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The Spirit of Laws in the Polish-Lithuanian Commonwealth, 1573-1791: Continuity, Change, and Conservative Jurisprudence

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O, bloodiest picture in the book of Time,
Sarmatia fell, unwept, without a crime;
Found not a generous friend, a pitying foe,
Strength in her arms, nor mercy in her woe!
Dropped from her nerveless grasp the shattered spear,
Closed her bright eye, and curbed her high career:
Hope for a season bade the world farewell,
And Freedom shrieked, as Kosciuszko fell!

- Thomas Campbell, “The Fall of Poland”, in *From Pleasures of Hope*

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INTRODUCTION

A Prolegomena to Polish-Lithuanian Constitutionalism

"Every nation requires a story […] about its origins, a self-defining mythos that says something about the character of the people and how they operate in the larger world and among each other"[1]

I. Polish-Lithuanian Constitutionalism: A Nearly-Lost Legacy

October 24th, 1795 is one of the most-significant, albeit least-known dates in European history. After a valiant, yet brief struggle of no more than half a year, the patriotic uprising led by Tadeusz Kościuszko was brutally crushed by the combined might of the Austrian, Prussian, and Russian Empires. The three victors, long-having lusted over the fertile lands of the Polish-Lithuanian Commonwealth[2], divided her amongst themselves. The

[1] Jay Parini. 2012. "The American Mythos." *Daedalus* 141(1): 52.

[2] Much of the problems in researching the Polish-Lithuanian Commonwealth and Polish history is that the Commonwealth itself was a complex, geographically immense, as well as culturally, ethnically, linguistically, and religiously diverse state. Throughout its history, its population as well as even its boundaries were constantly in flux, though over time the Poles—who were by far the largest ethnic group—emerged as the dominant social and political force, so much so that "Poland" often extended to every territory of the Commonwealth, such as Lithuania, Ruthenia, etc., though they were in fact explicitly distinct political units. This association with the Polish-Lithuanian Commonwealth with "Poland" or even the more innocuous vague distinctions between the two of them was present throughout much of its history and continues into historiography even to this day. As such, to address and simplify this complex issue, the terms "Poland-Lithuania", "Polish-Lithuanian Commonwealth", "Commonwealth", "Rzeczpospolita", or "Republic" will be used interchangeably. When just the area that corresponded to "Poland" is referred to, the term "the (Polish) Crown" or the "(Polish) Kingdom" will be referred to, whereas Lithuania or "the Grand Duchy" will be used when discussing Lithuania. This convention keeps with how the Polish-Lithuanian Commonwealth originally referred to the union of the kingdom of Poland and the Grand Duchy of Lithuania in 1569. For our purposes here, distinctions between Masovia, Greater Poland, Lesser Poland, and other "Polish" regions are relatively unimportant and will be generally considered under the term "the Crown". The terms "Poland" or "Polish" will be limited to modern-day Poland and its history, so that "Polish history" refers to the region of "Poland" after the partitions or the history done by Poles about their own history. This distinction is important, given that the author's intention is to challenge a lot how Poles understand their own history and historiography today, i.e. a better understanding of "the history of the Polish-Lithuanian Commonwealth" better informs Polish history today. In this, we agree with the perspective taken by Juliusz Bardach that: "The several centuries of the Crown and Grand Duchy coexistence brought, in spite of numerous controversies and conflicts, both 'political nations' (i.e. the magnates and nobility) closer together. However, the cultural Polonization of the Lithuanian upper classes during the seventeenth and eighteen centuries did not cause their identification with the Polish nobility. A two-tier national consciousness began to emerge in the 'political nations' of the Grand Duchy during the eighteenth century. Briefly, it consisted in the fact that the Lithuanians considered themselves different from the inhabitants of the Kingdom of Poland, but recognized themselves also as Poles. We should not give these notions the meaning we attach to them today. Even during the nineteenth century the word 'Lithuanian' meant a person who lived in the Grand Duchy regardless of whether he or she was ethnically and culturally Lithuanian, Byelorussian, or Polish, while the word 'Pole' meant a citizen of the Commonwealth of the Two Nations irrespective of whether he or she came from the Crown of the Grand Duchy," Juliusz Bardach. 1985. "The Constitution of 3 May and the Mutual Guarantee of the Two Nations." In: Samuel Fiszman, ed., *Constitution*

proud Stanisław August Poniatowski, last king of Poland-Lithuania, was forced to abdicate and retire to St. Petersburg where he lived a muted life as part of Catherine the Great's trophy collection. Kościuszko, likewise defeated and captured at St. Petersburg, was eventually freed upon the condition that he never again see his native land, wandering across Europe and briefly America before finally retiring to Switzerland where he would live out his days until 1817, though not before prophetically warning his Polish brethren against naively trusting in Napoleon. As for the Polish-Lithuanian Commonwealth, its 14 million souls were split between the three hungry nations, where for the next 123 years they would struggle to maintain their national pride and identity until they rose like a phoenix from the ashes in the embers of the dying empires of the Great War.

The Third Partition represented not merely the loss of a nation and the division of its peoples, but also the death of an idea, the extinction of one of the last, and longest-surviving republics (Rzeczpospolita) in the Age of Absolutism. Like her closer siblings in Venice, the Netherlands, and Geneva, and more distant cousins in England, Scotland, and later the United States, Poland-Lithuania was a complex, often messy system that widely and eclectically borrowed constitutional and political concepts from classical republicanism, natural law, renaissance humanism, and a jurisprudentially conservative defense of an ancient constitution enshrined in time-honored custom. Despite vast historical, cultural, and ethnic differences, along with oftentimes large geographical distances, these nations constrained their governments and promoted the common good through a remarkably similar set of institutional solutions, doctrines, and practices that are quite familiar to our modern sensibilities, such as: national and local parliaments, religious toleration, formal equality before the law, separation of powers, flirtation with constitutional monarchy, *inter alia*. For our purposes here, the Commonwealth was unique in three most significant ways: the presence of a so-called "democracy of nobles", the election of the king by the nobles rather than hereditary succession, and the presence of a written constitutional tradition.

Together these composed what was perhaps Poland-Lithuania's greatest—if not also *the* most overlooked—strength and contribution: a sophisticated constitutionalism with lessons that comparative historians, political scientists, and legal scholars should still study and learn from today. This work's main thesis aims for two targets: to not only uncover this constitutionalism on its own terms—that is, to understand its internal logic and development of institutions as its inhabitants would have understood them, avoiding such reflection on historical ramifications of certain ideas, institutions, actions or inactions whenever possible—but then to demonstrate how and why Polish-Lithuanian constitutionalism is relevant for today. The majority of our task is to answer the first part with minimal comparative, speculative, or historical asides, with comparison, implications, and questions of broader, modern relevance reserved for the concluding section of each chapter and the general synthetic concluding chapter of the whole work, lest they color our judgment prematurely throughout the analysis.

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and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791. Indiana University Press: Bloomington, pgs. 358.

In other words, we seek out the *spirit* of Polish-Lithuanian constitutionalism, to borrow from Montesquieu, who serves as something our methodological and theoretical patron saint. It is an admittedly a humble and woefully inadequate and fragmentary attempt, more a prolegomena to Polish-Lithuanian constitutionalism than a decisive enumeration of either its principles or a comprehensive listing of every text that could be considered to be "constitutionally significant". However, we do not seek out this spirit for its own sake. No analysis with a strong component of history can ever be completely neutral: our own analysis is spurred by a sense that Polish-Lithuanian history has been overlooked and understudied, for example. However, there must be careful distinguishment between subsequent problems or contemporary issues *developing* the questions for historical reflection, and subsequent problems or contemporary issues *driving* our understanding of past events, which must be appreciated on their own terms whenever possible. This requires a nuanced, specific, comparative historiosophical approach that will be further addressed later in this introduction but suffice it to say for now that it attempts to reconcile theory—which generalizes across time and space—and empirical context of the events themselves and follows in the broad footsteps of illustrious theorists such as Montesquieu, de Tocqueville, and Weber.[3]

Before we can positively flesh out our specific understanding of comparativist historiosophy that we will employ throughout this work, it is necessary to outline a survey and criticism of previous historical approaches. Thereafter, it will be necessary to address some important clarificatory remarks concerning the periodization of the overall work into the broad historical categories of 16th, 17th, and 18th centuries, though our constraint is *constitutionalist development*, rather than political—or any other kind—of *historical development*. The sufficiently narrow category of "constitutionalism" as our primary criterion must be explained, as well as the definition of key terms that will be pervade our analysis, such as *szlachta or szlachcic* vs noble and *konstytucja* vs constitution, as well as directly employing Polish terminology such as *Seym* (plural *Seymy)* and *seymik* (plural *seymiki*). Having established a broad roadmap of where we are leaving from and where we hope to travel to, so to speak, it is now necessary to more narrowly define what road we are taking to get there.

II. Outline of This Work

The remainder of this Introduction proceeds along the general structure of presenting a *theory*, refining a *method*, and then supporting it via *evidence*. The theoretical understanding will consist in two parts, which may be thought of as negative and positive justification: the first shall be a summary and critique of previous attempts to understand Poland-Lithuania with the goal of highlighting how it is misunderstood and why its contributions to constitutionalism have been overlooked. This is *negative* in the sense that it is not establishing the case itself, but rather clearing the path for it to come forth. Here, our source of inspiration is Heideggerian, and may be thought of as a mix of *clearing* (aletheia)

[3] Melvin Richter. 1969. "Comparative Political Analysis in Montesquieu and Tocqueville." *Comparative Politics* 1(2): 129-160.

or *destruction*.[4] This *negative* argumentation will consistent of the following subsections of the next section, The Poverty of Polish-Lithuanian Historiosophy, The Death of the Polish-Lithuanian Commonwealth as a Detective Story.

The next, positive theoretical section will consist of the parts Montesquiean-Inspired Spirit of Law as Transhistoriography and Constitutionalist Transhistoriography as Palliative respectively, and will actually present evidence for our theses. This involves a specific outlining of what we mean precisely by *spirit* of Polish-Lithuanian constitutionalism and our precise method for achieving it, which—as we shall see will be a transhistorical method that attempts to navigate the Scylla and Charybdis of ahistoricism and historicism by drawing on Montesquiean-de Tocquevillian-Weber comparativist and hermeneutics. The introduction then concludes by introducing necessary clarifications and addressing the broad audience for whom this work is most intended in the subsections, Some Critical Clarifications and Caveats and For Whom is This Analysis Written respectively.

The first chapter to follow the introduction will problematize the conception of "constitution" and juxtapose it with "constitutionalism", with *constitution* referring to the modifiers *constitutional* and *constitutionality*, whereas constitutionalism refers to the modifier *constitutionalist*. Constitutionality is an "internal perspective", that is it revolves around one system, e.g., questions of whether or not something is "constitutional" are always an internal measure, rather than a comparative measure. By contrast, constitutionalism refers to a theory of constitutions, that is comparative work across constitutional systems, e.g., written vs unwritten constitutionalism or common law vs civil law constitutionalism. This will also entail a detailed explanation of the genealogy and etymology of "constitutions" vs "constitutionalism" and to create some general constitutionalist archetypes and themes with which the rest of the study will be organized.

