-Zubkowski, *supra* note 13, at 233. The practice of the barons "giving advice" to the prince was worked out also in the German states. As early as 1231 the statute *Sententia de iure statuum* established the principle that the duke could not adopt new laws or impose new levies without the consent of the magnates, *nisi meliorum et maiorum tarrae consensu*. Gradually, the practice progressed so that in matters concerning estates the estate representatives who assembled in *Landtage* or *Landstande*—local diets—usually would be consulted by the duke. However, because of the antagonism between estates, the duke was capable of manipulating local assemblies and running independent policy.

24. See K. KORANYI, *supra* note 13, at 56.

the Polish nobility was largely due to their superiority over the other estates. The statute adopted in Warka in 1423, which recommended that guilds be liquidated, was never implemented; however, it spurred a century long attack by the nobles against the rights and liberties of the townspeople. By 1496, the burghers were not allowed to purchase real estate.<sup>25</sup> Finally, the constitution<sup>26</sup> of 1505 proclaimed that the noblemen who decided to become town officers or engage in trade or work as craftsmen would lose their *indygenat*, the right of belonging to the nobility.<sup>27</sup>

In order to increase grain production and supply grain to Western Europe, the Polish landlords also increased their control over the peasants. The nobles tried to buy up the lands owned by the village mayors, *sculeti* or *soltys*, who were less dependent on landlords and had jurisdiction over villagers in minor cases.<sup>28</sup> By purchasing the mayors' estates, nobles attempted to gain full control over peasants. The statute, adopted in Warka in 1423, allowed the nobles to remove any *soltys*, whom the nobles considered useless and recalcitrant.

At the end of the fifteenth century, serfdom was officially recognized by the law. Beginning in 1496, only one peasant a year could move from one village to another and only one son from each family could settle down in a town to study or to work as a craftsman.<sup>29</sup> The "constitutions" of the Sejm of 1501-1543 prohibited peasants from leaving the village without the landlord's permission. Being tied to the land, the peasants had to cultivate the land that was left to them by the landlord and pay him a rent, usually in kind; in addition, the peasants had to work on the landlord's estate, usually for one day a week per unit of land.<sup>30</sup>

25. This decision was made effective in 1543.

26. The Sejm's resolutions, in the sixteenth century, were called constitutions.

27. Topolski, *supra* note 13, at 229-30. As W. Konopczynski wrote, "the overgrowth of Polish nobility was obstructed for the long run, because the nobility debarred other estates from the public life." W. KONOPCZYNSKI, *DZIEJE POLSKI NOWOZYTNEJ* (HISTORY OF CONTEMPORARY POLAND) 268 (1936). Some Polish historians, like Karol Hoffman, maintained that the weakness of the Polish burghers, which were not as well organized as the German, French or Flanders trade people, was the cause of Poland's future fall. See also J. BYSTRON, *2 DZIEJE OBYCZAJOW W DAWNEJ POLSCE, WIEK XVI-XVIII* (HISTORY OF THE CUSTOMS IN ANCIENT POLAND, FIFTEENTH TO EIGHTEENTH CENTURIES) 191-200 (1976). Cf. M. SEREJSKI, *EUROPA A ROZBIORY POLSKI* (EUROPE AND THE PARTITION OF POLAND) 443 (1970).

28. The major cases were tried by the peasants' landlords; the peasants could appeal to a royal court. See W. WASIUTYNSKI, *ORIGINS OF THE POLISH LAW, TENTH TO FIFTEENTH CENTURIES* 51 (1936).

29. "Statuimus quod tantummodo unus filius de villa a patre recedere possit ad servitia, et praesertim ad studia, aut literarum, aut artificiorum, reliqui maneant in haereditate cum patribus." Z. KACZMARCZYK & B. LESNODORSKI, *2 HISTORIA PANSTWA I PRAWA POLSKIEGO* 48 (J. Bardach ed. 1966).

30. A unit of land was called a *mansus* and was the equivalent to about 16 hectares. A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 49. The dominant position of the Polish nobility was finally confirmed in 1505 by the famous constitution *Nihil Novi*, of King Alexander. It proclaimed that nothing new would be decided by the king and his successors without the consent of the counsellors and the representatives of the nobility.

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their political influence, the rulers of neighboring countries were setting the foundations for absolutism. In Russia, Tsar Ivan IV, with the support of the court dignitaries and the wealthy burghers, broke the power of the Russian boyars, feudal landowners, and moved them into new areas designated by the Tsar. The reform which was undertaken between 1565-1572 under the name of *oprycznina* centralized the country's administration and strengthened the power of the Tsar's officials. See generally SAOLIKOV, *OCZERKI PO ISTORII OPRYCZNINY* (ESSAYS ON THE HISTORY OF OPRYCZNINA) (1950).

In the late seventeenth century, the boyars, seeking to participate in major state political decisions, organized the Council of Boyars. The Council of Boyars attempted to control the district estate councils, *Zemskij sobor*, and through them impose some restraints on the Tsar's autocracy. However, the boyars' struggle with the court officials was unsuccessful and during the Romanov dynasty the Tsar's power was practically unlimited. See K. KORANYI, *supra* note 13, at 236-39.

Unlike in Russia, where the process of unification and centralization of power was successfully advanced by the Romanov dynasty, the German Reich (called the Holy Roman Empire of the German Nation—Das heilige Romische Reich deutscher Nation—since the fifteenth century) was a loose organization of autonomous states. The German emperor's (from 1438 to 1806, with the exception in 1742-1745 of the Habsburg dynasty) power was strongly limited by the Council of the Empire which was composed of the Colleges of Electors (princes and archbishops authorized to elect the emperor), Colleges of German Magnates and Colleges of the Cities. As the emperor's authority decreased, the power of the territorial rulers grew. These territorial rulers were capable of imposing high and permanent taxes and could manipulate the gentry so that they would compete amongst each other.

In the dominions of the Prussian Hohenzollerns (part of the territory which was called King's Prussia was a Polish fee until 1660), this process lasted up to the eighteenth century when the Prussians successfully united their territories, creating the title of king (König in Preussen). Subsequently, all estates were subordinated to the decisions of the king's administration.

In the Hapsburgs' estates, the reforms of Mary-Theresa and Joseph II resulted in the establishment of the system called "enlightened absolutism." Under this system, the power of the Austrian ruler, like that of the Russian Tzar, was absolute but justified in a more sophisticated way. Enlightened absolutism presented the emperor as the "father and mentor of the nation" who ruled solely in the interest of his subordinates, and only the emperor from the height of his throne could recognize, articulate and protect the nation's interests.

In Western Europe, the French absolute monarchy was solidified in the seventeenth century during the reign of Louis XIII and reached its climax during the reign of Louis XIV. Even in England, where Parliament's struggle for legislative control has a long history, the concentration of political power in the hands of the king could not be questioned. The sovereigns of the Tudor dynasty (especially King Henry VIII and Queen Elizabeth I) made the Crown of England the supreme power in the land. The Statute of Proclamation in 1539 confirmed that the king had wide powers of legislating without any interference from Parliament. Although the Statute of Proclamation was repealed in 1547, the legislative supremacy of Parliament was not established until the end of the seventeenth century, when Parliament's right to control taxation was fully recognized as was the principle that the king's prerogatives might be limited by law. *Id.* at 378-81; see also E. WADE & A. BRADLEY, *supra* note 17, at 38-45, 181-84.

Thus, at the end of the sixteenth century, Poland with its system of so-called "democracy of the gentry" looked like an island surrounded by monarchies which vested the combined legislative, executive and judicial power in one ruler. To solidify this system, Polish middle gentry organized the "movement for the execution-of-the-law."<sup>31</sup> The main speakers for this movement proclaimed that Polish laws were the best and, as such, required only execution of the still inoperative constitutional laws. Any changes were declared unnecessary and even dangerous.<sup>32</sup> The leaders of the movement believed that the magnates, not the monarch, were their most troublesome rivals. They assumed that the nobles' share of power was guaranteed by the fact that the supreme power in the state was vested not in the king alone but in the "King in Parliament".<sup>33</sup>

In the sixteenth century, the concept of the King in Parliament was popular both in England and Poland. It assumed that the Parliament was composed of three chambers (or, as it was called in Poland, three estates): the King, the Senate, and the House of Deputies. The king was theoretically "above other estates" but it was assumed that he carried out his functions with *consilium* (the custom of consulting the dignitaries and experts).<sup>34</sup> As the leaders of the nobility maintained, "those who ask for advice and consent are despotic only in a technical sense."<sup>35</sup>

31. In the fifteenth and the first half of the sixteenth century, the gentry had already made a significant impact on the policy of the Crown. It came, however, from supporting one of the groups of magnates who were trying to impose restraints on the king's power. In the second half of the sixteenth century, the gentry formed its own faction and set forth well articulated political programs. The actual beginning of the unique political structure is dated as the year 1454, which was the year that the Law of *Nieszawa* was granted by King Casimir.

32. See A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 178.

33. Some of the political writers of the Renaissance including Andrzej Frycz Modrzewski, the best known Polish political thinker in Poland during the sixteenth century and author of the famous *Commentarii de republica emendanda* (Commentaries on the reform of the Republic), spoke for a "strong government." A powerful government meant the enhancement of the representative organs, not the king's administration. See Ludwikowski, *Szlachecki stereotyp charakterologiczny a model współczesnego Polaka (The Stereotype of a Polish Nobleman and the Model of the Contemporary Pole)*, 16 WORKS IN POLITICS 182–83 (1980). Cf. Ludwikowski, *Wpływ tradycji Polskiego anarchizmu na polską kulturę polityczną (The Impact of the Traditions of the Polish Anarchism on Poland's Political Culture)*, 16 WORKS IN POLITICS 60 (1980); Sucheni-Grabowska, *Walka o demokrację szlachecką (The Struggle for the Democracy of the Gentry)*, in POLAND OF THE PERIOD OF RENAISSANCE 42 (1970).

34. See Grzybowski, *Corona Regni and Corona Regni Poloniae*, 60 CZASOPISMO PRAWNO-HISTORYCZNE 308 (1957). Well known in Poland and in England was the principal "lex facit regem" which meant that the king is bound by the law enacted by him and his council. Stanisław Orzechowski, the well known Polish orator asked, "Who leads the council?" Orzechowski then answered, "The King, as he is the head, the top and the mouth of the Council and it is he who has the right to order following the advice of his Council and none above him." Slaski, *Polskie dialogi polityczne Stanisława Orzechowskiego (Polish Political Dialogues of Stanisław Orzechowski [against the background of the Sejm of the period of "execution"])*, 12 RENAISSANCE AND REFORMATION IN POLAND 145 (1967).

35. K. GRZYBOWSKI, *TEORIA REPREZENTACJI W POLSCE EPOKI ODRODZENIA (THEORY OF REPRESENTATION IN POLAND DURING THE RENAISSANCE PERIOD)* 145 (1959).

This interpretation was contested by the royal faction (led by Piotr Gamrat, Tomasz Sobecki and Piotr Kmita) who wanted to strengthen the power of the last two Jagiellonian Kings: Sigismundus the Old and Sigismundus Augustus. The royal faction claimed that although the king was bound to consult with his council and the knights of the kingdom, the results of these consultations were not binding on him; moreover, they claimed that the will of the Polish state was the will of the king alone, not the combined will of the king, his senators and deputies.<sup>36</sup> Trying to counterbalance the growing influence of the gentry's movement, the leaders of the royal faction supported the alliance between the king and the magnates. This "union" became the main target for the "executioners" (the gentry).<sup>37</sup>

In response, the gentry faction's most eloquent speakers began articulating more precisely that the monarch's power should be controlled by the nobles' representation. The cry to limit the king's power found its strongest expression in the writings of Stanislaw Orzechowski, a flamboyant priest of the sixteenth century. In his speech to the Polish nobility, Orzechowski proclaimed, "Your king, if somebody tries to describe him, is nothing but the mouth of your kingdom. He is bound by your voluntary and legitimate election and in this way he cannot do, undertake or speak anything but that which comes from your deepest conviction."<sup>38</sup>

Orzechowski emphasized the difference between the Polish King and the monarchs in other countries. He referred to these other countries as "pagan" and stated, "In the pagan states, the king is the sole purpose of everything; in Poland—a Christian Kingdom, *summa summarum respublica est, rex servus reipublicae* (commonwealth is everything and the king serves the commonwealth)."<sup>39</sup> In Orzechowski's concept, the king was only *primus inter pares*, the first among equals, the guardian of the principles of the democracy of the gentry. The right of criticizing the king and of free discussions with him were viewed as the first safeguard of the nobles' freedom. As Orzechowski maintained, "Each

36. They usually quoted the popular political writers of the fifteenth century such as Jan Ostrorog, Jakub from Szadek, Kalimach, and Jakub Zuborowski, who wrote at the turn of the fifteenth and sixteenth centuries.

37. Sigismundus the Old was called "The King of Senators". Sigismundus Augustus after the short period of supporting the "movement for the execution" also tried to base his policy on the advice from his magnate advisors from the Senate.

38. S. ORZECZOWSKI, *Speech to the Polish nobility against Law and statutes of the Polish Crown as set in Order by Jakub Przulski*, in WYBOR PISM (SELECTION OF WORKS) 98 (1972). Orzechowski, though a priest, was married and for this reason was for many years engaged in fighting the Church. Later, he became a fervent advocate of the counter-reformation and an eloquent defender of the so-called "golden freedom of the Polish gentry." See M. Ludwikowski & R. Ludwikowski, *Stanislaw Orzechowski—Prekursor Szlacheckiego Anarchizmu (Stanislaw Orzechowski—A Harbinger of the Anarchism of the Gentry)*, in ACADEMIC WORKS OF THE JAGIELLONIAN UNIVERSITY, *reprinted in 16 Works in Politics* (1980).

39. S. ORZECZOWSKI, *supra* note 38, at 562–64.

nobleman owes the king nothing but a military service, a hearth-tax and subjection to the king's jurisdiction." Orzechowski's opinions were in a way an early proclamation of the right to set the nation free from obedience to the king. The position that the nobles had the right to criticize and even rebel against the king, combined with the adopted medieval principle *quod omnes tangit ab omnibus approbetur* (what concerns all should be approved by all) gave rise to the famous formula of *liberum veto*. This formula declared that not only the nobles as a whole but each single nobleman has a right to veto the decisions of others. The concept of the *liberum veto* was based on the assumption of the complete political equality of the nobles whose representatives were supposed to approve unanimously any law introduced into the Polish Sejm. Any individual veto could dissolve the Sejm and successfully block the legislative process. In the period preceding the constitutional reforms (end of the seventeenth century) the *liberum veto* brought the works of the Sejm almost to a standstill.

As mentioned above, the middle gentry's target in the sixteenth century was not the king himself, but rather his alliance with the magnates. The gentry especially sought to attack the magnates' privileges. The struggle for power was mainly being waged in the Sejms, which in 1562-1563 passed a law that the magnates must return to the treasury all the royal estates which they had illegally acquired since 1504.<sup>40</sup> However, complete "execution" of this law was never achieved, and in the beginning of the seventeenth century, the magnates gained superiority and began to manipulate the gentry's movement through paid clients.

The rebellion against King Sigismund III, led by a zealous Catholic, Mikolaj Zebrzydowski, was recognized as the beginning of a new epoch in Polish history. The epoch was called the "magnates oligarchy". As the Polish historians of this era, Janusz Tazbir and Emanuel Rostworowski, wrote, "The middle gentry, who were lured into the rebellion by slogans hostile to the magnates gained nothing by it. For them it was but a sad epilogue to the long years of struggle for the execution of the laws. The sole victors emerging from the rebellion were the magnates."<sup>41</sup>

40. A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 180.

41. *Id.* at 215. Some other historians like to extend the period of "democracy of the gentry" up to the second half of the seventeenth century. They argue that at this time the middle gentry still had a strong impact on the election of the Kings (this was particularly perceptible during the election of King Michal Korybut Wisniowiecki in 1668). See Czaplinski, *Rzady Oligarchii w Polsce nowozytnej (The Roles of Magnates Oligarchy in Contemporary Poland)*, in 52 PRZEGLAD HISTORYCZNY 445 (1961); J. MACISZEWSKI, *WOJNA DOMOWA W POLSCE, 1606-1609 (CIVIL WAR IN POLAND, 1606-1609)* 3 (1960). Cf. A. WYCZANSKI, *POLSKA REZECZYPOSPOLITA SZLACHECKA, 1454-1764 (THE POLISH NOBLES COMMONWEALTH, 1454-1764)* (1965).

In the beginning of the seventeenth century, it was obvious that the class of nobles became strongly differentiated. The social standing of the *possessionati* nobles, who had gained most of the privileges, depended on the actual size of their estates and their ability to hold provincial, crown or court offices. As a result of their superior social position and huge holdings, the magnates' influence increased. The existence of this real hierarchy was obliterated by the sophisticated doctrine of the "noble egalitarianism." This doctrine declared there was full equality among "the brotherhood of nobles,"

Soon after the rebellion Poland became involved in wars with Moscow which was then experiencing its "Time of Troubles." The prolonged attempts to settle a Polish dynasty in Moscow were not successful, and the Poles, who had held the Kremlin at Moscow for some time, had to leave and accept the establishment of the new Romanov dynasty in Russia.

In the seventeenth century, the gentry's concept of democracy received further support. This support came from a doctrine which used Poland's Sarmatian heritage as a catalyst for the existing political situation. According to the Sarmatian concept, the saga of the Polish gentry was derived from the ancient Slavs who inhabited so-called Sarmatia, a land located between the Wisla and Dniepr rivers.

Seventeenth-century Sarmatianism established the stereotype of the "old-Polish gentleman" which had a strong impact on generations of Poles.<sup>42</sup> A Sarmatian was defined as a true defender of democracy, of political equality, of limited royal powers, of principles espousing elected rather than hereditary monarchy, and of the right to opposition. A Sarmatian was usually presented as a brave warrior, equipped with all chivalric virtues, preferring an austere lifestyle, and always ready to sacrifice his life for the Fatherland. He was a man of rigid morality, strongly attached to Catholicism and its religious principles.

Sarmatianism emphasized the Polish political system's unique character. Polish noblemen were convinced that their Sarmatian legacy imposed on them the special responsibility of retaining democracy and chivalry and balancing the importance of the central power by the political activity of the whole nobility. Sarmatians had also the responsibility to preserve Catholicism and demonstrate their strong support for the position of the Roman Church. A Sarmatian was a true defender of the faith, defending Catholicism from Turks, Tartars, Protestant Scandinavians and schismatic Russians. Under the doctrine of Sarmatianism, the idea of a special relationship between the Polish national character and Catholicism was for the first time elevated as the leitmotif of Polish political thought.

In the eighteenth century, the stereotype of the Sarmatian knight, who was presumed to spend most of his life on a horse fighting the enemies of the state and

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with the king holding the patrimonial position of *primus inter pares* and that the senators were merely the senior fellows of the confraternity. The slogans of equality and liberty were, however, used and abused, and in fact among those equally free were those freer and the state more and more lacked the means of control and execution of "equal freedom."

When the law of 1690 was adopted the Sejm unfortunately used the term "minor nobility". The local diets displeased with this term forced their deputies to introduce a correction in the 1699 sitting. During this sitting it was proclaimed that, "because *per errorem* the Constitution of *anni* 1690 used a word "minor nobility", which abused the sense of *aequalitatis*; therefore, following the consent of all estates, this term is *in perpetuum* erased, and it is proclaimed that *in aequalitate* there is nothing "minor" or "major". See W. MLIČKA, KARMAZYNI I CKUDOPACHOLKI (THE NOBLEMAN IN CRIMSON AND THE IMPOVERISHED NOBLES) 42-50 (1968). Cf. J. MACISZEWSKI, SZLACHTA POLSKA I JEJ PAŃSTWO (POLISH NOBLES AND THEIR STATE) 166 (1968).

.42. See W. CZAPLIŃSKI, O POLSCE SIEDEMNASTOWIECZNEJ (ON POLAND IN THE SEVENTEENTH CENTURY) (1966).

of the Christian religion, was gradually superseded by the model of the Sarmatian landholder, who was always ready to leave his comfortable mansion-home to defend the Fatherland. There was, however, an obvious discrepancy between this ideal and the sybaritic lifestyle of the average landholder. The model was submitted to yet further evolution. Polish political literature of the eighteenth century reasoned that the decay of the knightly spirit was due to the adoption of foreign customs and Western lifestyle. The Polish nobleman was no longer stereotyped as the honorable knight, but rather, as the Polish gentleman whose attributes were kind-heartedness and friendliness, which were manifested in his relationships with his family and friends, in his interest in farming, in his care for the well-being of the peasants, in his attachment to religion and religious moral principles, and eventually in his service for the state. "Virtue" became the most important, although the most vague, attribute of the Polish gentry. Virtue was used as a catchword, both by those who strove for justice and by those who abused the law. The critics of Sarmatianism began to claim that in fact this political philosophy stood for an anarchistic defence of the gentry's liberties, for the disintegration of law and morality and for the religious fanaticism of the Polish nobility.

The term "anarchy" was associated with the situation of the Polish state during the rule of the Saxon dynasty (1697-1763) and was usually referred to as the anarchic model of life of the Polish magnates and wealthy nobles, who reluctantly followed the ineffective dispositions of the central administration. The decay of the Polish international position at the end of the seventeenth and in the eighteenth century was the result of the combination of internal and external factors. The growing class megalomania of the gentry blocked successfully the proportional development of peasantry and townspeople that resulted in economic problems for the Commonwealth. The foreign dynasties which had (with the exception of a few "Polish" kings) ruled in Poland since 1573 could not balance the growing independence of the magnates and retain both the country's military potential necessary to its protection from outside and administrative and judicial control within the boundaries of the state. The unchallenged system of the absolute political equality of all the nobles in fact contributed to the omnipotence of the oligarchs.<sup>43</sup>

43. J. Tazbir and E. Rostworowski wrote:

In the middle of the eighteenth century Polish magnates were considered to be the richest private individuals in Europe, next to English aristocracy. The source of their wealth, apart from hereditary fortunes lay in the acquisition of lucrative sinecures. In the Saxon times competition for vacant offices and ecclesiastical benefices was the main driving force in political activity. Distribution of vacant offices was the only real prerogative of the Crown, but maneuvering with this power was insufficient to create a stable Court party. Appointments were made for life so that a magnate, once provided for, was not obliged to obey the Court any longer. On the other hand, too much favour to one clique could intensify the opposition on the part of other pretenders to the danger of internal peace. The Saxons came finally to accept the Polish system (of appointments) and were concerned chiefly with the future of their dynasty.

A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 291-92.

The internal crisis of the Polish Commonwealth coincided with successful military, financial and administrative reforms of Peter I the Great (1682-1725) in Russia, which were a turning point in the process of establishing the tsar's absolute power. The internal reforms in Prussia and Austria resulted in the reconstruction of the power of the central governments in these countries and the general growth of their military potential. These neighbours were interested in keeping Poland demilitarized, neutralized and in the state of anarchy. The propaganda of the neighboring countries, interested in maintaining the constitutional status quo in Poland, argued that any change in the Commonwealth would be dangerous. On the other hand, the anarchy in Poland was used to justify plans to partition off Polish territories.