The second chapter, *Constitution Lost, Constitution Regained: From Constitutionalist Hermeneutics to Constitutionalist Exegesis* will present the methodology of constitutional exegesis, a specific approach to hermeneutics that is centered around texts-as-phenomena. This creates a dialogue between conceptions of constitutionalism and constitutionality as well as texts, a dialogue among the texts the themselves, and a dialogue

[4] Heidegger's understanding of clearing (*aletheia*) is that Da-sein [a human being's knowledge of itself] has knowledge about itself that comes from itself, e.g. "[t]o say that it is 'illuminated' means that it is cleared in itself *as* being-in-the-world, not by another being, but in such a way that it *is* itself the clearing." Thus, for Heidegger clearing comes from recognizing one's own principles and radiating outward. It is a strong positive sense. Destruction, on the other hand, is to recognize that in some sense one's knowledge of one's sense may be subject to history, and that in some sense history can "get in the way" of understanding, which Heidegger describes as "the inclination to be entangled in the world in which it is", which "deprives Da-sein of its own leadership in questioning and choosing." While Heidegger is concerned with the more arcane and deeper subject of human beings' existence, knowledge, and relationship to history and the perception of time are interrelated, his method holds inspiration for a critique of historical knowledge that is trapped by history, that is that our understanding of history *per se* becomes attached to history *per quod*. A stark difference is that whereas for Heidegger *Alethia* and *destruction* are ontologically connected—the act of clearing to allow something to become itself is the same as destroying that which prevents it from doing so—for us the ontological connection of *positive* and *negative* evidence can only be implied. See: Martin Heidegger. 1996. *Being and Time. A Translation of* Sein und Zeit. Translated by Joan Stambaugh. State University of New York Press: Albany, pgs. 19, 133.

of the texts and their historical context. The point of such a process is to be iterative, with concepts being presented, refined, clarified, and occasionally disproven or corrected via the texts themselves. As such, even the categories through which the texts are encountered and conceptualized will be problematized and will be themselves subject to change over the course of our analysis.

The remainder of the work is dedicated to the accrual of evidence, the "working out" of the evolution of Polish-Lithuanian constitutionalism. This will occur in three broad periods: the Period of Construction (1374–1609), which established the institutions and principles of the system as well as its first "constitution" in the 1573 Henrician Articles; the Seventeenth Century as the Period of Maintenance (1609-1717), in which the Commonwealth did the best it could to weather a series of constitutional, religious, political, and dynastic crises with a qualitative shift in constitutionalism toward the preservation of ideas, institutions, and practices; and the Eighteenth Century as the Period of Renaissance (1717-1791) in which the Commonwealth sought to overcome the constitutional stagnation during the Saxon period and rebuild its ideas, institutions, and practices.[5]

The study then concludes with an assessment of Polish-Lithuanian constitutionalism: what were its basic concepts and contours, its triumphs and contradictions, and its overall legacy, including relevance for today.

III. The Poverty of Polish-Lithuanian Historiosophy and the *Spirit of Law* as Palliative to It

The Death of the Polish-Lithuanian Commonwealth as a Detective Story

Is it not a rhetorical exercise—one that makes for good undergraduate examination questions and problem solving handbooks—to ask continually "Was Poland murdered or did she commit suicide?" Does it really matter unless we know what the lethal weapon actually was and who wielded it and why? – Herbert H. Kaplan [6]

[5] It must be briefly remarked that each of the three aspects—construction, maintenance, and renovation—are present to some degree in each of these periods, what distinguishes them is which of the aspects is most dominant. The following text selections best reflect or illustrate the balances of these constitutional forces as well as the dominant trends and themes of each period. To illustrate this point metaphorically, let us assume—for all intents and purposes—that the period of constructing a constitutional system is analogous to building a house. Though the period of building a house is obviously mostly defined by the action of building *per se*, within the building process accidents, crises, or unforeseen problems may arise such as the need to pause said building process in order make urgent repairs, or perhaps even have partial or even major reworking of the design . For example, a simple electrical fire may cause only minor superficial damage or perhaps require a brief pause for rewiring something, whereas a more severe fire might cause significant damage to the foundation or underlying structure. Thus, within the period of building, there may be need for minor repair or more significant renovation of the entire project.

[6] Herbert H. Kaplan, 1972. "Some Remarks on Interpretations of the First Partition of Poland." *The Polish Review* 17(4), pg. 19.

Kaplan's[7] "rhetorical exercise" serves as a perfect encapsulation of the last two and a half centuries of Polish-Lithuanian historiosophy, which essentially—and overly simply—can be broken down into those who placed the collapse of the Commonwealth on internal factors—that she committed suicide—versus those who placed the collapse on external factors—that she was murdered. Both sides have substantive material with which to prove their argument. As with any good detective story, we have a body, a victim but there is dispute over the cause of its demise, questions over motivations behind the perpetration of the act, and a search for a smoking gun.

Historiography, however, is not like detective work in that there is no one truth to be uncovered, nor some method to do so. Indeed, the weight of searching for such a truth in fact closes off or obscures any possibility of it. This is because both *history*—a set of facts—and *historiography*—a method for uncovering such set of facts—are both futile endeavors without an established *historiosophy*—a philosophy or theory of history—which organizes the two in a coherent whole.[8] In an ideal world, social science—*any* science, for that matter—proceeds from a cognizant theoretical approach that frames intuitions and speculations into research questions, which then demand certain methods or approaches commensurate with the particular theoretical approach. The research process then moves from theory to method to experimentation of some kind, which ultimately yields the *data* to verify or disprove the initial hypothesis. However, the weight of the collapse of the Commonwealth is so prevailing upon Polish-Lithuanian history that it has inverted this process: rather than a critical self-reflection that allows for some modicum of objectivity, the end of Poland-Lithuania has become a great weight distorting its historiography. As Władysław Smoleński notes:

> The organism, called the state, does not concentrate all the rays of life in itself; its history is not the quintessence of the past. Alongside the forging of the forms of state life, the Rzeczpospolita has woven a thread of civilizational achievements that survived the collapse and constitute the main motif of history. The collapse of the state in connection with the moral

[7] While Kaplan put it most poetically, it seems that Daniel Stone was the first to use the suicide vs murder metaphor to describe the fall of the Commonwealth—at least in English language peer-reviewed literature—a few months earlier, in the summer of 1972. See: Daniel Stone. 1972. "Review." *Slavic Review* 31(2): 467-468.

[8] "Thus, using the most general distinction, it can be assumed that philosophical reflection about history [...] the "philosophy of [natural] history", can be understood as an attempt to rationally justify the rules of historical cognition, the object of which is primarily historical science (a critical standard), while "historiosophy", understood as a proper "philosophy of [human] history", deals with the discovery of the meaning and sense of the historical process, based on philosophical speculation, going beyond historical reconstruction, building universally retrospective and prospective schemes (a speculative standard)," Piotr Wasyluk. 2012. "Filozofia dziejów, historiozofia czy filozofia historii? Próba definicji." *Diametros* 32, pg. 225. It should be briefly noted that Polish makes the distinction between "filozofia historii" and "filozofii dzieje"—which I have translated as the philosophy of *natural* history vs the philosophy of *human* history respectively—is largely non-existent in the English language, at least in the colloquial sense. A close approximation to *dzieje* was given by Collingwood's discussion of *res gestae* or "the attempt to answer questions about human actions done in the past." Both Wasyluk and Collingwood are concerned with a historical sense that does not simply divide the world into human and non-human events, but rather denote how *dzieje* / *res gestae* gives great agency to the historian in terms of conceptualizing and interpreting events, i.e., Collingwood later remarks that "rational action is free from the domination of nature and builds its own world of human affairs, *Res Gestae*, at its own bidding and in its own way." See: Robin George Collingwood. 1946. *The Idea of History*. Oxford University Press: Oxford, pgs. 9, 318.

> resources of society at the end of the eighteenth century must be the starting point for history in the nineteenth century, but should not serve as a standard for judging backward accidents, should not be the fundamental motive of the entire history. [9]

This inversion of purer theory with historicism—in the Popperian sense—is easily explainable within political and social psychology. Hobbes noted that individuals could not achieve much beyond the material level if they were only concerned with the struggle for survival.[10] Maslow's hierarchy of needs put physiological needs, safety, and the need for affection and belongingness as generally lower stages of development with mental, aesthetic, and cultural needs coming later.[11] Bourdieu famously remarked that "objective distance from necessity" was a precondition for culture.[12] Constitutional philosophy is certainly something far removed from "necessity" and concerns about physical safety. The tragedy of Polish-Lithuanian history created a bifurcation in Polish-Lithuanian historiosophy, a schizophrenia between those with a romantic-idealistic approach who wanted to further the national myth to encourage a beleaguered people, and those who sought for someone to blame for the death of the nation, with nearly the entirety of Polish-Lithuanian historical literature can be broken down into political orientation of the historian, rather than a more neutral engagement with the development of the ideas, institutions, and practices of the Commonwealth.[13] This bifurcation is regrettably understandable and has occurred throughout Polish history, with the perpetual crises of the 17th century, the collapse and partitions of the 18th and 19th centuries, as well as the chaotic aftermath of the First World War, the Second World War, and the collapse of communism all shifting toward more pragmatic or other less objective forms of historiosophical reflection. Now that we are 30 years out from the end of communism, Poland can perhaps enter a moment of deeper thought and reflection about her institutions and constitutional identity.

To put it in more concrete—if overly simplistic terms—those who advocate that the Commonwealth was murdered generally held Messianic or Romantic views and were concerned with keeping the dream of an independent Poland alive during the partitions. Many of them were themselves revolutionaries, artists, or poets in exile. The first generation was

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[9] Władysław Smoleński. 1898. *Szkoły historyczne w Polsce: główne kierunki poglądów na przeszłość.* Drukarnia Artystyczna Starnina Sikorskia: Warszawa, pgs. 158-159.

[10] Thomas Hobbes. 1997. *Leviathan*. Simon and Schuster: New York, pg. 97.

[11] James Chowning Davies. 1991. "Maslow and Theory of Political Development: Getting to Fundamentals." *Political Psychology* 12(3): 389-420; Maslow. 1943. "A Theory of Human Motivation." *Psychological Review* 50(4): 370-396. For recent work specifically comparing Hobbes and Maslow, see: Henrik Skaug Sætra. 2022. "Toward a Hobbesian liberal democracy through a Maslowian hierarchy of needs." *The Humanistic Psychologist* 50(1): 70-92.

[12] Pierre Bourdieu. 1984. *Distinction: A Social Critique of the Judgment of Taste*. Translated by Richard Nice. Harvard University Press: Cambridge, pgs. 55-56.