In the eighteenth century, a faction of politically mature nobles was formed. This faction was quite aware of the deficiencies within the Polish political system and despite the magnates' efforts to use the masses of *impossessionati* (landless), the nobles prepared sound programs of reform. By the end of the eighteenth century, the nobles' activity resulted in the adoption of the first written constitution in Europe which substantially reformed the Polish political structure.

### III. INTELLECTUAL BACKGROUND OF THE FRAMERS OF AMERICAN AND POLISH CONSTITUTIONS

The separation of the American colonies and England, under whose protection the colonies had grown, was widely discussed in Poland. A year before the American colonies adopted the Declaration of Independence, Poland, under pressure from Russia, held an extraordinary Sejm which in March, 1775, ratified the first enforced partition of Poland. The effect of this partition was the loss of almost 30 percent of Polish territory and 35 percent of Poland's population. After the partition, the Sejm guaranteed "the cardinal laws" of the Polish kingdom: free election, the *liberum veto*, the right of *de non praestanda oboedientia* (the nobles' exclusive right to hold offices and own land), and the gentry's dominion over peasants.<sup>44</sup>

The partition opened the eyes of the promoters of reform to the fact that under Russian tutelage no further transformations of the Polish government would be possible. The more active leaders of the reform faction carefully watched world events which could provide insights on how to solve Poland's problems. The early programs of reform are usually associated with three outstanding statesmen and thinkers of their time. They were the Piarist, Stanislaw Konarski, who set forth his ideas in the famous treatise *O Skutecznym Rad Sposobie* (*A Way to Effective Counsel*); Stanislaw Poniatowski, the father of the last Polish King, Stanislas Augustus, and the author of the widely read political essay, *List Ziemianina* (*A Landowner's Letter*); and the King Stanislas Leszczyński, whose

44. The *cardinal laws* had been previously confirmed by the Sejm of 1768.

political ideas were collected (probably by one of his clients) in *Głos Wolny Wolność Ubezpieczający* (*Free Voice Which Safeguards Freedom*). The idea that the Polish political system was in need of reform found broad support in the influential alliance of the two aristocratic houses of the Czartoryskich and Poniatowskich, so-called "The Family". The reform movement was enhanced also by the brightest Polish intellectuals: Hugo Kollataj, Stanisław Staszic, Józef Pawlikowski, Franciszek Salezy Jezierski and Franciszek Dmochowski. The reform group vividly discussed the American colonists' struggle for independence. One of the most eloquent speakers for reform, Hugo Kollataj, wrote, "When the obstinate [British] Parliament did not want to permit [the American colonists] national liberties . . . , Franklin, seized by the spirit of justice and genuine freedom, linked arms with courageous Washington and decided to bring the whole people their natural rights and to create a republic in America."<sup>45</sup>

The Polish events were not unknown to the American Founding Fathers and the Polish struggle was commented on in the American press. The news about Poland came to America through Poles who fought for American independence.<sup>46</sup> In *The Federalist*, Poland is mentioned several times, usually as an example of the problems which arise from a confederate form of government. Madison described Poland's government as "a mixture of aristocracy and monarchy in their worst forms . . . unfit for self-government" and "at the mercy of its powerful neighbors."<sup>47</sup>

Despite the mutual interest in the events of both countries, the framers of both constitutions believed that Poles and Americans had only a few characteristics in common. For example, whereas the colonies only had to solidify their union and enforce its independence, Poland, in order to defend its sovereignty, had to cast out and cut off its Russian patronage. The same Kollataj, who admired Franklin and Washington, wrote shortly after the beginning of the French Revolution:

Let us look on the example of America from other points of view. Let's assume that our legislators following great souls of Franklin and Washington will treat the Polish nation in the fashion of the French Estates, which waived their privileges and feudal benefices; that in Poland as in France or Netherlands the man will be nothing but an object of the revolution and legislature; that the privileges of the estates will give way to the future decisions of law. I am asking whether, given this unexpected turn of events, the Polish nation should follow the example of American colonies? The republic confederated in America is surrounded from all sides by the spheres of safety; we have everywhere the sword of despotism raised over our heads; they have an ocean of savage nations, here the mightiest empires surround the borders of the weakened country; there, one third of a million souls own the land, which can

45. H. KOLLATAJ, *O sukcesji tronu i innych sprawach najwazniejszych*, in KUZNICA KOLLATAJOWSKA (KOLLATAJ'S FORGE) 81 (B. Lesnodorski ed. 1949).

46. The most famous of the Poles were Kazimierz Pulawski and Tadeusz Kosciuszko.

47. THE FEDERALIST NOS. 14, at 152; 19, at 180; 39, at 280 (J. Madison) (B. Wright ed. 1961); see also G. DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 188, 224, 226-27 (1960).



comfortably feed thirty million people; here, the soil is not large enough to satisfy the greed of the inhabitants.<sup>48</sup>

The American founding fathers and the framers of the Polish Constitution were aware that their future constitutions would have to meet the various needs of their respective countries. Yet, despite the fact that they were looking for different solutions to different national problems, they borrowed their ideas from comparable sources.

Searching for the most suitable political ideology that had already been tested over earlier centuries, the American founding fathers drew most fruitfully from antiquity. As Benjamin F. Wright, the editor of *The Federalist*, wrote, "This was a time when a decent respect for the opinions of the voters called forth essays signed with pen names, frequently ones having association with the Roman Republic like Publius, Cato or Caesar."<sup>49</sup> The same writing practices could be observed in Poland, where it was indecorous not to quote the ancient classical authors, and where each nobleman was expected to speak fluent Latin. This skill was often the factor which distinguished a nobleman from a commoner, more so than his swordsmanship or his coat of arms.<sup>50</sup> There is evidence that the framers of both constitutions not only signed their essays with Roman names, but that they received the same classical education and were familiar with the ancients; particularly, Demosthenes, Plutarch, Cicero, Herodotus, Thucydides, and Polybius.

As Clinton Rossiter noted, the chief spokesmen of the American Revolution were consumers rather than producers of ideas. Despite the fact that the colonies rebelled against their mother country, they respected their British heritage and were dedicated followers of British political thought.<sup>51</sup> However, American political thinkers, although drawing heavily from British political thought and British constitutional experience, were very selective in whose ideas they followed.<sup>52</sup> Next to John Locke, who was recognized as the theoretical father of the American Revolution, the American political philosophers often cited Edward Coke,

48. H. KOLLATAJ, *supra* note 45, at 82.

49. *The Federalist* 4 (editor's introduction); see also Kirk, *supra* note 6, at 5. The pamphlets, essays, and newspaper articles were written by various Catos, Caesars, Publiuses, Chronuses, Rusticuses, Juniuses, and Venises. See C. ROSSITER, *supra* note 1, at 10.

50. It was particularly noticeable in Poland of the seventeenth century, when Polish Sarmatianism with all of its Roman borrowings was at its climax, that a classical background, based on a Latin education, was the best identification card for the large number of landless nobility. At the end of the eighteenth century, although still popular, Latin was gradually being superseded by French, which became the most popular language of the Polish aristocracy.

51. See C. ROSSITER, *supra* note 1, at 66–67; see generally G. DIETZE, *supra* note 47, at 309 (Hamilton's, Madison's, and Jay's broad readings in politics includes a number of works by influential British thinkers).

52. C. ROSSITER, *supra* note 1, at 65. For a roster of the political thinkers of the American Revolution, see C. ROSSITER, *supra* note 1, at 6–7.

Henry Bolingbroke, William Blackstone, James Harrington and David Hume.<sup>53</sup> Also among those favorably and frequently mentioned is Algernon Sidney, who was strongly influenced by the Polish political writer, Laurentius Grimaildus Goslicius, the author of *De Optimo Senatore*.<sup>54</sup>

British political ideas were also absorbed by the Polish reform faction. The ideas worked out by the faction strongly influenced the framers of the Polish Constitution. The faction's leaders spent considerable time analyzing and examining British ideas; many of them travelled to the West and were well-read in British literature. One of the Polish political writers, Jacek Jezierski, even worked out in detail a utopian project of the union of Poland and England. According to Jezierski's utopia, both countries would be ruled by a common king who would spend half a year in Poland then half a year in England.<sup>55</sup> British political structures were also profoundly analyzed by another political philosopher, Stanislaw Konarski, and strongly recommended by the candidate to the Polish throne, Prince Adam Kazimierz Czartoryski.

Institutions of the English unwritten constitution were studied in Poland through Montesquieu's *The Spirit of Laws* and through the very early translations of Blackstone's *Commentaries on the Laws of England* as well as De Lolme's *The Constitution of England*.<sup>56</sup> Poles examined Bolingbroke's *The Idea of a Patriot King* and admired his concept of a "patriarchal monarch" whose throne was hereditary but whose power was limited.<sup>57</sup> England was viewed as an example of a moderate constitutional monarchy which successfully combined features of democratic, aristocratic, and monarchic government. Polish political writers favorably cited the balance of the English Constitution which they saw as being accomplished through "cooperation and clashes" among the King, the House of Commons and the House of Lords.<sup>58</sup> Father Hugo Kollataj, the famous political

53. See C. ROSSITER, *supra* note 1, at 69. On the impact of Locke's ideas, see G. DIETZE, *supra* note 47, at 324–26. The careful reader of *The Federalist* will discover that the other great political thinkers like Thomas Hobbes, Jeremy Bentham, Robert Filmer and Edmund Burke were almost never directly cited. See C. ROSSITER, *supra* note 1, at 67; G. DIETZE, *supra* note 47, at 319. On the impact of Edmund Burke, see Kirk, *supra* note 6.

54. As Wenceslas Wagner, Arthur Coleman and Charles Haight convincingly proved, Goslicius' political ideas strongly influenced Cardinal Robert Bellarmine, the "spiritual father" of Algernon Sidney. See Wagner, Coleman & Haight, *supra* note 9, at 105. Because of the reasons mentioned in the beginning of the article, this section gives only a fairly cursory explanation of American political thought at the time of the revolution.

55. See B. LESNODORSKI, *DZIELA SEJMU CZTEROLETNIEGO, 1788–1792 (THE WORK OF THE FOUR-YEAR LONG SEYM, 1788–1792)* 63 (1951).

56. See generally W. BLACKSTONE, *COMMENTARIES*; J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR AN ACCOUNT OF THE ENGLISH GOVERNMENT: IN WHICH IT IS COMPARED, BOTH WITH THE REPUBLICAN FORM OF GOVERNMENT, AND THE OTHER MONARCHIES OF EUROPE* (London 1788). On the Polish translations of Montesquieu and De Lolme, see B. LESNODORSKI, *supra* note 55, at 60. The works of Blackstone were translated into Polish by Teodor Ostrowski in 1789.

57. See H. BOLINGBROKE, *THE IDEA OF A PATRIOT KING* (London 1749).

58. See B. LESNODORSKI, *supra* note 55, at 61–62.

activist and writer, maintained that the English Constitution combines “the authority of the Crown and the personal impact of the King on the government with the parliamentary system and the protection of the citizens’ freedom.”<sup>59</sup> In an unpublished essay, *O Konstytucji w Ogolnosci i w Szczegolnosci (On the Constitution in General and Detailed Way)*, Kollataj concluded, “The people of Great Britain outpaced all others and although they still did not reach the complete perfection, they are held up as a model for all of Europe.”<sup>60</sup>

In contrast, the English government was criticized by the reactionary faction of magnates which viewed Poland as a republic. The main spokesman of this group, Seweryn Rzewuski, argued that both the English hereditary monarchy and the English system of constitutional balances did not protect freedom in a satisfactory way.<sup>61</sup>

The impact of European continental philosophers on the framers of the American and Polish Constitutions raised many controversies. In both countries, there were those who wanted to view constitutional acts as unprecedented and unique documents which did not grow from any special historical or intellectual background.<sup>62</sup> Americans split particularly often in their opinions on the impact of French thought on the founding fathers. As James Breck Perkins wrote,

By French literature the colonists were unaffected, because, with few exceptions, they knew nothing about it. The number who could read French was small, the number who did read French to any extent was smaller. [T]he political theories of Montesquieu and of Rousseau, the wit of Voltaire, the infidelity of the encyclopedists, had no influence upon men, the most of whom did not know these writers even by name. Our ancestors’ modes of thought were essentially English; the political traditions which they inherited, and the political institutions which they founded, were unaffected by French thought.<sup>63</sup>

Between this extreme statement and the opinions of those who believed that Americans had “taken all their knowledge” from continental European thought,

59. H. KOLLATAJ, UWAGI NAD PISMEM SEWERYNA RZEWUSKIEGO O SUKCESJI TRONU W POLSCE RZECZ KROTKA (COMMANDS ON SEWERYN RZEWUSKI’S ESSAY ON THE SUCCESSION OF THE THRONE IN POLAND) (Manuscript No. 100 in the collection of the Polish Academy of Arts).

60. *Id.* (Manuscript No. 179, ch. 3). See also K. OPALEK, HUGONA KOLLATAJA POGLADY NA PANSTWO I PRAWO (HUGO KOLLATAJ’S IDEAS ON THE STATE AND LAW) 199 (1952).

61. S. RZEWUSKI, O SUKCESJI TRONU W POLSCE RZECZ KROTKA (A SHORT ESSAY ON THE SUCCESSION OF THE POLISH THRONE) (Warsaw 1790).

62. A.C. Coolidge quotes William Gladstone’s famous remark in his essay on de Tocqueville’s *la Democratie en Amerique* that the Constitution was “the most wonderful work ever struck off at a given time by the brain and purpose of man,” and John Stuart Mill’s declaration that “the whole edifice was constructed within the memory of man, upon abstract principles.” A. COOLIDGE, THEORETICAL AND FOREIGN ELEMENTS IN THE FORMATION OF THE CONSTITUTION 5 (Freiburg 1892); Spurlin II, *supra* note 2, at 27. There were also opinions that the Polish political system was unique, and, as such, required unprecedented solutions. This conviction was a legacy of Poland’s Sarmatian nationalism which firmly established the belief in “special attributes” of the Polish political structures.

63. J. PERKINS, *supra* note 2, at 418–19.

one can easily find a variety of more moderate positions.<sup>64</sup> But even the most militant defenders of the “unique character” of Polish and American political thought rarely contested the impact of Montesquieu on the framers of both Constitutions.<sup>65</sup> The first English translation of Montesquieu’s *The Spirit of Laws* was announced for sale in Boston in 1762, and his *Persian Letters* were offered to American readers two years later.<sup>66</sup> In Poland, Ignacy Krasicki summarized the first few chapters from *The Spirit of Laws* in his *Monitor*, following the English translation by *Spectator*, and in 1772 the entire work was translated into Polish.<sup>67</sup>

The authors of *The Federalist* frequently mentioned Montesquieu directly but not always favorably. Madison in his tenth, fourteenth and thirty-ninth letters argued that Montesquieu failed to distinguish a republic from a democracy. Hamilton in letter nine maintained that the size of the republic which the author of *The Spirit of Laws* had in mind would not be applicable to any of the larger states in the American confederation.<sup>68</sup> Still, the authors of *The Federalist* praised Montesquieu for his examination and popularization of the English system of government. As Madison wrote, “The oracle, who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.”<sup>69</sup>

In America and in Poland, Montesquieu was quoted by the opponents, as well as the defenders, of the Constitutions. The French philosopher was widely cited in *The Cato Letters* published by Governor George Clinton who opposed the ratification of the Constitution.<sup>70</sup> In Poland the reactionary faction, opposing the reform, quoted Montesquieu as an advocate for the “division of powers.”

Rousseau and the French Encyclopedists were well known and even popular in America, but their impact on literature, which prepared the adoption of the Constitution, was insignificant. On the one hand, when in 1797 the exhibition of

64. See Laboulaye, *Etude sur l’Esprit des Loix, de Montesquieu*, 1 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPARE 161, 179 (1869); see also SPURLIN II, *supra* note 2, at 6–7.

65. Francis Newton Thorpe maintained that Montesquieu’s *The Spirit of Laws* had more influence on eighteenth-century American political thought than any other work on government. See F. THORPE, 1 THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 155 (1901). “Every literate colonist could quote [Montesquieu] to advantage.” C. ROSSITER, *supra* note 1, at 71.

66. MONTESQUIEU, *THE SPIRIT OF LAWS* (published originally in France 1746) (T. Nugent trans., 1st English ed., London 1750) (I. Thomas Jr. trans., 1st U.S. ed. 1902).

67. The first translation into Polish was done by J. Czarnek. The second, and much better translation into Polish, was done by Boy Zelenski in 1927. See B. LESNODORSKI, *supra* note 55, at 60, 112.

68. THE FEDERALIST No. 9, at 126 (A. Hamilton) (B. Wright ed. 1961); THE FEDERALIST Nos. 10, at 135–36; 14, at 150; 39, at 280–86 (J. Madison) (B. Wright ed. 1961).

69. THE FEDERALIST No. 47, at 337 (J. Madison) (B. Wright ed. 1961).

70. Seven letters were published in the New York Journal between September 27, 1787 and January 3, 1788. They are reprinted in ESSAYS ON THE CONSTITUTION 256 (P.L. Ford ed. 1892) at 247–78.

life-waxen figures was prepared in Philadelphia, the statues of Rousseau and Voltaire were among the most popular and (as Professor Spurlin observed) Montesquieu's effigy was not even included in this unusual collection. On the other hand, Voltaire was only mentioned occasionally by the American writers; Rousseau was never mentioned by the authors of *The Federalist*.

The impact of Rousseau on the Polish political thought throughout the eighteenth century was much more perceptible. In 1789, the Poles were first exposed to the translation of Rousseau's *Comments on the Polish Government*. His *Social Contract* was quoted and used both by the reactionaries and the proponents of reform. The reactionaries were exploring Rousseau's works for his arguments supporting their anti-monarchic rhetoric and for defense of the traditional liberties of the gentry. The reformists argued, also following Rousseau, that the substantial transformation of the Polish social structure was not only necessary but quite feasible. In Poland, Rousseau had strong and loyal admirers; however, Rousseau also had powerful critics, like Kollataj, who contested Rousseau's eulogy of the Polish elective monarchy in his essay *Krotka Rada Wzgleciem Napisania Dobrej Konstytucji Rzadu* (A Short Advice Concerning the Good Constitution).<sup>71</sup> Rousseau's recommendations to vest an executive power in a Senate composed of departments headed by Ministers were contrary to the projects of the leaders of the reform faction, since they sought a solution to the Polish problems through enhancement of the king's executive authority. In fact, most of the reformers believed that Rousseau's concepts could be implemented only in a society which abolished the privileges of the feudal estates and guaranteed full individual autonomy. However in Poland, this concept was beyond the grasp of even the boldest reformers. As one of the Polish political writers concluded in the year the Polish Constitution was adopted, "opinions and comments of Mr. Rousseau on the Polish government cannot be helpful for any party in a political dispute."<sup>72</sup>

Generally speaking, the philosophers of the French Enlightenment were studied more carefully in Poland than in America. By the end of the eighteenth century, most of Voltaire's works were translated into Polish. The Warsaw press printed each of Voltaire's latest tragedies which were then performed in Western theaters. His funeral was reported in details comparable to those of powerful monarchs.<sup>73</sup> Other French writers were also translated into Polish, including Marmontel and Mably. The French physiocrats were widely quoted. Franciszek Salezy Jezierski translated Sieyes' essay, *What is the Third Estate?*, and Hugo

71. An essay published in 1790 was mistakenly ascribed to Szyjkowski. It was later corrected by Władysław Smolenski who pointed out that the real author was Kollataj. See W. SMOLENSKI, *PRZEWROT UMYSŁOWY W POLSCE WIEKU XVIII (INTELLECTUAL UPHEAVAL IN EIGHTEENTH CENTURY POLAND)* 424 (1979).

72. W. SMOLENSKI, *supra* note 71, at 425. See also KWIATKOWSKI, *PROBKA PIORA (THE TEST OF A PEN)* (Warsaw 1791).

73. See *Gazeta Narodowa i Obca* (National and Foreign Daily) (Poland), no. 3 (1791).

Kollataj favorably examined the doctrine of the French National Assembly and made critical comments about Jacobinism.<sup>74</sup>

From the comments presented above, it is quite obvious that the intellectual background of the framers of the Polish and American Constitutions shows remarkable similarities. The fact that Polish and American political thought of the eighteenth century reflects the ideas of many of the same West European philosophers is of great weight when comparing the two constitutions. As will be pointed out below, despite different geopolitical circumstances in which both constitutions were adopted, as well as the different political structures which were provided by both constitutions, one can discover some significant similarities in the major principles to which both constitutions adhered. These similarities are the result of a common legacy from the Western European political culture from which both Polish and American framers drew heavily. In this tradition rest the roots of American and Polish order, and it is this common legacy which deserves careful consideration.

#### IV. THE CONSTITUTIONAL MOVEMENTS

##### A. *The United States*

As Carl B. Swisher wrote, "Most fundamental political changes are brought about only after long periods of agitation and discussion. The movement toward a new constitution, providing for a closer integration of the Union and giving substantial powers to the central government in the United States, was no exception."<sup>75</sup> The foundation for this movement was prepared by the constitutional debates which occurred in each of the American states after their separation from Great Britain. The discussion set forth the idea that each new state should have a constitution to provide a frame of government which would articulate the inalienable rights of the people. In May, 1776, this idea was most clearly expressed by the townspeople of Pittsfield who, in a long memorial to the Massachusetts legislature, argued "[t]hat the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and ground-work of legislation. . . ." <sup>76</sup> The debate advanced the idea of written constitutions adopted by special conventions whose fundamental decisions would be above ordinary law, and thus would impose boundaries on the regular legislative assemblies.<sup>77</sup>

Along with the growth of the sympathy toward a more permanent union of the

74. Letter to Reptowski, analyzed by K. OPALEK, *supra* note 60, at 91.

75. C. SWISHER, *supra* note 1, at 28.

76. C. ROSSITER, *supra* note 1, at 183.

77. For an analysis of the deeper roots of written constitutions in the United States, see H. HOCKETT, *supra* note 1, at 113-20.

colonies, there grew a common feeling that not only particular states, but a future stable confederation should also frame the written document containing the fundamentals of the central government. The Articles of Confederation and Perpetual Union, prepared by the Continental Congress, could not meet these expectations. The process of ratification lasted over three years, and the Confederation was not fully established before the fall of 1781.<sup>78</sup> The Union was a "league of friendship" composed of the sovereign states. The powers granted to "The United States in Congress assembled" rested upon the authority of the state government. Both Congress and its executive officers lacked power to enforce their decisions and hardly could be considered as a "central government." As Thomas M. Cooley commented,

The Confederation was given authority to make laws on some subjects, but it had no power to compel obedience; it might enter into treaties and alliances which the States and the people could disregard with impunity; it might apportion pecuniary and military obligations among the States in strict accordance with the provisions of the Articles; but the recognition of the obligations must depend upon the voluntary action of the thirteen states, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union; it might contract debts, but it could not provide the means for satisfying them; in short, it had no power to levy taxes, or to regulate trade and commerce, or to compel uniformity in the regulations of the States; the judgments rendered in pursuance of its limited judicial authority were not respected by the States; it had no courts to take notice of infractions of its authority, and it had no executive. A further specification of defects is needless, for any one of those mentioned would have been fatal.<sup>79</sup>

The movement toward a new constitution developed concurrently with the adoption of the Articles. In 1781-1782, Hamilton published a series of his articles in *The Continentalist* in which he expressed a deep skepticism concerning the harmonious relations of the Congress and state governments. In 1783, Pelatiah Webster, a successful merchant from Philadelphia, published a small pamphlet, *Dissertation on the Political Union and Constitution of the Thirteen United States of America*, in which he claimed that the Congress should be given the power to levy taxes. Webster was mostly interested in financial questions, and recognizing him as the "architect of the constitution" went too far; however, his essay certainly stressed that the future constitution should determine those things which are necessary for the general welfare but which are beyond the competence of the States singly.<sup>80</sup> In 1785, Noah Webster published his *Plan of Policy for Improving the Advantages and Perpetuating the Union of the American States* in

78. The Articles went into effect on March 1, 1781, after ratification, but it is often claimed that the Union was not in operation until the States had chosen new delegates. H. HOCKETT, *supra* note 1, at 146.