[13] For an excellent general summary of the historiography of the Polish-Lithuanian Commonwealth, see: William J. Rose. 1930. "Polish Historical Writing." *The Journal of Modern History* 2(4): 569-585; Oscar Halecki. 1943b. "Problems of Polish Historiography." *The Slavonic and East European Review. American Series*. 2(1): 223-239; A. F. Grabski. 1972. "The Warszawa School of History." *Acta Poloniae Historica* xxxvi: 153-170. Much of the proceeding historiographical discussion is a result of the author's own readings and observations, along with Rose's and Halecki's. Davies himself gives a summary of Polish-Lithuanian historiography, which offers some different opinions than those of the author, with substantive comments on Marxist and Soviet historiography. See: Norman Davies. 2005. *God's Playground: A History of Poland*. *Volume I: The Origins to 1795*. Revised Edition. Oxford University Press: Oxford, pgs. 7-15.

the so-called "Lelewel school" after Joachim Lelewel, his associates, as well as his students and their associates, with the second generation being the so-called Lwów School. Adam Mickiewicz and Henryk Sienkiewicz were associates of this group, as well as August Cieszkowski. Though Lelewel was known for being a rigorous historian,[14] as were his students such as Henryk Schmitt, there was a great deal of internal tension within the group. For example, Cieszkowski and Mickiewicz are both considered to be romantic and Messianic thinkers, though Cieszkowski was a Hegelian and an optimist, whereas Mickiewicz was a poet and quite negative of Polish-Lithuanian history at times. Lelewel himself seems to have become more romantic as well as more interested in messianism over time.[15]

Those who advocate the view that Poland-Lithuania committed suicide were politicians equally concerned with an independent Poland, but who were concerned with saving Poland from its own past by deconstructing national myth. This group saw the death of old Poland as the seeds for a new and independent Poland. This group was generally centered around Jagiellonian University and was the so-called Kraków school, with the most prominent member being Michał Bobrzyński, whose disdain for the institution of the Commonwealth and overly pessimistic approach to Polish-Lithuanian historiosophy are legendary. Władysław Konopczyński is often grouped together with Bobrzyński, though himself not a member of the Kraków school proper, and was critical of Bobrzyński for being pessimistic and interpreting the Commonwealth through its collapse.[16] However, as we shall see momentarily, Konopczyński own work is also quite pessimistic[17] and tends to view Polish-Lithuanian history in light of the collapse. Konopczyński shares Bobrzyński's dislike for the work of Lelewel and those associated with him,[18] whom he refers to as "romantics". Marxist historians paralleled this group, with the two groups sharing committed to a supposedly more scientific and empirical understanding of history.

Critiques of both approaches appeared around the turn of the century by a group of thinkers who wanted to both empirical but also who rejected the pessimism and cynical demythologizing of Polish-Lithuanian history. They particularly attempted to expand the reach of Polish-Lithuanian historiography beyond legal, political, or theological questions, doing extensive work on economic history or the history of social relations. This is the so-called Warszawa school—sometimes connected with Warsaw positivism—and has continued to shape 20th century Polish history, with historiography of the Commonwealth broadly branching into social relations, politics, constitutional and legal history, *inter alia*.

To some extent, all three are reflections of their own time and space. The Lelewel School (roughly 1825-1875) and Lwów School (roughly 1850-1925) were concerned with

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[14] William J. Rose. 1937. "Lelewel as Historian." *The Slavonic and East European Review* 15(45): 649-662.

[15] Andrzej Walicki. 1985. "The Idea of Nation in the Main Currents of Political Thought of the Polish Enlightenment." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 161; Rose, *ibid*., pgs. 569-570, 578-579.

[16] Piotr Bieliński. 1999. *Władysław Konopczyński: historyk i polityk II Rzeczypospolitej (1880-1952).* Inicjatywa Wydawnicza Ad Astra: Warszawa, pg. 24.

[17] Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies.* Ossolineum: Wrocław, pgs. 8-9.

[18] Michał Bobrzyński.1881. *Dzieje Polski w zarysie*. Tom II. Nakład Gebethnera i Wolffa: Warszawa, pg. 296.

the survival of Poland's identity, and very much reflect a people coming to terms with a destroyed nation, given that Lelewel had witnessed the collapse of the Commonwealth in his youth. The Kraków School and Warszawa School (both roughly 1875-1950) were both concerned with the revival of Poland, which became a very real possibility in the age of nationalism, revolution, and the slow decay of the empires that had partitioned Poland-Lithuanian in the latter half of the 19th century through the First World War. These tensions reveal an underlying problem with Polish-Lithuanian historiosophy: whether one is romantic or messianic, pessimistic or empiricist, idealistic or realistic, there is a tendency toward either political or geographical determinism.

The spectacularly rapid and total collapse of the Commonwealth left an indelible impression upon its historians. Once the decay was set in motion all efforts at reform—contextual and limited as they were rather than revolutionary and transformative—became pyrrhic victories. As Norman Davies notes, a major problem with Polish-Lithuanian historiography is that it is very heavily shaped by how Poles appreciate the geographical-historical context of their nation over the last thousand years. He recounts an amusing anecdote from the Second World War:

> Few people have doubted that Poland's geography is the villain of her history. Trapped in the middle of the North European Plain, with no natural frontier to parry the onslaughts of more powerful neighbours, Poland has fought an unequal battle for survival against Germany and Russia. Poland has been variously described as 'the disputed bride', condemned forever to lie between the rival embraces of two rapacious suitors; or, more cruelly, as 'the gap between two stools'. An unfortunate geopolitical location is invoked to explain the Partitions of the eighteenth century, the abortive Risings of the nineteenth, and the catastrophe of the Second Republic in the twentieth. As one Polish officer was heard to exclaim in London in 1940, when told that the Allied Governments did not intend to fight both Hitler and Stalin simultaneously, 'Then *we* shall fight Geography!"[19]

This geographical-historical determinism is often mixed with a political-historical determinism in a kind of geographical-political historicism, which Davies himself commits.

> Unlike the English, who could always retreat behind the Channel and their Navy, unlike the Spaniards or Italians on their self-contained peninsulas, unlike the Swiss amid their Alps or the Dutch behind their dykes, the Poles have had nowhere to hide. Their state has been exposed to every ebb and flow of political power in modern Europe, and the tides have left it alternately stranded and submerged.[20]

Polish-Lithuanian history proves a very strong temptation for speculative history, to understand what Poland *would have looked like*, had it had a stronger king, had it had less aggressive neighbors, had the Kościuszko uprisings been successful, *inter alia*.[21] Indeed, this

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[19] Norman Davies, *God's Playground*, pg. 23.
[20] *Ibid*., pg. 24.
[21] Such a speculative history is offered by Richard Butterwick-Pawlikowski, though he attempts to restrain himself from making too romantic an interpretation of Polish history, such as she would have naturally evolved into a modern constitutional monarchy in the spirit of the United Kingdom or Scandinavian countries, something that is often implied by such speculative work. Such a temptation is something that the author himself has struggled to avoid. See: Richard Butterwick-Pawlikowski. 2017. "Where were you going, Poland (before

appears to be a common historiosophical error throughout Polish-Lithuanian historiography, in that there is comparison of the Commonwealth to external events or interpreting earlier periods of time through later events, i.e. looking for the seeds of the 18th century collapse throughout the history of the nation, rather than trying to understand each epoch according to its own, internal logic.

For example, Michał Bobrzyński refers to the *pacta conventa*—the document that bound the powers of the king—established at the beginning of the Polish-Lithuanian Commonwealth as the "worst, monstrous fetus of the interregnum"[22]. When in 1607 the *szlachta* (nobles) exercised their right to form an assembly called a *konfederacja* (confederation, plural *konfederacje*) to rise up against a king who violated his *pacta conventa*, Bobrzyński claims that "No one else, only the *Konfederacja* had finally lost our country" (Nikt też inny tylko konfederacya kraj nasz ostatecznie zgubiła).[23] Certainly, a positive attitude, *panie* Bobrzyński, that the Commonwealth—which formally lasted until 1795—was essentially stillborn! Even more depressing, even the achievements of the Polish-Lithuanian Commonwealth were transformed into weakness by Bobrzyński's account, e.g. religious toleration, for which the Commonwealth has long-been traditionally recognized,[24] even by non-Polish sources, was the result of a weak state that could not make up its mind which religion it wanted to support against the others, rather than a sign of respect for individual freedom.[25] Throughout the book, Bobrzyński recommends a stronger, more centralized government as the only panacea to the ills plaguing the nation at the time. He concludes by giving his vision of history as specifically linking understanding the decline to facilitate modern Polish flourishing, noting that "the greatest lesson of [the] past is undoubtedly that

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you were so rudely interrupted)?" International Federation of Library Associations and Institutions, World Library and Information Congress (IFLA WLIC) Keynote Address http://library.ifla.org/id/eprint/1838/1/071-butterwick-pawlikowski-en.pdf (Accessed 15 Jan. 2021).

[22] "This is how the election of 1573 changed the previous form of Polish government from monarchical to republican. Next came the pacta conventa, a word hitherto unknown in Poland, undoubtedly the worst, monstrous fetus of the interregnum," Bobrzyński, *Dzieje Polski,* pg. 115.

[23] "Within the limits of the law neither the king nor any well-meaning citizen could do anything. We say: "within the limits of the law", because the pernicious laws did not allow anything salutary and effective to serve the homeland and the country. Hence the natural consequence that those exceptional people who had not succumbed to the general corruption, who still thought about the good and salvation of the nation, could only develop their activities outside the boundaries of the laws in force, had to see their first task in breaking these laws, in their violent subversion. It is an exceedingly sad phenomenon that the best of citizens had to become the greatest of anarchists. This anarchy, necessitated by the Republic's system itself, by its fundamental laws, even created for itself a permanent form, to which it usually resorted: *konfederacja* [...] Nothing else but *konfederacja* ultimately doomed our country," Bobrzyński, *Dzieje Polski*, pgs. 178-180.

[24] Wacław Uruszczak. 2021. *Historia państwa i prawa polskiego. Tom I (966-1795)*. Fourth Edition. Lex a Wolters Kluwer business: Warszawa.

[25] "The tolerance of that time was therefore a religious peace, a ceasefire between conflicting confessions, none of which, including the Catholics, found enough conviction in themselves, enough faith in their truthfulness and future, to fight the others firmly. Such tolerance, imposed on the state by the denominations, was therefore a symptom of disorder, and one would be greatly mistaken if one were to elevate it and place it on a par with today's tolerance, which a strong state, placing itself above conflicting denominations, imposes on these denominations and, on the basis of a higher humanitarian idea, forbids them to carry their ecclesiastical struggle into the field of social and political life," Bobrzyński, *ibid.*, pg. 101.

our nation only grew by acquiring healthy achievements of Western civilization"[26] courtesy of only a hundred years of oppression by "enlightened" Prussia, Russia, and Austria-Hungarian Empires![27] The great irony of this was that the Kraków school conservative

[26] "It has already been a hundred years since the better part of the nation clearly and openly broke with the revelations of evil, and, having set a new program of action, began working hard in its defense. Subsequent generations undertook it, drawing wider and wider circles and social strata into it, giving them new resources of experience, new sources of encouragement and strength. Already this original program, too, cannot suffice for us today. It was put up by people to whom only one part of our history, the era of decline, was available and known. They built it on the principle of contrast, they included in it the simple opposites of everything that consumed us at that time, in place of coarse materialism they put idealism, in place of privatism sacrifice, in place of sins repentance. However, the lofty idea that animated them was satisfied. Today, against the era of decline we can already place the era of rebirth, and based on it we can crave and desire a deeper, more realistic program of work. *This task is taken up in large part by newer historiography. It, throwing a bridge over the epoch of decline, seeks to establish the thread of our work today with the great work of the epoch, our historical flowering, seeks to reconstruct the whole of history before the eyes of society, the spirit that animated it, to awaken it and to bring the hidden treasures of experience to their audience.*

Turning to historical research with all enthusiasm, let us not demand more from our history than it can give us, let us not seek in it the entire program of today's activity and work, let us apply the new program to the new, changed conditions. *The greatest honor of the past does not put a dam in this direction, because the greatest lesson of the past undoubtedly lies in this: that our nation only by assimilating the healthy achievements of Western civilization,* only by expanding the range of its beliefs and feelings, only by noble work on the highest issues of humanity grew and became more powerful" (emphasis added)," Bobrzyński, *Dzieje Polski*, pgs. 354-355.