79. T. COOLEY, *supra* note 5, at 14.

80. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 53 (1913); see also H. HOCKETT, *supra* note 1, at 184-85.

which he urged that "there must be a supreme power at the head of the union, vested with authority to make laws that respect the states in general and to compel obedience to these laws. . . ."81

The general concern for the future of the Union, expressed in numerous pamphlets and political disputes, finally resulted in the adoption of a resolution by the Congress on February 21, 1787,<sup>82</sup> which recommended that a constitutional convention be held in Philadelphia. The Constitutional Convention which was scheduled to meet on May 14, 1787 did not begin work until May 25, when a sufficient number of delegates finally arrived to make a quorum. The formal debates lasted until September 17, when a draft of the proposed Constitution was signed and sent to the Congress which forwarded it to the states for ratification.<sup>83</sup>

### B. Poland

When the American Constitutional Convention was nearing its end, the Polish movement for reform was trying to make use of the unusual geopolitical situation which seemed to open the road for a major transformation in the Polish political system. In fact, the demilitarization and anarchy in Poland suited the interests of her neighbors, and their protection of the Polish system was the major obstacle for the reformers. A month before the work of the American Constitutional Convention was finished, Russia entered into a war with Turkey and was soon joined by Austria. In July, 1788, Russia's northern army was busy fending off Swedish attacks. The Polish reform faction decided that this was the time to end the Russian guarantees for the fundamentals of the obsolete Polish political system. On October 7, 1788, the historical Sejm convened; this Sejm was later called the "Four Year Diet" or the "Great Polish Parliament." The Sejm constituted itself into a Confederation which meant that all decisions were taken by a majority vote and that the proceedings could not be broken up by *liberum veto* of a minority faction or even a single deputy.<sup>84</sup>

Two coteries were the most active in the first phase of debates. First, the so-called "Patriotic Faction," supporting reform plans, rallied around magnates

81. N. WEBSTER, PLAN OF POLICY FOR IMPROVING THE ADVANTAGES AND PERPETUATING THE UNION OF THE AMERICAN STATES (1785), quoted in H. HOCKETT, *supra* note 1, at 185; see also K. KORANYI, *supra* note 13, at 222.

82. See C. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 31 (1890).

83. For information on the organization and debates of the Constitution see M. Farrand, *supra* note 80; H. LYON, THE CONSTITUTION AND THE MEN WHO MADE IT; THE STORY OF THE CONSTITUTIONAL CONVENTION OF 1787 (1936); D. ADAIR, FAME AND THE FOUNDING FATHERS (1974); C. WARREN, THE MAKING OF THE FEDERAL CONVENTION OF 1787 (1966); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1972); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1891).

84. This procedure, often used in the sixties and seventies, curtailed the use of the *liberum veto*, whose importance was often overestimated by Western historians. See A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 319, 335.



such as Adam Kazimierz Czartoryski and Ignacy Potocki. Second, the "reactionary" group solicited Russian support and planned to overthrow the king. The anti-reform faction was headed by Ksawery Branicki, Seweryn Rzewuski and Szczesny Potocki. The royal faction hesitantly tried to be a go-between and, in fact, its members still hoped that Russia would accept the project of strengthening the Polish king's power. Outside the Sejm, the projects for reform were popularized by the so-called "Kollataj's forge," a group of outstanding writers and journalists who assembled around Hugo Kollataj.<sup>85</sup>

In the beginning of its work, the Sejm increased the Polish army more than fivefold up to 100,000<sup>86</sup> and deprived the *hetmans* (commanders-in-chief) of the control over the military forces. On September 7, 1789, the Sejm appointed a special Deputation for the Improvement of the Form of Government which was headed by Bishop Adam Krasinski. The main role within this body, however, was played by Ignacy Potocki and Joachim Chreptowicz. In December, 1789, the Deputation submitted *Principles of the Reform of the Government* and, in 1790, extended *The Project Concerning the Reform of Government*.<sup>87</sup> On March 24, 1791, the Sejm also adopted a statute on local diets which significantly reduced the political rights of landless nobility. On April 18, the law on municipal reform was passed, which accepted the presence of town plenipotentiaries in the parliament, but only entitled them to vote on matters concerning towns and commerce.

In the meantime the "Patriotic Faction" joined forces with the royal coterie, and both groups started to work on the more detailed projects of a written constitution. The most sound drafts were prepared by Ignacy Potocki, Father Scipione Piattoli, who was the King's secretary, and the King, Stanislas Augustus Poniatowski, himself.<sup>88</sup> The final draft, entitled *Reforma Konstytucji*<sup>89</sup> was pre-

85. The most active in "Kollataj's Forge" were the following: Franciszek Salexy Jazierski, Franciszek Ksawery Dmochowski, Jozef Meier, Rafal Kollataj (one of Hugo's brothers), Jan Dembowski, Tomasz Maruszewski, Antoni Trembicki. The works of the "Forge" were supported by the scientist, Jan Sniadecki and writers like Julian Ursyn Niemcewicz or Franciszek Zablocki. See B. LESNODORSKI, *supra* note 55, at 32-33; see also W. KALINKA, *KONSTYTUCJA TRZECIEGO MAJA: STOSUNKI EUROPEJSKIE I PRZYGOTOWANIA W WARSZAWIE DO KONSTYTUCJI TRZECIEGO MAJA—ZAMACH STANU (CONSTITUTION OF MAY 3RD: EUROPEAN RELATIONS AND CONSTITUTIONAL PREPARATION IN WARSAW—COUP D'ETAT) (1888)*.

86. Later, as a result of the financial deficit this number was reduced to 65,000.

87. See A. AJENKIEL, *supra* note 20, at 54-55.

88. Potocki's first project was written in French. The original is in Potocki's Archives; Manuscript CXCVII. Potocki also translated in French the draft project *Principles of Reform* to which he attached his comments entitled "Pro Memoria." As Boguslaw Lesnodorski suggested, the translations were to familiarize the foreigner, Piattoli, with the fundamental assumptions of the reform faction. On the basis of these translations, Piattoli prepared his own project. Stanislaw Augustus read both drafts and dictated Piattoli his own draft. Cf. B. LESNODORSKI, *supra* note 55, at 141-215 (extended analysis of all of Piattoli's projects).

89. H. KOLLATAJ & I. POTOCKI, *THE REFORM OF THE CONSTITUTION*, Potocki's Archives, Manuscript XCVII.

pared by Hugo Kollataj and Ignacy Potocki after secret discussions in a very narrow circle of proponents of the reform.

The passing of the Constitution was to be accomplished in the Seym by a procedural trick often referred to as a *coup d'etat*.<sup>90</sup> The framers of the Constitution decided to discuss the draft in the Seym on May 3 (at first they planned to do it on May 5) when most of the deputies from the "reactionary" faction had left the capital for Easter holiday. On the evening of May 2, eighty-three deputies met at a semi-public gathering in the house of the Seym's President, Stanislaw Malachowski, and signed a resolution in support of the draft. In the morning when the Seym met, the number of proponents of the Constitution grew to 101, with 72 deputies against it. Thus, the Constitution was backed by a majority of representatives. But a problem remained in the traditional proceeding assumed in the Polish Diet, which required that the project should be first sent to a "deputation," published, and then submitted to the deputies for three days and later discussed in the Seym.<sup>91</sup> Contrary to this traditional proceeding, the framers of the Constitution proposed to examine the draft immediately. On May 3, after a long and fervent discussion, the king went up on the chair and, backed with the voices of the deputies chanting "Viva Constitution," asked the bishop of Cracow to read the words of the oath. He swore and stated, "Iuravi Domino, non me poenitebit" (I swore and would not regret that). On May 4, twenty-eight opponents submitted an official protest that the normal legislative procedure was circumvented. In response the Seym, by a majority vote, voted for a resolution that all protests against the Constitution were invalid. The Constitution became an accomplished fact.

## V. MAIN PRINCIPLES OF THE AMERICAN AND POLISH CONSTITUTIONS COMPARED<sup>92</sup>

The Preamble of the American Constitution appeals to "the people of the United States." In comparison, the Polish Constitution begins with the words, "In the name of God, the one and only in the Holy Trinity." For a person interested in studying the political culture of both countries, the first words of these foremost political documents are very telling.

The American Constitution refers to religious matters in Article VI which declares that "no religious test shall ever be required as a qualification to any

90. A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 372.

91. A. AJENKIEL, *supra* note 20, at 60; cf. UCHWALANIE KONSTITUCJI NA SEJMANC W XVI-XVII (ADOPTING OF THE CONSTITUTIONS BY THE SEYMS IN SEVENTEENTH AND EIGHTEENTH CENTURY) (S. Ochman ed. 1979).

92. This article focuses on political and constitutional analysis. The author is quite aware of the importance of socio-economic factors which contributed to the development of the constitutional structures in both countries. The sound exploration of these problems is, however, hardly possible in an article of this format. It has been left to separate and differently focused analysis.

office or public trust under the United States." The First Amendment states clearly that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>93</sup> The Polish Constitution did not only begin with an appeal to God, but Article I declared that "The sacred Roman Catholic creed with all rights granted to it will be recognized as the predominant national religion. Deviation from the predominant religion to any other creed is prohibited and will be punished as apostasy."

This clear-cut difference between statements of the two constitutions fades away in light of a more profound study of religious attitudes in America and Poland. As Professor Cooley pointed out,

It was never intended by the [American] Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects.<sup>94</sup>

The Polish Constitution drew the distinctions between Roman Catholicism and "other creeds," but it also confirmed that "the religious freedom, and protection of the government for other (than Roman Catholic) religions is guaranteed."<sup>95</sup> The deviation from Catholicism was recognized as apostasy. On the other hand, the Constitution offered toleration and protection to those who were born non-Catholics. Almost since the beginning of its existence, Poland was within the Catholic cultural sphere and Catholicism had gained an unquestionable supremacy. On the other hand, Poland was always very proud of its religious tolerance. The Counter-Reformation strengthened predominance of the Catholic Church, but the persecution of Protestants in Poland was never as strong as in Spain or Italy, where Protestantism was thoroughly suppressed. Poland preserved its tradition of religious tolerance and did not experience either mass executions or religious wars; it remained a Catholic country, primarily because of the peasants' and the nobility's, the two largest segments of the population, strong attachment to Catholicism. In the eighteenth century, because Poland was surrounded by Protestant, Muslim and Orthodox Christian nations, the protection of the primacy of the Catholic Church seemed to be an important national dogma.