[27] Bobrzyński is just one of many Polish historians who gave a sense that the dismemberment and occupation of the country was an improvement, as it allowed the deconstruction of serfdom and the *magnat* oligarchism. This is an undoubtedly pessimistic approach, believing that there was no possibility of internal reforms to remove serfdom, and instead conquest was necessary. For a more detailed summary of this approach and a sharp invective against it, we turn to the words of Balzer in full:

The strange thing is that even in the group of historians by profession, who should evaluate historical events and relations from a historical perspective, objectively and critically, this voice of condemnation of our former political characteristics is not only common, but sometimes even particularly loud; that in these defects of our system some see directly, if not exclusively, then at least the main cause of the fall of the Polish Republic. There is a legion of such critics in the camp of foreign historians, most often hostile not only to our past, but also to our present aspirations; there is even a certain number of them among Polish historians themselves. Finally, it was necessary that one of them, reporting on more recent research on Polish sejmiki, concluded that the Republic of Poland - until the end of its existence - was a medieval state organism, with all its law, all its system based on thoroughly medieval principles, a creation incapable of lasting in the present atmosphere and conditions of European statehood. "The old Polish state" - with its law, its system and its character - "has fallen irretrievably". -- these are his own words, with which he concludes his remarks, words all the more painful, all the more humiliating for us, because they were uttered before an auditorium of a nationality hostile to us" [...].

We have exhausted the question that is part of the great historiosophical issue that has been considered for a century and a half in our and foreign historiography: what was the proper, essential cause of the collapse of Polish statehood? In foreign historiography, there is an outstanding tendency to blame the fall of Poland on Poland itself; in Polish historiography, there is a certain shameful fear of looking for the causes of the event outside of Poland, in the very arrangement of external relations at the time of the partition. Thus the two camps, in the last few decades in particular, have converged in the view that the causes should be sought in Poland itself: either in certain pre-determined conditions of its historical life, or, worse, in its obvious culpability. The counterpart to the latter assertion is the view, either stated bluntly or implicitly advanced, that the collapse of the states was an expiation of Poland's own faults. The remarks we have compiled here have shown the unreasonableness of only one of the premises of the entire view, namely, that the cause of the collapse was in Poland's systemic relations. We had no intention of examining the validity of other premises, nor do we have the legitimacy to do so. But the partial result we have already obtained, the question of the political system is

historians, though always nominal supporters of independence, found themselves increasingly well-connected within the political administration of the Austrian province of Galicia, with the dreams of independence becoming conveniently more theoretical. [28]

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of paramount importance for the evaluation of the whole question, because the political system, by its very nature, is one of the most essential conditions for the vitality of a state; it must also weigh most heavily in the balance when it comes to solving the question defined above. It is not without reason that historiography, especially the most recent, when blaming Poland for the cause of its own downfall, has placed emphasis either exclusively or at least primarily and most strongly on our systemic defects. If the previous argument is correct, that these defects are not the cause of our downfall, then a large part of the question of guilt can be considered settled – in the negative direction. About other details of the issue, let the others who are called upon to speak out. What can be seen here with the untrained eye of a layman, deserves to be pointed out: that the other, alleged causes of the fall either ask to be excluded in advance, or are subject to divergent assessments in historiography itself, and thus again lose their evidentiary value. For example, it was believed that Poland could not maintain its statehood because of its unfavorable geographic position, having borders that were largely open to its neighbors. It should be added that some other countries with open borders, such as the Grand Duchy of Moscow, not only preserved their existence, but were able to transform themselves into powerful monarchies. It was thought that the reason for our downfall was the innate inability of the Slavs to create and maintain a stronger state organization, overlooking the fact that Poland itself, despite great external obstacles, not only created such a strong organization, but also managed to maintain it for a long time; and that other Slavic peoples, for a shorter or longer time, gained such an organization, and even partly, in a huge territorial monarchy, have maintained it until today. It has also been assumed, moving on to less fundamental matters, that our downfall was caused by an erroneous external policy at the time of the partition, based on unfavorable alliances; such a claim, put forward by one historian, is ruthlessly fought by another historian, thinking that this alliance was proof of political reason, a thing in every respect convicting and salutary. And so the premises on which the view of the causes of Poland's downfall - which lie within itself - wobble and dissolve more and more, one after another. From the enchanted circle that, after all, only such causes have doomed us, we nevertheless find it all difficult to liberate ourselves; therefore, as these things fail there, I create new views, sometimes peculiar, as long as they do not deviate from the main thesis. After all, not long ago there was a claim that we would have been able to save our state existence if we had brought out a military genius to lead us to victory at a critical moment. If it is only so much our fault that we did not bring him out, we can fall asleep with a peaceful conscience. The fact that in the group of these views there are already such claims is the best proof of how flaccid, how less and less certain the thesis of the collapse of Poland's statehood, which was caused by Poland itself, is becoming. And it is impossible to say whether the moment is approaching when, after so many, various, laborious attempts to justify this view, after so many intricate, sometimes subtle arguments devoted to proving it, it will be necessary, after all, with the old, tried and tested method of Columbus, to reach for an answer, which has always been and is here the first of the line - and the simplest: that the proper, decisive cause of the collapse of our statehood, the essential "causa efficiens" of this event, is: the covetousness of neighbors united, therefore overwhelming, conspiring to Poland's destruction. And not only in the sense that this collapse was directly caused by the partitions carried out by our neighbors; but also in the sense that if it had not been for the partitions, there would have been neither the historical necessity for the collapse, nor the lack of conditions for Poland, having transformed in due time its devices on an equal footing with other countries, to have survived together with them, for further centuries, as a living and - vital organism." Oswald Balzer. 1915. *Z Zagadnień ustrojowych Polski.* Nakładem Towarzystwa dla Popierania Nauki Polskiej: Lwów, pgs. 5-6; 73-75.

[28] "The Cracow conservatives diagnosed the evils of the insurrectionary tradition by reinterpreting Poland's past. The Cracow historical school attacked Lelewel and his liberal-democratic heritage […]. Regarding the state rather than the nation as the educator in civic virtues, the Cracow conservatives desired to bring up a new generation of Poles which would think in terms of work, social order, and political realism. Galicia's role was not that of a Polish Piedmont, but rather that of a school in which the Poles would serve an apprenticeship in government and administration. The conservatives did not abandon the ultimate goal of Polish independence, nor did they deny the need for an all-Polish national political center. But by rejecting conspiracy they relegated such objectives to a purely moral sphere. As time went on and as their efforts were crowned with some political success, the conservative leaders of Galicia virtually gave up an all-Polish policy and unwittingly strengthened the concept of Triple Loyalism; this was bound to deepen the divisions between the partitioned Polish lands," Piotr S. Wandycz. 1974. *The Lands of Partitioned Poland*. University of Washington Press, pg. 217.

Aside from the obvious complexities of having mixed political allegiances with the conquering powers when studying the political history of the conquered, those who criticized the Polish-Lithuanian Commonwealth as too politically and militarily weak relative to the political and geographical needs of her age are lacking on several levels. Aside from the excesses of some king—such as Bobrzyński's judgement that the 1592 inquisitorial Seym against Zygmunt III was justified[29]—his overall opinion was for the king to be stronger. Bobrzyński is right in pointing out that strong kings are generally good defenders of their nations, however, he also neglects that strong and ambition kings also tend to engage in *more* warfare. As we shall see, there was something of a recurring pattern in Polish-Lithuanian history where a strong king would invade surrounding land or otherwise try to engage in a war that the *szlachta* had no interest in. The *szlachta* would then withhold money or troops until the king gave them a series a privileges or other guarantees. When the crisis or war abated, the king would try to renege on those promises, walk them back, or otherwise try to reclaim some of his lost power, generally with partial success. Over time, this dance produced a political system wherein the *szlachta* gradually became more politically self-aware as well as more skillful in the art of politics, allowing them to balance out the king, though often the *szlachta* had deep internal divisions, such as between geographical regions or *szlachta* with lass land, wealth, and status competing against the more powerful *magnaci*. This system is sometimes referred to as *szlachta democracy* (demokracja szlachecka), though the term itself is contested.[30] To what extent it was really a democracy or not as well as whatever is the proper term to define it is of no importance to us, only that such a tension existed.

Over-ambitious policies of kings often caused problems for the Commonwealth, such as when Jan Olbracht's 1497 invasion of Moldavia proved utterly disastrous; Zygmunt III Waza over-extended during his war against Muscovy in 1610, and the continued efforts of the Waza dynasty to regain the throne of Sweden had mixed to negative results, significantly provoking the Swedish Deluge and the loss of left-bank Ukraine, Ducal Prussia, and northern Livonia. It is best to avoid speculative historical counterfactuals, but there seems to be enough evidence to suggest that strong, warrior kings would not have necessarily fared any better, and in fact could have worsened the problem with more political entanglements. Furthermore, the equivocation of attempts by the king to increase his power—usually by streamlining institutions, limiting the reach of the Seym, or increasing taxes—automatically with reforms is a historicist presumption that "strong states" are necessary states. This type of historicism is dependent on the historiosophical model that states naturally evolve from the medieval period to absolutism or monarchy and then into democracy, which a thesis to be proven, rather than presumed.

To finally highlight the absurdity of this one-sidedness in historical interpretation, the reception of Jan II Kazimierz's 1661 speech before the Seym is instructive. At the time there was deep tension between the nobles and the king, with critics of the regime using a specific kind of parliamentary veto—the *liberum veto*—to reign in his excesses, most ominously the attempt to undermine the entire system of freely electing the king by forcing the election of a relative of his French wife. The content of his speech outlined why this election was a

[29] Bobrzyński, *Dzieje Polski*, pgs. 185-186.
[30] Władysław Czapliński and Kazimierz Orzechowski. 1967. *Synteza dziejów polskiego państwa i prawa: demokracja szlachecka i oligarchia magnacka*. Instytut Historii Polskiej Akademii Naukowe: Warszawa.

necessary reform, along with the need for the *szlachta* to diminish their *liberum veto*. As Catherine McKenna notes, historians critical of the Polish-Lithuanian Commonwealth have seen this speech as prescient, a kind of prophetic warning against its future collapse. Of course, throughout his reign Jan II Kazimierz was known for his constant violation of the laws and customs of the Commonwealth, attempts to bribe or intimidate members of the Seym, creating an illegal trial against Lubomirski and then rigging the jury, trying to establish an oligarchy with the Senat that ignored the *szlachta*, and executing his political enemies.[31] Surely it was the untold selfishness of the *szlachta* that undermined the Commonwealth, their shortsighted blocking of much needed reform for the good of the nation! Nietzsche once quipped that "if one had no good father, one should then invent one."[32] In the case of Jan II Kazimierz, some Polish historians have invented a good king!

Władysław Konopczyński's work was noticeably more subtle—and seemingly more tortured—than Bobrzyński's was. His 1918 work on the *Liberum Veto* demonstrates just how complex his thinking was, and is worth a deeper look in terms of historiosophy, rather than substance. The issue of the *liberum veto* and Konopczyński's understanding of it will be a task for the Chapter on the Seventeenth Century. Konopczyński's method is admirable and quite similar in many ways to what we aim to accomplish here. He seeks to move beyond the *liberum veto*, the "wolne nie pozwalam" (the free "I do not allow") not only in the context of its history, but he wishes to understand its empirical connection to other Polish institutions as well as to escape the idea of institutions being sole reflections of the "spirits of their nations", because such a spirit is indeed unknowable in a concrete sense. Finally, he wants to understand institutions in terms of their temporal and spatial context, rather than by appeal to such an abstract concept as "the nation".

> We promise ourselves threefold benefits in exploring the "free I do not allow" s past. First, it will reveal their proper character and place in the general picture; second, it will be possible to verify on the field of broader empirics the causal dependencies discovered in Polish affairs; third, it will be possible to escape the erroneous method of finding the sources of institutions in the spirit of the nation, as if that spirit were a known and fixed disposition. On the contrary, it will turn out that the liberum veto is not an exclusive emanation of Polish culture [...] It is all explained by the form of legal-political life, by the pressure of forces acting in time and space, and not by any solidified national character.[33]

It is quite clear that Konopczyński is reacting against the nationalism and romanticism common to his era; writing on the verge of the rebirth of the Rzeczpospolita, he is seeking to learn concrete lessons from the past to improve the future as Bobrzyński was, but it is clear he is more neutral about it. Unfortunately, he begins the same book by referencing the *liberum veto* as a "disease":

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[31] Catherine Jean Morse McKenna. 2012. *The Curious Evolution of the* Liberum Veto: *Republican Theory and Practice in the Polish-Lithuanian Commonwealth (1639-1705).* Georgetown University Institutional Repository, Department of History, Graduate Theses and Dissertation, History. https://repository.library.georgetown.edu/handle/10822/557618 (Accessed 7 Dec. 2021), *passim*.

[32] Ben-Ami Scharfstein. 1980. *The Philosophers*. Oxford University Press: Oxford and New York, pg. 292.

[33] Władysław Konopczyński. 1918. *Liberum Veto: Studyum Porównaczwo-Historyczne.* Składy Głowne: S.A. Krzyzanowski: Kraków, pgs. 10-11.

> It is high time for such an attempt. After all, this is about the history of quite a "disease" - It is about the history and diagnosis of a cancer, which was fighting the vital forces of society; and precisely because we are dealing with a cancer, with a wound, with an ailment, we must approach it coldly, without any optimistic or pessimistic admixtures, with as little moralistic eagerness as possible, with the utmost desire to *rerum cognoscere causas*.[34]

While his express desire in both of these passages is to be neutral, he does not seem to realize that by simplifying referring to the *liberum veto* as a disease, he has already lost his objectivity, because, as Bobrzyński did, he could not look at the development of the institution neutrally according to its own development, but only in part of a greater historical conversation about an inevitable decline. The overall structure of the book does not seem to accomplish his purpose either, for the beginning chapters discuss theories of European parliamentarianism as well as the development and then differentiation of unanimity from majority rule and then once the *liberum veto* is introduced, he spends little time trying to contextualize its actual emergence in 1652. Instead, his analysis examines the *liberum veto* in terms of political principle rather than chronological development, and his analysis ping-pongs around in terms of time and space, with one section jumping forward to the 18th century then returning to the 15th century then returning again to the 16th century, all the while making allusions between Poland-Lithuania, Spain, France, and a host of other European countries. Konopczyński "devotes the second half of his book to an at-times emotional description of more than a century of broken parliaments and the senseless obstruction of corrupt delegates who used the *liberum veto* to break parliaments."[35] In this Konopczyński makes another error resultant from his historiosophy, in that he seems equally concerned with trying to learn from Poland-Lithuania's past to help 1918 Poland, understand the *liberum veto*, and develop a comparative study of European majoritarianism spanning a period of about four and a half centuries.

For a book that is supposed to be concerned with the *liberum veto* the reader is left unsatisfied, wondering more about the concrete details of the institution and—if it was truly such a disease—why did the Poles-Lithuanians not do more to cure it? Such questions can only be answered by carefully constructing the context in which a historical phenomenon occurred, instead of a rush to judge a phenomena or to compare it with others. We must reiterate that Konopczyński's design and intentions were something we aspire to, but it was rather his implementation that proves problematic. Despite this, his book remains the most important text on the *liberum veto*, though recent work is significantly starting to challenge this.[36] It also problematic that the English historical literature remains woefully dependent

[34] Konopczyński, *Liberum Veto*, pg. 2.
[35] McKenna, *Curious Evolution of the Liberum Veto*, pg. 6.
[36] The work of McKenna and Zbigniew Dankowski try to understand how it evolved as an institution as well as how both its usage—and the theory behind such usage differed over the 139 years of its existence. Marek Tracz-Tryniecki, on the other hand, extensively focuses on the 1652 Seym and how it emerged, particularly in relationship to 17th century Polish statement Andrzej Maksymilian Fredro, whom is often—and Tracz-Tryniecki argues, unfairly—blamed for its emergence. See: McKenna, *Curious Evolution of the Liberum Veto*; Michał Zbigniew Dankowski. 2019. *Liberum veto: chluba czy przekleństwo? Zrywanie sejmów w ocenach społeczeństwa drugiej połowy XVII wieku*. Jagiellońskie Wydawnictwo Naukowe: Toruń; Marek Tracz-Tryniecki. 2019a. *Republika versus Monarchia: Myśl polityczna i prawna Andrzeja Maksymiliana Fredry*. Wydawnictwo Uniwersytetu Łódzkiego: Łódź; Marek Tracz-Tryniecki. 2021. "Andrzej Maksymilian Fredro

on Konopczyński's work, despite it being written over a century ago, with more recent historians going unread—especially those who are treating the *liberum veto* in more nuanced and sophisticated terms, taking into account the plethora of feelings about the institution in the 17th and 18th centuries.[37]

It is useful to abstract away from the debate about the literature for a moment to reframe the problems of Polish-Lithuanian historiosophy in more traditional historiographical parlance, so as to clarify them and express them more generally. Put simply, historians are always tempted between *ahistoricism*—to search for what is timeless and universal—and *historicism*, which is that ideas can only be understood in terms of their context. Uniting the two is transhistoricism,[38] which seeks to unite historical research in order to *inform* the present with practical knowledge, but not to *submit* the past to the present, as Bobrzyński and Konopczyński's instrumentalization of history in service of politics does.

Ahistoricists would advocate for timeless "wisdom of the ages" or perhaps follow Lincoln's quip that "books serve to show a man that those original thoughts of his aren't very new, after all."[39] Historicism, on the other hand, gives too much weight to history and has a tendency to restrict all meaning within a narrative context. Nor are these two approaches mutually exclusive, with a strong presentist historian reinterpreting historical development to suit their particular narratives. Of course, perfectly objective history is unachievable—at the least because the historian themselves can never drop all possible bias in picking research questions—and ahistoricism has the benefit of searching for general or comparative truth, whereas historicism allows for the development of ideas and contexts in greater detail.

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na sejmie zwyczajnym 1652 r. – nowe spojrzenie." In: D. Kupisz, ed., *Na sejmikach i sejmach. Szlachta ziemi przemyskiej w życiu politycznym Rzeczypospolitej XVI–XVIII wieku*. Warszawa.

[37] Dankowski's recent work points out that though Polish historiography of the Commonwealth's ideas, institutions, and practices has become more nuanced over the last 30 or so years—citing Władysław Czaplińskim Zbigniew Wójcik, Adam Kersten, Zbigniew Ogonowski, Stefania Ochmann-Staniszewska, Krystyn Matwijowski, and Wojciech Kriegseisen as examples, *inter alia*—a critical re-examination of the *liberum veto* has significantly lagged behind, which he attempts with surprising and remarkable success. See: Dankowski, *Liberum veto, passim*.

[38] This is a vast oversimplification of the debate within historiography. Historians themselves cannot seem to clearly differentiate what they mean by "historicism" vs "ahistoricism". One definition of historicism—perhaps the prevailing one—is that of contextualism, though it might also come to mean that everything is historical (Sluga), Dilthey saw it as the present only (Krüger), that of the "histories of philosophers whom we think, or others think, are great" (according to Murphey and written by Kuklick). Another would be the "cumulative nature of the history of political thought" (Manov). We follow the basic distinction given by Frazer, where ahistoricism is the search for timeless truths, historicism is the appreciation of localized "languages"—political, economic, etc.—as developed in specific contexts. Transhistoricism aims to "reclaim [classical ideas'] practical wisdom for their application today." See: Hans Sluga. "Frege: the early years," in: Richard Rorty, J.B. Schneewind, and Quentin Skinner, eds. 1984. *Philosophy in History: Essays in the Historiography of Philosophy.* Cambridge University Press: Cambridge, pg.350; Lorenz Krüger. 1984. "Why do we study the history of philosophy?" In Rorty, Schneewind, and Skinner, eds, *Philosophy in History,* pg. 89; Bruce Kuklick, "Seven thinkers and how they grew: Descartes, Spinoza, Leibniz; Locke, Berkeley, Hume; Kant," in Rorty, Schneewind, and Skinners, eds., *Philosophy in History*, pg. 137; Michael L. Frazer. 2010. "Three Methods of Political Theory: Historicism, Ahistoricism, and Transhistoricism." Draft for Presentation at the 2010 CPSA (Canadian Political Science Association). https://cpsa-acsp.ca/papers-2010/Frazer.pdf (Accessed 15-June 2020), pg. 8; Boris Manov. 2016. "The Paradigmatic Approach in Political Historiography: Nature and Solutions." *Annales Uniersitatis Mariae Curie Skłodowska* xxiii(1), pg. 132.

[39] James Ernst Gallagher. 1898. *Best Lincoln Stories, Tersely Told.* M.A. Donohue & Co.: Chicago, pg. 53.

Historicism is the more dangerous of the two, because it can seduce us into thinking we are objective and neutral, when in reality we are building just as utopians—and just as doomed—projects as more romantic approaches.

The strongest critique of historicism was perhaps given by Popper, who associates the fundamental era of such an approach of over-contextualizing with events with the ease with which it is used to establish a theoretical progression through history. Popper notes—like Hayek does—that there is an evolving *scientism*, or the extension of natural science concepts to other areas such as "social engineering".[40] It rejects the model of ahistorical truth with the idea of a progression of history, a series of individual presents that can be nonetheless combined into a *theory of history*.

> These considerations have taken us to the very heart of the body of arguments which I propose to call historicism, and they justify the choice of this label. Social science is nothing but history: this is the thesis. Not, however, history in the traditional sense of a mere chronicle of historical facts. The kind of history with which historicists wish to identify sociology looks not only backwards to the past but also forwards to the future. It is the study of the operative forces and, above all, of the laws of social development. Accordingly, it could be described as *historical theory, or as theoretical history*, since the only universally valid social laws have been identified as historical laws. They must be laws of process, of change, of development—not the pseudo-laws of apparent constancies or uniformities. According to historicists, sociologists must try to get a general idea of the broad trends in accordance with which social structures change. But besides this, they should try to understand the causes of this process, the working of the forces responsible for change. They should try to formulate hypotheses about general trends underlying social development, in order that men may adjust themselves to impending changes by deducing prophecies from these laws (emphasis added).[41]

One can scarcely find a better fit for the very historicism Popper is criticizing than Bobrzyński or Konopczyński, aside from perhaps Social Darwinists or Marxists: once the *liberum veto* or the *konfederacja* were implemented, the natural laws of development led to the collapse of the Commonwealth. By understanding the natural laws of social development, we can learn from this collapse and reverse it into the future. Social history is like an equation: we can find the pieces that were missing—the course Poland-Lithuania *had been taking*—and then to restore it "back on track" according to these laws. Though Popper was addressing the union between history and sociology specifically, it can be extended to any kind of social science more generally, in this case law and politics. The error is a fundamental one, it is one of epistemology, rather than of morality.