In America, with its "multiplicity of sects,"<sup>96</sup> the enforcement of religious conformity clearly contradicted the right to the free exercise of religion. As Carl Swisher wrote,

93. T. COOLEY, *supra* note 5, at 213. The reference to the establishment of religion means setting up or recognizing a state church, or at least conferring upon one church special favors and advantages which are denied to others. See T. COOLEY, *supra* note 5, at 213.

94. T. COOLEY, *supra* note 5, at 213-14.

95. UPADEK KONSTITUCJI 3 MAJA, art. I, *translated into English in NEW CONSTITUTION OF THE GOVERNMENT OF POLAND*, at 5 (London 1791).

96. See THE FEDERALIST NO. 51, at 358 (J. Madison) (B. Wright ed. 1961).

Religious dissenters constituted important elements in the population of certain colonies—and religious dissent in those days usually signified traits of nonconformity and strength of will likely to resist regimentation by a government three thousand miles across the sea.<sup>97</sup>

In any case, it was a centralized, state-supported religion such as the Anglican Church in England that the Americans feared. The American reality required not merely tolerance, but religious equality. In Poland, which was predominantly a Catholic country, religious liberty amounted to religious tolerance. However, it is noteworthy that despite this difference, the framers of both constitutions emphasized the significance of religious belief and incorporated this recognition into the constitution.<sup>98</sup>

The Preamble of the United States Constitution states that “the people of the United States . . . ordained and established the Constitution.”<sup>99</sup> This Lockean and Rousseauistic idea was asserted by the Declaration of Independence and strongly defended by the authors of *The Federalist*. Madison wrote, “the people are the only legitimate fountain of power”<sup>100</sup> and Hamilton emphasized that “the fabric of American empire ought to rest on the solid basis of *the consent of the people*.”<sup>101</sup> Despite fear of some undesirable side-effects of democracy, the American Founding Fathers accepted popular government as the basic principle of the Constitution. As George Mason said, “notwithstanding the oppression and injustice experienced . . . from democracy, the genius of the people must be consulted.”<sup>102</sup> Several decades later Alexis de Tocqueville pointed to America as

97. C. SWISHER, *supra* note 1, at 8.

98. See *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1951) (Douglas, J.):

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our people and accommodates the public service to their spiritual needs. To hold that it may not, would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

99. U.S. CONST. preamble.

100. THE FEDERALIST NO. 49, at 348 (J. Madison) (B. Wright ed. 1961).

101. THE FEDERALIST NO. 22, at 199 (A. Hamilton) (B. Wright ed. 1961) (emphasis in the original).

102. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 101 (M. Ferrand ed. 1911), noted in G. DIETZE, *supra* note 47, at 67.

a symbol of the world moving inescapably toward democracy and social equality.<sup>103</sup>

The Polish Constitution provides an apparently similar declaration. It is proclaimed in Article V that "all power in the human community takes its origins in the will of the nation."<sup>104</sup> The Constitution was adopted under a patriotic slogan: "The King with the People, and the People with the King." It was often argued, however, that the term "people" meant something quite different in Poland than in America. The American, democratic Constitution was frequently set against the Polish non-democratic Constitution, which was to protect the interests of the single social class of the nobles. This tendency had its rationale in the predominant tone of Polish literature of the eighteenth century which referred to Poland as "the Commonwealth of the Nobility."<sup>105</sup> The non-democratic character of the Polish Constitution was also exposed by the socialist historians who often argued that the Constitution was adopted by the nobility, served the interest of this single class, and did not solve the crucial social problems of this time.<sup>106</sup> This clear-cut confrontation requires examination.

It is true that the Polish Constitution did not undermine the monopoly of the nobility's political power. It declared that the nobility will take precedence in the "private and public life" and guaranteed all liberties granted to the nobles by the kings since Casimirus the Great. On the other hand, the Constitution introduced some new partners into the political arena. The Polish Constitutional Act adopted Montesquieu's concept of the gentry-townspeople's compromise, although in reality it was a compromise of two unequal partners in which the nobility sustained control over the political decision-making process. The burghers (in accordance with the municipal law which became a part of the Constitution) were to be represented by the plenipotentiaries elected by the towns in which appellate

103. See generally A. DE TOCQUEVILLE, *DE LA DEMOCRATIE EN AMERIQUE* (1840).

104. *USTAWA RZADOWA Z DN. 3-GO MAJA 1791* (M. Handelsman ed. 1791); *TRZY KONSTYTUCJE (THREE CONSTITUTIONS)* 4 (E. Spolka ed. 1915).

105. Radical Franciszek Salezy Jezierski asked in *KATECHIZM O TAJEMNICACH RZADU POLSKIEGO (CATECHISM ON THE SECRETS OF THE POLISH GOVERNMENT)*, "Who controls the legislative and executive power in the Commonwealth?" His answer was: "The king, senate and the knighthood." Apparently, he argued, three estates share power in Poland. But, in fact, "the king is a nobleman. The senator is a nobleman. The deputy is a nobleman. So all these three estates are reduced to one estate."

Jezierski explained that "[a] Nation is a gathering of the people who have a common language, customs and habits comprised in one general law, common for all citizens." He argued that a nation cannot survive if it does not treat its citizens equally. The nation that discriminates against some of its members cannot count on their support.

*CATECHISM* was published by B. LESNODORSKI in his edition of Hugo Kollataj's *KUSNICA KOLLATAJOWSKA*, *supra* note 45, at 3-4. see also F. JAZIERSKI, *NIEKTORE WYRAZY PORZADKIEM ABECADLA ZEBRANE I STOSOWNYMI DO RZECZY UWAGAMI OBJASNIONE (SOME WORKS COLLECTED IN ALPHABETICAL ORDER AND APPROPRIATELY EXPLAINED)* 19.

106. For a more sound review of evaluations of the Polish Constitution, see A. AJENKIEL, *supra* note 20, at 5-15.

courts were set. They worked actively in the Sejm Commissions in matters concerning towns and commerce (*vozem activam*), but were only "consulted" in other matters (*vozem consultivam*).<sup>107</sup> After two years of work in the Commissions, plenipotentiaries were to be raised to the rank of nobility. The Constitution also facilitated the ennoblement of those burghers who owned land or estates in the town. The Sejm at each session was bound to elevate to nobility the burghers who served in the army and gained higher officers' ranks and those burghers who purchased a village or a town. The Sejm was also to ennoble at least thirty of the other *possessionati* at each session. Townspeople were allowed to purchase real estate, and were granted *neminem caprivabimus* and their own "assessor's court," to be set in Warsaw. The towns, however, lost the remnants of autonomy and were subject to the control of the Commission of Police. In general, the Constitution maintained social divisions and facilitated only the entry of burghers into the rank of nobility. On the other hand, it must be borne in mind that, while in France and Germany the nobility constituted one percent of the population of the countries, in Poland the nobility constituted twenty-five percent of the Polish speaking people and ten percent of the whole population.<sup>108</sup> Hence, the size of the political body constituted by the nobles, and the number of burghers raised to the rank of nobility, was comparable to the American figures.

In America "people" were also divided between politically active voters and passive non-voters, and similarly in theory it was assumed that "the former represent and speak for the latter. . . ."<sup>109</sup> Setting the qualification for voters was left to the States, and the requirements prescribed by the States for voting varied substantially. During the convention, it seemed to be hardly possible to prescribe uniform voting requirements in a way acceptable to all the States. Usually a certain length of residence and amount of property was required. Generally speaking, it "has been estimated that about one-fifth of the adult white males possessed no vote."<sup>110</sup> The Constitution does not discriminate for or against any special class of property owner. Article IV, section 2, guarantees that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The same article gives, however, a constitutional provision making possible the recapture of slaves who had escaped to other States. This provision reflected the requirements of the deputies from the Southern States who, on the one hand, wanted to count slaves as citizens to increase the representation of their States in the federal bodies but on the other hand objected to the interference with the importation of and existing policy toward the slaves. The final provisions of the Constitution are the result of a compromise which ex-

107. Polish Constitution of May 3—Original name of the law, *Ustawa Regdowa z dnia 3 maja 1791*, art. II, cl. 2 [hereinafter *The Law on Government of May 3*].

108. See A. AJENKIEL, *supra* note 20, at 16–17.

109. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 1 (1954).

110. C. WARREN, *supra* note 83, at 400.

cluded non-taxed Indians and approved the counting of only three-fifths of the slaves.<sup>111</sup>

The social position of the serfs in Poland was comparable to the American slaves and required sound reform. The Constitution did not change this position substantially. Article IV declared that the peasants would be taken under the protection of law; however, this merely meant that the future contracts between the peasants and landlords were subject to the government's control and supervision. All people who came from abroad and decided to purchase property in Poland were declared free forever. One of the most progressive statutes was the Statute of April 23, 1792, which resolved that the king's estates would be put on sale. The peasants who lived on these estates were given the opportunity to sell their rights to the property and leave the land after the termination of the contract with their purchaser. In fact, the servitudes remained in force, and the Polish peasant was personally dependent on the gentry and subject to gentry's jurisdiction no less than the American slave. Only in the king's estates were the peasants' cases heard by so-called *referendar's courts*. In the partitioned Poland, the emancipation of serfs in Prussian and Austrian parts did not take place until 1848-1850. In the Russian dominions, the emancipation was carried out in 1861-1864, approximately the same time as slavery was abolished in America.<sup>112</sup>

Concluding, the traditional attempt to set the democratic American Constitution against the non-democratic Polish Act does not seem justified, and, in fact, the comparison of the addresses of the political rights as provided in both Constitutions shows much more impressive similarities than are usually admitted.

The Articles of Confederation declared that "[e]ach State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled."<sup>113</sup> This concept of a "league of friendship,"<sup>114</sup> with a central government working only as a common agent, was strongly criticized in the period directly preceding the Constitutional Convention. The Confederation was set against the concept of the State which was to act as one sovereign entity, vesting the exercise of certain powers in a central government and the remaining powers in local governments. Confederacy was seen as a league of sovereign states; a federal state was viewed as a single state having only a federal form of governmental organization.<sup>115</sup>

The distinction between a confederacy and a federal state was not always clear-cut, and the so-called Anti-Federalists also spoke about a "federal" union as a "society of societies." The vagueness of constitutional terminology forced the

111. See C. SWISHER, *supra* note 1, at 231; U.S. CONST art. I, § 3, cl. 2.

112. E. CORWIN, *supra* note 109, at 1-2.

113. ART. OF CONFED., art. II, *reprinted in* I Old South Leaflets, No. 2 (1888).

114. See H. HOCKETT, *supra* note 1, at 153.

115. See generally W. WILLOUGHBY, I THE CONSTITUTIONAL LAW OF THE UNITED STATES 6 (1910) (comments on distinction between Confederacy and Federal State).

framers to characterize the constitution as a “compound” of federal and national features.<sup>116</sup> Madison explained that,

[t]he difference between a federal and national government, as it relates to the *operation of the government*, is . . . supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the constitution by this criterion, it falls under the *national*, not the *federal* character. . . .

In other places, Madison suggests that the Constitution is

neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character. In rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal*, and partakes of the *national* character.<sup>117</sup>

Generally speaking, the framers of the American Constitution tried to take advantage of the vague constitutional terminology and extended federal power at the expense of the States.<sup>118</sup> In the Polish model, the framers had already seen a combination of sovereign states subject to all deficiencies of the confederate form of government. In fact the Polish system did not adhere to any of the forms of government characterized by the framers of the American Constitution. The union of Poland and Lithuania sworn in 1569, in Lublin, established one State—the Commonwealth, where the Polish king held the title of Grand Duke of Lithuania and was jointly elected by the Polish and Lithuanian nobility. Both countries had a common Sejm and monetary system and conducted the same foreign policy. On the other hand, the administration of both parts of the Commonwealth remained separate as well as the Treasury and the Judiciary.<sup>119</sup>

Thus, the Polish government, at the very least, was already as centralized as the union established by the American Constitution. Contrary to the assessment of the American Founding Fathers, the deficiencies of the Polish system were

116. See D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 51 (1984).

117. *THE FEDERALIST* NO. 39, at 285 (J. Madison) (B. Wright ed. 1961).