> The crucial point is this: although we may assume that any actual succession of phenomena proceeds according to the laws of nature, it is important to realize that practically no sequence of, say, three or more causally connected concrete events proceeds according to any single law of nature […] The idea that any concrete sequence or succession of events (apart from such examples as the movement of a pendulum or a solar system) can be described or explained by any one law, or by any one definite set of laws, is simply mistaken. There are neither laws of succession, nor laws of evolution.[42]

[40] Karl R. Popper. 1961. *The Poverty of Historicism*. Harper Torchbooks: New York and Evanston, pg. 60.
[41] *Ibid*., pg. 45.
[42] *Ibid*., pg. 117.

If there can be no historical laws or sense of determinable, historical progression, then there can be no judgment of prior "stages" of development as inferior. Works based on such a flawed understanding ultimately collapse as utopian dreams. Thus, the "positive" work of Bobrzyński and Konopczyński against the "romantic" work of Lelewel proves to be ultimately self-defeating.

> Social revolutions are not brought about by rational plans, but by social forces, for instance, by conflicts of interests. The old idea of a powerful philosopher-king who would put into practice some carefully thought out plans was a fairy-tale invented in the interest of a land-owning aristocracy. The democratic equivalent of this fairy-tale is the superstition that enough people of good will may be persuaded by rational argument to take planned action. History shows that the social reality is quite different. The course of historical development is never shaped by theoretical constructions, however excellent, although such schemes might, admittedly, exert some influence, along with many other less rational (or even quite irrational) factors. Even if such a rational plan coincides with the interests of powerful groups it will never be realized in the way in which it was conceived, in spite of the fact that the struggle for its realization would then become a major factor in the historical process. The real outcome will always be very different from the rational construction. It will always be the resultant of the momentary constellation of contesting forces. Furthermore, under no circumstances could the outcome of rational planning become a stable structure; for the balance of forces is bound to change. All social engineering, no matter how much it prides itself on its realism and on its scientific character, is doomed to remain a Utopian dream.[43]

The natural opposite of historicism, ahistoricism is exemplified by universal and utopian thinking as well as the hope that previous insight from thought in the past holds true today, for example faith in the classical cannon of political theory such as Plato and Aristotle still being read today. Historicists, on the contrary, might offer the extreme criticism that because Aristotle advocates for slavery, he is not relevant for today. It is important to recognize that ahistoricism is not a rejection of history or of the necessity of events, but rather the rejection that meaning is necessarily historical inscribed, whether this be universal, timeless wisdom or that there was some non-historical force at work such as divinity or destiny.

Polish-Lithuanian messianism was unique in that it had become completely secularized, connected with preparing the way for a future resurgence of the Polish people. It was not strictly associated with Catholic thought or identity.[44] Because it was oriented toward the future, it was neither purely ahistorical nor utopian, though it ultimate believed in

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[43] Popper, *The Poverty of Historicism*, pg. 47.

[44] "However, the conscious reference by Polish Romantics to classical millenarian texts does not give us the right to derive Polish messianism directly from millenarianism. Regardless of the intentions of individual messianists, Polish messianism must be considered, in our opinion, as a phenomenon that goes far beyond religious consciousness, falling - if we look at it from the perspective of religious messianism - into a broad current of conscious or unconscious secularization of millenarian expectations. This, moreover, can be generalized: strictly religious messianism is not the same as messianism in the broader sense, encompassing phenomena derived from messianic religions and sects, and even those whose connection with religious messianism is reduced to a general similarity in the structure of thought. This is, however, where serious difficulties begin," Andrzej Walicki. 1970. *Filozofia a Mesjanizm: Studia z Dziejów Filozofii i Myśl Społeczno-Religijnej Romantyzmu Polskiego.* Państwowy Instytut Wydawniczy: Warszawa, pg. 14.

a higher order to the universe: the destiny of the Polish people.[45] In a similar manner to historicism, Polish messianic thinking was not purely a negation of the past, but rather supplied a "future-oriented historiosophy" that saw the modern era as the bridge between the glorious past and the glorious future to come.

> Messianic historiosophy is a historiosophy turned towards the future; it is a historiosophy of hope and expectation, and at the same time (mostly) a catastrophic and apocalyptic historiosophy. The modern era is experienced by messianists as an era of "great solstice," the twilight of the old world and the painful birth of the new world. Utopian thinking is very often, perhaps even as a rule, the fruit of epochs of crisis, but the epoch's turning point does not always find conscious expression in it; not every utopian was accompanied by the awareness that he was living in an extraordinary time, "which will not happen again as long as humanity is human" - at a time when "the old world is dying and the new world is being born; the third world is coming! Turning thoughts to the future is a feature of most utopias (although retrospective utopias are also common), but it seems that the special intensity of expectation and evocation of the future, this tension, which can be called a prophetic pathos, is primarily inherent in messianic utopias.
>
> However, this turn to the future, as a rule, is not combined with a radical negation of the past. On the contrary: it is most often an attempt to restore these or other elements of a lost or dying tradition. Nineteenth-century Polish messianism also resembles religious millenarianism in this respect, characterized, as researchers emphasize, by its ability to bridge the gap between the past and the future. As in the case of millenarianism, we can divide messianisms into restorative and innovative, bearing in mind, of course, that restorative ideas also contain elements of innovation.[46]

However, it was decidedly distinct from historicism in that it was more an anticipating and hoping toward the future, then actively working toward it. Indeed, the most common advocates of messianism and romantic thinking were poets and philosophers, while the Lelewel School, Lwów School, Kraków School, and Warszawa school had members extensively involved in politics.

Having established the broad contours of Polish-Lithuanian historiosophy, we can now definitely address the question of whether the death of the Commonwealth was a murder or a suicide. The answer is that the question is utterly and ultimately meaningless. Not because historians cannot find *an* answer, but simply because there is not *one* answer to find. Furthermore, if our intention is to escape the confines of both ahistoricism as well as historicism *en route* to our modest transhistoricism, then we must recognize that such an ideologically loaded question is incompatible with our transhistoricist objective of trying to both appreciate the Polish-Lithuanian Commonwealth on its own terms as well as to revive

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[45] "The sense of mission, expressed in such words and clearly distinguishing messianists from ordinary utopians, was the sense of fulfilling a higher will realized in the historical process. Hence the historiosophical nature of messianism - a feature that contrasts messianic utopianism with the ahistorical, abstractly rationalistic type of utopian thinking. Non-messianic utopias may have historiosophical justifications, but they may also lack them - in the case of messianism, such justifications are the rule. Moreover, history seen in a messianic perspective cannot simply be the work of men - it must be, to one extent or another, a sacred history, carrying out the plan set before it and aiming at the goal usually defined, according to the millenarian tradition, as the Kingdom of God on earth," Walicki, *Filozofia a Mesjanizm*., pgs. 18-19.

[46] *Ibid.*, pg. 20.

interest in the Commonwealth's constitutionalism and its potential contributions to modern constitutionalist theory.

Before we turn toward building our positive model seeking out the *Spirit* of Polish-Lithuanian constitutionalism, it is necessary to clear away some final debris in Polish-Lithuanian historiography. The question of the Commonwealth's cause of death has been largely an internal problem to be solved by the Poles themselves, but what about the external treatment of the Rzeczpospolita in the history of European thought? Our progress thus far is already aimed toward Poles and Polonists, but if we are to address the question of applying the Commonwealth's constitutionalism to a broader audience, then our gaze must be commensurately broader.

While we are rejecting any historicist implications of any political or historical determinism, it is important to acknowledge that the collapse of the Commonwealth had a strong impact on the reception of Polish-Lithuanian ideas and contributions to European thought, as well as the very real implication of very strongly limiting historiographical theories as well as access to historiographical sources. It turns out that there is a deep interconnection between the evolving map of Europe both politically and geography as well as ideationally, all of which—in some way or another—is entangled with the historiosophy of the Enlightenment. For, when Bobrzyński praises the importation of "Western" ideas, much of what he is referring to is Enlightened Absolutism.

In a work that has been praised as the "invention-of-[a]-tradition,"[47] Larry Wolff has borrowed from Ledyard's work of a "freely constructed geographical sentiment" that subordinated "geography to its own geographical values, its investment of the map with subtleties that eluded the stricter standards of scientific cartography,"[48] to produce what he refers to as "philosophic geography." Philosophic geography undermines geography and cartography as empirical, positivist sciences and instead notes that maps—which are very often subject to politics—generally reflect the biases and philosophical imagination of mapmakers. For example, he notes that during the Renaissance through the Reformation period, the axis of Europe was south vs north, with the Renaissance radiating outward from Italy into the lesser developed hinterlands of Germany, the Dutch Republic, Poland-Lithuania, and Scandinavia, and the Reformation clearly splitting the Catholic South from the Protestant North.

The Enlightenment shifted of the axis of what is "Europe" from south-north to east-west, with a Parisian centered, *philosophe*-ical geography tracing the flow of ideas from West to East. According to Wolff's thesis, the very idea of Eastern Europe as a geographically and culturally distinct, backward hinterland on the border between civilized Europe an barbaric Asia, was the invention of Voltaire,[49] and this subordination of geography as *science* to geography as *idea* was the defining character of Voltaire's approach to history.[50] As the

[47] Maria Todorova. 1997. "Review." *Slavic Review* 56(1), pg. 124.
[48] Larry Wolff. 1994. *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment*. Stanford University Press: Stanford, pg. 6.
[49] *Ibid.*, pg. 89.
[50] *Ibid*., pg. 45.

French Enlightenment progressed throughout the 18th century, its emerging sense of historical self-importance paralleled the development of "scientific" approaches to geography and natural science. At the same time, Central and Eastern Europe had been in decline since the 17th century, with Poland-Lithuania, Moldova, Hungary, and Bohemia all eclipsed or outright conquered by the emerging Austrian, Prussian, and Russian Empires, all of which were ruled by monarchs who paid lip service to the political and religious freedom of the Enlightenment, so long as it supported their need for efficient administration, economic development, and stronger armies. This myth of the inferiority, backwardness, inferiority, unenlightenedness, etc. of Central and Eastern-Europe still persists today.[51]

Poland-Lithuania and its decline were widely commented upon by many thinkers in the West including Edmund Burke, Thomas Paine, and Jean-Jacques Rousseau, many of whom were sympathetic to the Commonwealth as a country going through a time of recreating itself[52], whereas Voltaire was almost exclusively negative. [53] As Wolff notes, "[t]his idea of Poland as an ever shrinking domain, of Polish history as a process of reduction, suggested the geographical consequences of 'history and government' and pointed toward the next generation, when Poland would be eliminated from the map altogether in the partitions." [54] The irony of it all is that Voltaire was seen as a preeminent theorist of Eastern Europe, despite never visiting the Commonwealth, and himself being an admirer, friend, and confident with both Catherine the Great and Fredrick the Great—the leaders of the two nations who spent the most effort weakening the Commonwealth over the 18th century.[55] There is certainly no more trusted a political historical of account of one's country that one written by a foreign historian who is pen-pals with one's enemies![56]

Hyperbole aside, the *philosophes* philosophical geography highlights deeper problems with the conceptualization of the Enlightenment itself, and then the application of said concept to Polish-Lithuanian historiography. In other words, it is—once again—a

[51] For example, Wallerstein created a Marxist adoption of it, putting Central and Eastern-Europe in the status of "periphery". See: Immanuel Wallerstein. 1974. *The Modern World-System: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century.* Academic Press: New York.

[52] Glenn Petersen. 1995. "Reclaiming Rousseau: The Government of Poland's Relevance for Modern Anthropology." *Dialectical Anthropology* 20(3/4): 247-283; Mark F. Brzezinski. 1991. "Constitutional Heritage and Renewal: The Case of Poland." *Virginia Law Review* 77(1): 49-112; Thomas Paine. 1945. *The Complete Writings of Thomas Paine*. Collected and edited by Philip Sheldon Foner in Two Volumes. The Citadel Press: New York, pg. 367, 270; Edmund Burke. 1910. *Reflection on the Revolution in France*. J.M. Dent and & Sons, Ltd.: London, p. 305; Edmund Burke. 1790. *Further Reflection on the French Revolution*. The Online Library of Liberty. Accessed 15 September 2020. http://oll-resources.s3.amazonaws.com/titles/660/Burke_0006_EBk_v6.0.pdf; Edmund Burke. 1756. *A Vindication of Natural Society*. The Online Library of Liberty. Accessed 15 September 2020. http://oll-resources.s3.amazonaws.com/titles/850/Burke_0339_EBk_v6.0.pdf, p. 20.

[53] Voltaire and David Williams, ed. 1994. *Political Writings*. Cambridge: Cambridge University Press, *passim*.

[54] Wolff, *Inventing Eastern Europe,* pg. 187.

[55] Krystyna Piechura. 1985. "Voltaire's Interpretation of the International Rivalry in the Eastern Baltic Region." *Journal of Baltic Studies* 16(4): 357-372.

[56] Of course, it must be admitted that Voltaire was certainly not alone in critiquing the Polish-Lithuanian Commonwealth. Overall, its treatment was overwhelmingly negative, with the most critical—yet influential—work on the Polish question being Claude Rulhière's *L'Historie de l'Anarchie de Pologne*. See: John Stanley. 2007. "French Attitudes toward Poland in the Napoleonic Period." *Canadian Slavonic Papers / Revue Canadienne des Slavistes* 49(3/4): 209-227.

historiosophical problem. If one considers the Enlightenment as the final set of ideas, institutions, and practices resulting from Renaissance critique of the central political and religious authority of the Catholic Church that was then refined by 18th century Parisian *philosophes* into a rational secularism that emphasized individual liberty, then the Polish-Lithuanian Commonwealth was only "Enlightened" in its final decades and the Poles needed the help of foreign rulers to correct their poor institutions.[57]

However, there has been an abundance of historical and political scholarship since the last half of the 20th century that undermines this Greco-Roman-Renaissance-Reformation-Paris[58] narrative, with notable examples being the Scottish Enlightenment,[59] the Anglo-American Atlantic political community,[60] and the Catholic Enlightenment, the latter of which was deeply connected with Poland-Lithuania.[61] All of these produced many

[57] Rau is particularly critical of the view that the "Enlightenment" was necessary to cure the deficiencies in Polish-Lithuanian political culture: "zastąpienia go tradycją Oświecienia właściwą dla uniwersalnego europejskiego etosu," in Zbigniew Rau. 2018. "Przedmowa." In Kasper Siemek, *Dobry Civis Bonus*. Józefa Macjona, trans. Introduction and footnotes by Ilona Balcerczyk and Paweł Sydor. Narodowe Centrum Kultury, Warszawa, pg.16.

[58] Notable historians and philosophers Carl L. Becker, Peter Gay, Charles Frankel, J.G.A. Pocock, and Hugh Trevor-Roper have been particularly critical of the false dichotomy between the supposed or assumed secularism and anti-clericalism of the *philosophes*' political vision and the "Enlightenment" as a dispersed, organic process where some states evolved more conservative versions that were more sympathetic of religion. As Gay and Becker suggest, the *philosophes* were not so radically distinct from religion as they wanted themselves to be, whereas Pocock and Hugh-Trevor Roper suggest that the American Revolution, the Scottish Enlightenment, and the 18th century British Empire were much closer in terms of ideas, institutions, and practices than they would have liked to admit due to political animosity and nationalist feelings especially by later historians. See: Carl L. Becker. 1932. *The Heavenly City of the Eighteenth-Century Philosophers*. New Haven and London: Yale University Press; Peter Gay. 1966. *The Enlightenment: An Interpretation.* Volume I: The Rise of Modern Paganism. Alfred A. Knopf: New York; Charles Frankel. 1969. *The Faith of Reason: the Idea of Progress in the French Enlightenment*. Octagon Books: New York; J.G.A. Pocock. 1997. "Enthusiasm: The Antiself of the Enlightenment." *Huntington Library Quarterly* 60(1/2): J.G.A. Pocock. 2008. "Historiography and Enlightenment: A View of Their History." *Modern Intellectual History* 5(1): 83-96; Hugh Trevor-Roper. 1999. *The Crisis of the Seventeenth Century: Religion, the Reformation, and Social Change*. Liberty Fund: Indianapolis; Hugh Trevor-Roper. 2010. *History and the Enlightenment.* Yale University Press: New Haven and London.

[59] Jane Rendall. 1978. *The Origins of the Scottish Enlightenment*. MacMillan: London; John Robertson. 1997a. "The Scottish Contribution to the Enlightenment." *Institute of Historical Research, Institute of Historical Research. At the School of Advanced study, University of London.* https://sasspace.sas.ac.uk/4408/1/The_Scottish_Contribution_to_the_Enlightenment_by_John_Robertson___Institute_of_Historical_Research.pdf. Accessed 5 August 2018; John Robertson. 1997b. "The Enlightenment above National Context: Political Economy in Eighteenth-Century Scotland and Naples." *The Historical Journal* 40(3), pgs. 671-673; Alexander Broadie, ed. 2003. *Cambridge Companion to the Scottish Enlightenment*. Cambridge University Press: Cambridge; Hugh Trevor-Roper. 2008. *The Invention of Scotland*. Yale University Press: New Haven; Hugh Trevor-Roper. 2010b. "The Scottish Enlightenment." In Hugh Trevor-Roper, John Roberts, eds.: *History and the Enlightenment,* Yale University Press: New Haven, pgs. 17-33.

[60] Julia Rudolph. 2013. *Common Law and Enlightenment in England, 1689-1750*. Boydel and Brewer: Woodbridge; J.G.A. Pocock. 1989. "Conservative Enlightenment and Democratic Revolutions: The American and French Case in British Perspective." *Government and Opposition* 24(1): 81-105.

[61] Ulirch L Lehner. 2016. *The Catholic Enlightenment: The Forgotten History of a Global Movement.* Oxford University Press: Oxford and New York; Richie Robertson. 2016. "The Catholic Enlightenment: Some Reflections on Recent Research." *German History* 34(41): 630-645; Jeffrey D. Burson and Ulrich L. Lehner,

ideas completely independently of—as well as both thematically and substantively counter to—the French experience of a decaying absolutist monarchy with a highly centralized state and close relationship with the Catholic Church. For example, even though the American founding fathers were clearly aware of and influenced by Montesquieu's ideas, the adoption of his understanding of the division of powers was very different in an empire that spanned the Atlantic and huge swaths of unsettled wilderness, where debates settled around the representation within parliamentary governance structures, rather than questioning whether said structures should exist. Returning to our theme, Pocock argues that all this is enough to undermine the concept of *the Enlightenment* for a pluralism of Enlightenments,[62] with some recent work being done on the "Enlightenment" as understood within national contexts.[63] In some sense, the precision and elasticity of the term "Enlightenment" has truly always been problematic, even since Kant famously asked, "What is Enlightenment"?[64]

In general, the contributions of the Polish-Lithuania to the Enlightenment have been outright denied, or else otherwise sincerely understudied. Much of this has been due to Poles themselves internalizing the very real horrors of Polish-Lithuanian history, resulting into romanticism or messianism as escapism or extreme cynicism and apologism for the partitions. A clear practical problem is that the historiography of the Commonwealth has often been developed by those hostile to it—such as Voltaire—or otherwise skewed sources—such as the predominance of German and Russian historians.[65] As Wandycz notes, this conceptual undermining of Polish-Lithuanian ideas, institutions, and practices appeared

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eds. 2014. *Enlightenment and Catholicism in Europe: A Transnational History*. University of Notre Dame Press: Note Dame; Richard Butterwick-Pawlikowski. 2014. "Między oświeceniem a katoliczymem, czyli o katolickim oświecieniu I oświeconym katolicyzmie." *Wiek Oświecenia* 30: 11-55; Ulrich L. Lehner. 2010. "What is 'Catholic Enlightenment'?" *History Compass* 8(2): 166-178; Ulrich L. Lehtner and Michael Printy, eds. 2010. *A Companion to the Catholic Enlightenment in Europe*. Koninklijke Brill, NV: Leiden.

[62] J.G.A. Pocock. 1999. "Enlightenment and Counter-Enlightenment, Revolution and Counter-Revolution; A Eurosceptical Enquiry." History of Political Thought 20(1): 125-139; J.G.A. Pocock. 1997b. "What Do We Mean by Europe?" *The Wilson Quarterly* 21(1): 12-29.

[63] Roy Porter and Mikuláš Teich, eds. 1981. *The Enlightenment in National Context*. Cambridge University Press: Cambridge. For an opposing view defending some definition of "The Enlightenment", see: Robertson, "Enlightenment above National Context"; John Robertson. 2005. *The Case for The Enlightenment*. Cambridge University Press.

[64] Though Kant's answer seems to indicate the victory of "rational thinking", in true Kantian fashion it is not so clearly cut. His actual opinions on religion are much more ambiguous than the clear and open hostility of the *philosophes*. See: Immanuel Kant. 2013. H.B. Nisbet, trans. *An Answer to the Question: 'What is Enlightenment*?' Penguin Books: London.

[65] "The historians, especially the official Russian historians, who felt called upon to justify and sanction with servility the deeds that were done, heaped an avalanche of slander on the past of Poland, that little by little found its way through Europe and, because of the total ignorance of facts, the aim of this continual hawking of lies was finally accomplished. The historical truth of a series of common facts were completely distorted. It was thus that the belief in 'Polish anarchy' was spread abroad, as well as that despicable story about different 'oppressions' practiced in Poland […] The organization created by the Polish nobility, was a model free State. But the official historians, contaminated by doctrinism, or even openly working for more or less suspicious interests, have affirmed over and over again that all this was of no value whatsoever, that Poland was a paradise for the governing class only, while the rest of the population lived under wretched conditions; that the peasants were oppressed and the middle class deprived of rights. To hear these crushing accusations denouncing this unequal distribution of rights, one might have thought that in Europe what were known as the lower classes, slept on beds of roses while in Poland they were oppressed by a regime of misery and servitude," Antoni Choloniewski. 2016. *The Spirit of Polish History*. Jane Arctowska, trans. Read Books, Ltd., pgs. 8-9 and 27.

at the same time as the emergence of the modern conception of "Europe" as well as the emergence of history as a serious discipline.

> Since the end of the eighteenth and throughout the nineteenth century—that is, at the time of the growth and flowering of history as a scholarly discipline—Poland did not exist on the political map of Europe. This circumstance had an obvious impact on Polish culture and learning, including the study of history. The partitioning powers deliberately cultivated an image of Polish history as indicative of Poland's inability to exist as an independent state. In German and Russian textbooks, the country was presented as a historical failure.[66]

Fortunately, such trends are changing, with scholars interested in a more nuanced assessment of Polish-Lithuanian's past slowly increasing since the communist period, with the pace only accelerating over the last thirty years or so, including work on the Polish Enlightenment.[67] Unfortunately, such a sophisticated and thorough meta-historiosophical examination of the Polish-Lithuanian Commonwealth's relationship to the Enlightenment is beyond the ask of our present inquiry, though would certainly be welcome and indeed necessary, should such an inquiry to go further beyond a prolegomenon. It is sufficient for us to merely say that the Enlightenment is a crucial part of how and why Poland-Lithuanian historiosophy has developed; as more of the Commonwealth's ideas, institutions, and practices are uncovered and understood in their proper context, a parallel research project into how the Polish-Lithuanian Commonwealth both shaped and was shaped by, and was a contributor as well as a passive receiver of, the Enlightenment.