118. See FOX, *Amending the Constitution to Accomplish Social Goals*, in 9 *SOCIAL THOUGHT*, No. 3, at 3–4 (1983).

119. After 1569, the Polish Crown was composed of twenty-two voivodships and a few separate lands and subdivided into 119 districts (*powiaty*) when the Grand Duchy of Lithuania was divided into eight voivodships subdivided into twenty-two districts and the Duchy of Samogita (*Zmudz*). Kos-Rabcewicz-Zubkowski, *supra* note 13, at 239–40; see also A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 183.



found in the Polish political culture's anarchistic features and not directly in the confederate character of its government.

The Constitution of May 3 tried to advance the process of the unification of the Commonwealth. It was often emphasized that it was the intention of the framers of the Polish Constitution to establish a state with a strong central administration. The Constitution was adopted and sworn in the name of one Polish nation. The detailed laws still referred to two nations but they provided for further centralization of administrative functions. Adopted in October 22, 1791, *Zareczenie Wzajemne Obojga Narodow* (*Mutual Assurance of Both Nations*) declared that the Constitution is "one, common and indivisible governmental law serving the whole state, the Crown and Grand Duchy of Lithuania." The law stated that the government, the army and the treasury of the state will be inseparable. So, in fact the Polish Constitution as well as the American Constitution provided for further political consolidation of the country.<sup>120</sup>

Both Constitutions refer to the doctrine of the separation of powers as the most fundamental principle of good government. Articles I, II, and III of the American Constitution base the framework of government on the grounds of this doctrine. The Polish Constitution, in Article V, proclaims that, "three powers, should and on the basis of this law will always constitute the Government of the Polish nation; they are legislative power vested in the assembled estates, the highest executive power vested in the King and the Council of Guardians and the judicial power vested in the courts set for this purpose or which are going to be set."

The advantages of the separation of powers were recognized by Aristotle and widely examined by Locke. Locke listed three powers in the British Commonwealth: Legislative, Executive and Federative. He vested the supreme power in the legislative and did not even mention the judiciary as a separate power. The judiciary was enumerated among "powers" by Montesquieu who was recognized as "the oracle always consulted and cited on this subject."<sup>121</sup> But Montesquieu, as Mauro Cappelletti convincingly argued, despite listing the judiciary among "powers," believed that in fact it is no "power" at all. He wrote that "[o]f the three powers of which we have spoken, the judicial is, in a sense, null."<sup>122</sup> In fact, the American Constitution adopted a Lockean or Montesquieuian model of the government only to some extent, and it was often raised that the Polish Constitution provided for separation of powers mostly by name.

It is unquestionable that contrary to Montesquieu's suggestions, the American Constitution vested "real power" in the "Supreme Court and in such inferior

120. USTAWA RADOWA Z 3 DNIA MAJA 1791 ROKU WRAZ Z PRAWEM O MIASTCH I ZARECZENIEM WZAJEMNYM OBOJGA NARODÓW (THE GOVERNMENT AT LAW OF MAY 3, WITH "THE MUNICIPAL LAW" AND "MUTUAL ASSURANCE OF THE BOTH NATIONS") (1926).

121. THE FEDERALIST NO. 47, at 337 (J. Madison) (B. Wright ed. 1961).

122. MONTESQUIEU, 1 DE L'ESPRIT DEIS LOIS, book XI, ch. 6 (G. Frères ed. 1973); Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 CATH. U.L. REV. 11, 12-14 (1985).

courts as the Congress may from time to time ordain and establish.”<sup>123</sup> Despite some limitations on judicial power, the United States federal courts certainly cannot be treated as a minor actor on the governmental stage.<sup>124</sup>

In Montesquieu's France, the separation of powers was to impose efficient restraints on the executive power and protect citizens against the absolutism of monarchs. Separation of powers in America was conceived as a guaranty of liberty, but it also was intended to protect the system established by the Constitution against the domination of any single power. As Cappelletti states, “To be sure, the strict separation, ‘French style,’ of the governmental powers, whether or not actually ‘Montesquieuian’ in inspiration, was miles away from the kind of separation of powers which almost contemporaneously was adopted by the American Constitution. Separation of powers in America is better described as checks and balances. . . .”<sup>125</sup> As enumerated by one of the early statesmen of the country (John Adams) the checks and balances were as follows:

First, the States are balanced against the general government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the executive authority is in some degree balanced against the legislature. Fourth, the judiciary is balanced against the legislature, the executive and the state governments. Fifth, the Senate is balanced against the President in all appointments to office, and in all treaties. Sixth, the people hold in their own hands the balance against their own representatives by periodical elections. Seventh, the legislatures of the several States are balanced against Senate by sexennial elections. Eighth, the Electors are balanced against the people in the choice of President and Vice-President. And this, it is added, is a complication and refinement of balances which is an invention of our own, and peculiar to this country.<sup>126</sup>

In Poland, the Constitution was adopted by the nobility and their liberties did not require any further protection. The Polish concept of the separation of powers (at least in the view of the reform faction) was to balance the excessive freedom of the big magnates and to strengthen the authority of the king.

The critics of the Polish Constitution argued frequently that despite the declaration that the highest authority is vested in the three powers,<sup>127</sup> the whole concept of the distribution, separation and balances of main “branches” of government is not accomplished in the Polish constitutional reform. The Law on Government (as the Constitution of May 3 was officially called), followed by a few detailed statutes, departed from the original concept of “checks and balances” and granted far superior power in the Sejm.

The Sejm held the legislative power. It was composed of two chambers: the

123. U.S. CONST. art. III.

124. See W. MURPHY & J. TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW; CASES AND COMMENTARIES* 4 (1977).

125. Cappelletti, *supra* note 122, at 14.

126. T. COOLEY, *supra* note 5, at 148.

127. UPADEK KONSTYTUCJI 3 MAJA 1791, art. V (Constitution of May 3, 1791), *translated into English in* *New Constitution of the Government of Poland*, at 12 (London 1791).

Senate and the Chamber of Deputies. The right to sit in the Senate was granted to bishops, *wojewodowie* and *kastellani* (heads of the provincial districts), and ministers. The Senate was presided over by the king. The Chamber of Deputies was composed of 204 deputies from the nobility elected for two years and plenipotentiaries sent by the cities.

The Constitution declared that "The Chamber of Deputies in which the national sovereignty is vested will be a temple of legislature."<sup>128</sup> All bills were introduced to the lower chamber and later sent to the Senate for further debate. The king did not have the right to veto the decisions of the lower chamber. This right was vested in the Senate, and the Senate's veto could be overruled by the Chamber of Deputies in the second ballot at the subsequent session. The legislative initiative was vested in the king with the Council of Guardians, in deputies and in *sejmiki* (the local diets). The *sejmiki* retained the legislative initiative but could no longer vote local taxes, and their instructions were not binding on the deputies to the Sejm, who were recognized as the representatives of the whole nation. In this way, the whole legislative power was centralized in the Sejm. The constitutionality of its decisions was not subject to any control. As Boguslaw Lesnodorski wrote, "[I]n short, we do not have here (in the concept of the reformed government) the idea of the strict division of powers. There is no balance. There are good foundations for the *seymocracy* of the nobility."<sup>129</sup>

The Constitution introduced a system which featured some of the attributes of the parliamentary form of government. The legislature was recognized as a supreme power. The king, as head of the state, appointed the ministers for two years but the nominations were to be presented to both Chambers of the Sejm which could vote "no confidence" for the king's nominees. Also during his two-year tenure, a two-thirds majority of the joined Chambers could dismiss the minister. The king's power to appoint sixteen ministers (four chancellors, four hetmen, four marshals and four treasurers) was reserved to Stanislas Augustus for life. Later this authority was to pass on to the Sejm which was to call and recall ministers. The Constitution did not provide, however, for any procedure which could dismiss the whole government. The king, as a chief executive officer, was no longer elected. After the death of Stanislas Augustus, the Polish throne became hereditary in the House of the Elector of Saxony.<sup>130</sup> The king was not responsible for the parliament but his decisions (as in the British government) could be exercised through and on the advice of ministers who were expected to countersign them.

The Constitution provided that the executive power would be vested in the king and the Guardians of Law. The Guardians did not constitute a formal cabinet. They were to perform the role of the king's Council. In this Council the "king's voice was to prevail." So, as in the American system, the king assumed both

128. UPADEK KONSTYTUCJI 3 MAJA 1791, art. VI (Constitution of May 3, 1791), translated into English in *New Constitution of the Government of Poland*, at 13 (London 1791).

129. B. LESNODORSKI, *supra* note 55, at 294.

130. The two Polish kings directly preceding Stanislas Augustus were from the Saxon dynasty.

roles: the “head of state” and “head of government.” The Constitution of the United States did not mention a cabinet, and it was assumed that all matters relating to cabinet procedures were in presidential discretion. A president could reject or accept advice from his staff. Formally the Polish king also had a decisive voice in his council, but he only had limited influence on the composition of the Guard. The primate, the heir of the throne, the marshal of the Sejm and the President of the Commission of the National Education were given permanent membership in the Guard. The king could select only five Guardians of his ministers: one of the Chancellors as a minister of internal affairs, another one as foreign minister, one of the hetmen as a minister of war, one of the treasurers as a minister of treasury and a marshal as a minister of the police department.<sup>131</sup>

The king was to head the Senate where he had one vote and the second vote in the case of a draw. The right to nominate lay senators was also reserved for Stanislas Augustus for life. Later the senators were to be nominated by the king, but he was to have only a choice of two candidates selected by the local diets.<sup>132</sup>

The Constitution declared that “the judicial power cannot be exercised either by the legislative power or by the king, but only by the specially established and elected magistrates.”<sup>133</sup> In fact the court system was radically reformed. Special courts for the nobility (*ziemski*, *podkomorski* and *grodzki*) were replaced by the landowners’ courts (*ziemianskie sady*), and appellate, provincial courts, staffed by judges elected for four years by the local diets (*sejmiki*). Townspeople were subject to the jurisdiction of the town courts and appellate *assessors’ court* in Warsaw, peasants to the jurisdiction of the landlords, and in the king’s dominions to the special *referendars’ court*. The most important courts, however, to hear the cases “against the nation” and “against the supreme Government of the Commonwealth” were to be selected by the Sejm and composed of its members. As Lesnodorski wrote, “The system of the separation of powers was also infringed as far as the judicial functions were concerned. . . . As through the interference into executive functions, the Sejm reached out for the rules in the state as through the Sejm courts it guaranteed to itself the jurisdiction in the political matters.”<sup>134</sup>

## VI. THE CONSTITUTION WHICH “GREW AND SURVIVED” AND THE CONSTITUTION WHICH “FELL BUT WON”

There is one fundamental difference between the American and the Polish Constitution. The first has endured for two centuries; the second survived only a little more than one year.

131. Ambassadors and members of government commissions (ministries) were to be appointed “during the meetings of the Sejm . . . with its consent.” B. LESNODORSKI, *supra* note 55, at 294.

132. See W. SMOLENSKI, *Ostatni rok sejmu wielkiego* 217–40 (1897).

133. UPADEK KONSTYTUCJI 3 MAJA 1791, art. VIII (Constitution of May 3, 1791), *translated into English in* New Constitution of the Government of Poland, at 31 (London 1791).

134. B. LESNODORSKI, *supra* note 55, at 294.

As Russell Kirk noted in his article on the American constitutional tradition that,

We have learned how to transplant human hearts, after a fashion, precariously; but constitutions, the hearts of nations, remain unresponsive to sudden surgery. . . . The constitutions are not invented; they grow. . . . For the most part, the American Constitution expressed formally what already was accepted, practiced and believed in by the people of the new republic. A constitution without deep roots is no true constitution at all.<sup>135</sup>

There are no doubts that the Polish Constitution also arose from the roots of many centuries of political experience and the healthy attempts to accommodate these elaborate traditions into new realities. The Polish Constitution did not survive for long, but this fact is rarely recognized as a failure of its Framers. To the contrary, in the Polish historiography, the Constitution, despite some criticism, was widely evaluated as one of the most significant political achievements which affected the political culture of the generations of Poles.<sup>136</sup> The more critical commentators usually tried to expose some inconsistencies of the Law on Government and point out that they contributed to the final fall of the Constitution.<sup>137</sup> It was often raised that the Constitution, particularly the successive detailed laws, departed from the original concept of the “reformers” who had planned to strengthen the executive power at the cost of the magnate controlled Sejm. It was argued that the projects of the reform were monarchical, and that the final draft was a result of an overly reaching compromise with the “republican,” reactionary faction.<sup>138</sup> This compromise resulted in the departure from the fundamental principle of the separation of powers and deprived the Constitutional reform of its original coherence.<sup>139</sup>

Polish socialists, with Julian Marchlewski and Adam Prochnik at the head, attacked the document for not satisfying the most urgent needs of unprivileged masses of the society.<sup>140</sup> These opinions impacted many of the socialist historians who had tried to undermine the myth of the “constitutional miracle” and emphasize that the Constitution did not represent the interests of the majority of the Polish nation. The reform which was offered by the nobles came too late. Poland was no longer strong enough to defend her Constitution. The criticism was raised that the Framers believed that the Governmental Act was a “miracle” and paid more attention to its development than to the need to defend the country against an unavoidable Russian attack.

In the light of extensive studies, these arguments are not quite convincing. It is

135. Kirk, *supra* note 6, at 3, 11.

136. See B. LESNODORSKI, *supra* note 55, at 456 (quoting opinion of Prince Adam Czartoryski, *Nadwislanin* (1861)).

137. See M. HANDELSMAN, *KONSTYTUCJA 3 MAJA 84* (1907).

138. See W. SMOLENSKI, *supra* note 71, at 417–18.

139. See B. Lesnodorski's comments, *supra* note 134 and accompanying text.

140. See J. MARCHLEWSKI, *3 TWORCZOSC* (1950).

certainly true that the Constitution of May 3 was a result of a social and national compromise. The Governmental Act did not challenge the superior position of the nobility, but declared that the Polish nation was composed of peasants and townspeople as well. The Constitution particularly affected the burghers who were given some limited political rights.

Taking into account the quite exceptional position of the Polish nobility, which was not threatened by any major social turbulences, the constitutional "compromise" has its special meaning. The concept of reform was initiated by the nobility, and although it gained some enthusiastic support from the townspeople, it was undoubtedly "a transformation from within." In these circumstances, any radical change of the social structure was highly unlikely, and the fact that the Constitution tried to regulate some of the most urgent social problems should be properly addressed.

It is true that Poland as a "Commonwealth of nobility" was not prepared for any more radical social reform. It is, however, also unquestionable that even the moderate compromise was contrary to the existing geopolitical situation and was unacceptable for Russia. Under these circumstances more radical projects of reforms were simply unrealistic.

Every constitutional act is a sort of social and political compromise, and a constitution hardly has a chance for survival if its provisions do not meet the expectations of the most influential social groups and political factions in the country. The political compromise offered by the Constitution of May 3 attempted to accomplish the same goal. It was true that the original concept of the reform was monarchical, but on the other hand, the idea of a king with strong executive power was under attack by the influential "republican" faction which referred to the reform as "revolution" and which attempted to block the works of the Sejm by seeking Russian protection. The "republican" concessions in these situations were to moderate the "monarchical and democratic" character of the "revolution" of May 3 and to help the country escape civil war.

It is also hard to accept the argument that "the republican concessions," which forced the reform faction to end up with the concept of "seymocracy" and depart from the original doctrine of the separation of powers, effected coherence of the constitutional provisions. As stated above, the doctrine of the separation of powers has meant different things in different countries. Neither Locke nor Montesquieu believed that the powers should be equal nor did they mean that the legislature and executive "ought to have no influence or control over the acts of each other, but only that neither should exercise the whole power over the other."<sup>141</sup>

The American constitution places an emphasis on a real division of powers and on the elaborate system of checks and balances, but it is usually assumed that, for example, the British concept of the separation of powers means little more than

141. E. WADE & A. BRADLEY, *supra* note 17, at 25.

an independent judiciary.<sup>142</sup> The Parliament in England is recognized as the supreme power in the country. The ministers sit in one of the chambers, the House of Lords is the highest court in the country, the Lord Chancellor, the top judicial officer and the speaker for the Lords, is a member of the Cabinet. In many European constitutions, the separation of powers corresponds well with the superior authority vested in the Legislature. In that respect, the Polish Constitution was not unique at all. It adopted the concept of separation of functions of the different branches of government and this idea certainly was not incompatible with that of influence or even control of one power over the acts of another. If we take into account the European context of the discussed doctrine, the coherence of the Polish Law of Government seems to be no less solid than other constitutions.

The Constitution of the United States has not only grown out of the centuries of European traditions and American colonial experience, but also has kept growing over the last two centuries. American constitutional development is a mixture of continuity and change.<sup>143</sup>

The Framers of the Constitution were fully aware that the document they drafted was not perfect, and that its adaptability to the changing conditions would be severely tested. As William F. Fox, Jr. pointed out, "The Framers recognized that drafting a truly living document required that some flexibility be built into the document to permit it to accommodate changes in political, social, and economic conditions."<sup>144</sup> In fact, this adaptability makes the Constitution a truly remarkable document.<sup>145</sup> The built-in flexibility allows for either an amendment to the provisions of the Constitution or allows for the courts to accommodate the meaning of these provisions through their decisions. This flexibility permitted the document to survive for two centuries in altered circumstances. These two centuries of constitutional development provide the single most important answer to the question: what does the American Constitution mean today? It means that almost the whole history of the United States can be understood through the study of American constitutional development, and that the understanding of the American heritage is not possible without knowledge of American Constitutional history.

The Framers of the Polish Governmental Law of May 3, understood as well as

142. *Id.*

143. See e.g., C. SWISHER, *supra* note 1, at 1016 (Developments after World War II evidence the mixture of continuity and change in American constitutional development).

144. *Amending the Constitution to Accomplish Social Goals*, 1 SOCIAL THOUGHT 3 (Summer 1983).

145. The flexibility which was written into the document in accordance with the Framers' intentions should be distinguished from the idea of a "living or evolving Constitution" which allows judges to disregard traditional, textual based constitutional interpretation and introduce into the Constitution some contemporarily recognized values. See S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1986).

their American counterparts that a constitution is a framework document which should prove adaptable to both the changing conditions and the needs of the most representative groups of society. The Polish Constitution outlined only the structure and functions of the major governmental bodies and left further regulation to the detailed laws. The deliberate use of the ambiguous language was to pave the way to flexible constitutional interpretation. The far-reaching constitutional compromise was conceived to accommodate expectations of the Russian-backed "Republicans." The moderate social reforms were to satisfy aspirations of the Polish burghers and timid anticipations of peasants without challenging the phobic, anti-revolutionary and anti-democratic attitudes of the reactionary factions in neighboring, authoritarian countries.

Despite this built-in flexibility and deliberate readiness to compromise, the Polish Constitution survived only fourteen months. On April 27, 1792, the "Republican" faction of the Polish magnates, led by Seweryn Rzewuski, Ksawery Branicki and Szczesny Potocki, in St. Petersburg, signed the Act of Confederation which was later promulgated under the false date of May 14, in the border town of Targowica.<sup>146</sup> The leaders of the Confederation condemned "the monarchical and democratic revolution of May 3rd" and asked for the protection and support of the Russian Empress, Catherine II. Although at first victorious at the battles of Zielence and Dubienka, the Poles did not stop the much larger Russian army. Under Russian pressure, the Guardians with the King declared the accession to the rebel Confederation (July 24). Six months later on January 23, 1793, Russia and Prussia signed in St. Petersburg the second agreement of the partition of Poland. The partition was ratified by the Polish Sejm in Grodno (in June 1793) which re-established the fundamental laws and pre-constitutional institutions.

The Governmental Law was abolished, but the basic principles of the government, which were worked out by the Framers of the Constitution, remained very much alive in Polish political thought. The ardent defenders of the 1791 reforms set the constitutional document among the most praiseworthy achievements of the nation. They often reiterated, after Bronislaw Dembinski, that "Poland fell not because it could not live but, just contrary, because she wanted to live. The miracle of the Constitution did not save the state but did save the nation."<sup>147</sup> In light of this viewpoint, the Constitution "fell but won."

There is some truth to this. Perhaps, it would be going too far to claim that the Constitution saved the Polish nation; however, it gave the nation optimism and confidence that Poland was capable of creating a viable political and social system. The Poles' constitutional declaration of the supremacy of Catholicism strengthened the conviction that there is a special relationship between Catholicism and the Polish national character. In the nineteenth century, this conviction accompanied the progressive formation of a strong Polish national consciousness. It contributed to the stereotype of "a Pole: a Catholic" which assumed that

146. A. GIEYSZTOR & S. KIENIEWICZ, *supra* note 13, at 377.



Catholicism is a necessary feature of the Polish character—that each true Pole must be a Catholic. This conviction, which in some degree had survived in the Polish political culture until recently, is part of a cultural inheritance of the Constitution.

The Constitution was a document drafted by the nobility, but was to serve the whole nation. The framers of the Governmental Act tried to convey a message that the ruling estate of the nobles has both rights and duties. The Constitution also confirmed the democratic traditions of the Polish political culture; it was a special tradition of equality within one social group, the nobles. This concept, however, assumed that all those who were finally admitted to the “common order” should actively participate in the control of common affairs. In the nineteenth century, the concept of the closed estate of nobles was replaced by that of “spiritual and intellectual nobility,” but the idea of the “active participation” and “direct contribution” of all to the “common wealth” became an important legacy of the first Polish Constitution.

The belief in the “miracle” of the Constitution enhanced Polish political romanticism—a unique attribute of the Polish national character which can be understood (to simplify the concept somewhat) as a set of attitudes that are irrational, unpredictable, unstable, and atypical.<sup>148</sup> The legend of the Constitution transmitted a belief in “unpredictable events” and in a sense of “fighting in lost battles.” Polish romanticism can be understood as the permanent readiness of the people to sacrifice important human values in defense of religion, national identity, culture, tradition and liberty even in situations where the ultimate struggle seems unable to offer any rational chance for victory. In this sense, the noble battle for a Polish Constitution was lost but nevertheless successful. Although the Constitution fell, its legacy is still very much alive.

147. B. DEMBINSKI, *POLSKA NA PRZEŁOMIE* (POLAND ON THE TURN) 4 (1913).

148. See R. LUDWIKOWSKI, *POLSKA KULTURA POLITYCZNA: MITY, TRADYCJE I WSPÓŁCZESNOŚĆ* (POLISH POLITICAL CULTURE: MYTHS, TRADITIONS AND CONTEMPORARY TIMES) (1980).