With this, our unfortunately but necessarily shallow process of clearing away the space for an inquiry into Polish-Lithuanian constitutionalism is complete; that is, we have significantly said what the *Polish-Lithuanian Commonwealth*, its contributions, and how it has been received have *not been* within European thought, and have instead opened many doors into what the Commonwealth *could be* understood and appreciated. It is necessary to put forth how it *should* be treated, and to this end two tasks remain: the reconstruction of a general method that is appropriately transhistoricist from Montesquieu, *inter alia*, and then to focus such a general method on Polish-Lithuanian constitutionalism concretely.

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[66] Piotr S. Wandycz. 1992. "Historiography of the Countries of Eastern Europe: Poland." *The American Historical Review* 97(4), pg. 1011.

[67] Henryk Hinz. 1971. "The Philosophy of the Polish Enlightenment and its Opponents: The Origins of the Modern Polish Mind." *Slavic Review* 30(2): 340-349; Wanda Dziwagala. 2003. "Voltaire and the Polish Enlightenment: Religious Responses." *The Slavic and East European Review* 81(1); Richard Butterwick. 2005. "What is Enlightenment (Oświecenie)? Some Polish Answers, 1765-1820." *Central Europe* 3(1): 19-37; Witold Wójtowicz. 2007. "Czy można "przepisać" polskie oświecenie?" *Świat Tekstów. Rocznik Słupski* 5: 35-52; Richard Unger, ed. 2008. *Britain and Poland-Lithuania: Contact and Comparison from the Middle Ages to 1795*. Koninklijke Brill, NV: Leiden; Tomasz Cieślak, Jerzy Wiśniewski, and Wiesław Pusz. 2016. "Dlaczego oświecenie? Tomasz Cieślak i Jerzy Wiśniewski rozmawiają z Profesorem Wiesławem Puszem." *Czytanie Literatury. Łódzkie Studia Literaturoznawcze* 5: 255-266; Rafał Szczurowski. 2017. "Oświecenie I kontroświecenie czasów Królestwa Polskiego. Polemika o Karola Surowieckiego z ministrem Stanisławem Kostką Potockim." *Folia Historia Carcoviensia* 2: 405-426; Teresa Kostkiewiczowa. 2017. *Polski Wiek Świateł: Obszary swoistości.* Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń.

Montesquieuan-Inspired *Spirit of Law* as Transhistoricist Method

Throughout this introduction, Montesquieu has been referenced many times as a patron saint of sorts for this entire endeavor. As we shall see now, the choice of Montesquieu—and likeminded thinkers who followed him—as lodestars of our theory is due to his sophisticated methodology, outlined in the *Spirit of Laws*. Montesquieu is mainly known for improving upon the theory of mixed government first presented by classical thinkers such as Aristotle and carried forward by Polybius then Cicero, and so forth in political philosophy through the Middle Ages[68] to create an active system of checks and balances,[69] which was specifically influential in the formation of the United States Constitution. However, there has been much recent work on how Montesquieu is more than this, with important contributions to constitutional theory, political sociology, comparative anthropology, philosophy of history, etc.[70] What is underappreciated in Montesquieu, however, is his greater methodological approach to human nature, history, and politics, with Ernst Cassirer praising:

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[68] Małajny is largely focused on the separation of powers within the American constitution, but does ground the American political experiment in a longer tradition beginning with Aristotle and continuing down through Polybius and then into English and French thought before the American colonies. See: Ryszard M. Małajny. 1985. *Doktryna podziału władzy „Ojców Konstytucji" USA.* Uniwersytet Śląski: Katowice, especially pgs. 44-76. For a more general approach to the division of powers in both theory and practice, see: M.J.C. Vile. 1998. *Constitutionalism and the Separation of Powers*. Liberty Fund: Indianapolis, *passim.*

[69] Essentially, the classical understanding was of government by the many (*politeja* or democracy), rule by the few (aristocracy or oligarchy), and rule by the individual (monarchy or tyranny). The ideal form of government was to mix the three of them together, but this did not necessarily translate into three separate divisions within a government. Very often this division itself was more ambiguous or assumed rather than spelled out within the law. Furthermore, where there was division, it was mores so that each division had its own sphere of competence, within which it remained absolute. For example, the king enforced the laws and so long as the king did not try to create the laws, then his power within the sphere of executing the law was absolute. Montesquieu and the American model he inspired challenged this passive division of power and replaced it with an active theory of power wherein members of the legislature could restrain the king within the king's own sphere if they believed him to be asking excessively, or where members of the king's own administration could seek out help from other divisions of government to restrain the king. Thus, there was a limitation according to sphere, but also the power within these relative spheres was not absolute. The Americans took it a step further with the creation of the federal system, which not only divided the government into branches horizontally, but also created multiple layers of government based on geographically limited political units: each state government had its own divided government but also a sphere of autonomy against the national government, but that even within states themselves there could be even more layers of subdivision. For a sophisticated history of the theory of the division of power before and after Montesquieu. See: Charles Louis de Secondat, Baron de Montesquieu. 2004. *The Spirit of Laws*, Vols. I and II in *The Complete Works of M. De Montesquieu* [1777]. Translated from the French in Four Volumes. Evans and W. Davis: London. Republished by Liberty Fund, Online Library of Liberty: Liberty Fund: Indianapolis., *passim.* For applications of Montesquieu and the theory of American federalism both in theory and practice, see: Alexander Hamilton, James Madison, and John Jay. 2008. *The Federalist Papers*. Oxford University Press: Oxford, *passim.*

[70] For a critique of Montesquieu's traditional relegation as a subject of interest for constitutional and political theory, see: Rebecca E. Kingston. 2009. "Introduction." In Rebecca E. Kingston, ed. *Montesquieu and His Legacy*. SUNY Press: Albany, pgs. 1-6; Michael Mosher. 2009. "What Montesquieu Taught: 'Perfection Does not Concern Men or Things Universally.'" In Rebecca E. Kingston, ed. *Montesquieu and His Legacy*. SUNY Press: Albany, pgs. 7-28. For a broad appreciation, see the rest of the volume edited by Kingston.

> Within the era of the Enlightenment the first decisive attempt at the foundation of a philosophy of history is made by Montesquieu in The Spirit of the Laws. This work ushers in a new epoch. It did not arise directly from historical interest J Bayle's interest and delight in factual detail is foreign to Montesquieu. The very title of Montesquieu's book shows that he is concerned with the spirit of the laws, not with that of the facts. The facts are sought, sifted, and tested by Montesquieu not for their own sake but for the sake of the laws which they illustrate and express. Laws are comprehensible only in concrete situations only in such situations can they be described and demonstrated. On the other hand, these tangible situations take on real shape and meaning only when we employ them as examples, as paradigms, illustrating general connections.[71]

What Montesquieu is demonstrating, according to Cassirer, is precisely the kind of transhistoricism that we are searching for to escape the trap of the self-deluded poverty of historicism as well as the escape to romance and fancy. If we take "law" to mean in the sense of a law of nature or a law somehow governing existence, the difference between the ideal and the real, the objective and the subjective, is largely illusory, for a theory is nonsensical without data and data nonsensical without theory. We begin with theory as a necessary step to the organization of our inquiry only. Montesquieu himself explains:

> I have first of all considered mankind; and the result of my thoughts has been, that, amidst such an infinite diversity of laws and manners, they were not solely conducted by the caprice of fancy.
>
> I have laid down the first principles, and have found that the particular cases apply naturally to them; that the histories of all nations are only consequences of them; and that every particular law is connected with another law, or depends on some other of a more general extent.
>
> When I have been obliged to look back into antiquity, I have endeavoured to assume the spirit of the ancients, lest I should consider those things as alike which are really different, and lest I should miss the difference of those which appear to be like.
>
> I have not drawn my principles from my prejudices, but from the nature of things.
>
> Here a great many truths will not appear till we have seen the chain which connects them with others. The more we enter into particulars, the more we shall perceive the certainty of the principles on which they are founded. I have not even given all these particulars; for who could mention them all without a most insupportable fatigue!
>
> The reader will not here meet with any of those bold flights which seem to characterise the works of the present age. When things are examined with ever so small a degree of extent, the sallies of imagination must vanish; these generally arise from the mind's collecting all its powers to view only one side of the subject, while it leaves the other unobserved.[72]

This long section from the preface to the *Spirit of Laws* details several important aspects of Montesquieu's approach and concomitant methodology. First of all, his work is

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[71] Ernst Cassirer. 1951. *The Philosophy of the Enlightenment.* Fritz C.A. Koelln and James P. Pettgrove, ed. Princeton University Press: Princeton, pgs. 209-210.

[72] Charles Louis de Secondat, Baron de Montesquieu. 1777. *The Spirit of Laws*, Vols. I and II in *The Complete Works of M. De Montesquieu*. Translated from the French in Four Volumes. Evans and W. Davis: London, Vol I, pg. xxxvii.

comparative and anti- *a priorist* in that he is seeking to understand the nature of law derived from the whole of human experience. Secondly, he is moving from the creation of principles—that is theory—to their empirical proof, and that this interest in general laws or fundamental relationships concerning the human condition as understood through particular circumstances transcends any "history". However, this is not a static process, but as the laws are understood and explored more intimately, it is revealed that there are more fundamental laws or more general theories to be found. Historiosophically, Montesquieu is a contextualist in that he is trying to understand how the ancients endeavored to understand the world; this avoids us from paying too much attention to what is only apparent, that things which appear similar may not when looked upon closely, and things which appear different may share more in common when examined more carefully. We are to be as neutral as we can, and to try to distinguish principles of understanding from prejudice. Montesquieu stresses how very often we may become "lost in the details" so to speak, in that it is necessary to go through "the chain" that connects many small truths to understand these principles. This process is necessarily always incomplete, since it is impossible for understand all the details of every principle, nor is it necessary to understand all the details for a principle to be revealed. It is also vital to be moderate and to avoid any rush toward comparison: understanding of the constitutional system and its principles comes first, with judgement and then comparison coming later, i.e., no "bold flights".

It is important to truly grasp what Montesquieu means, because he goes on to give more sophisticated explanation of the nature of laws, which may be understood as somehow deterministic or perhaps otherwise too dependent on a theological ontology. He writes:

> LAWS, in their most general signification, are the necessary relations arising from the nature of things. In this sense, all beings have their laws; the Deity his laws, the material world its laws, the intelligence superior to man their laws, the beasts their laws, man his laws.
>
> They who assert, that a *blind fatality produced the various effects we behold in this world*, talk very absurdly; for can any thing be more unreasonable than to pretend that a blind fatality could be productive of intelligent beings?
>
> There is then a primitive reason; and laws are the relations subsisting between it and different beings, and the relations of these to one another.
>
> God is related to the universe as creator and preserver: the laws by which he created all things are those by which he preserves them. He acts according to these rules, because he knows them; he knows them, because he made them; and he made them, because they are relative to his wisdom and power.
>
> Since we observe that the world, though formed by the motion of matter, and void of understanding, subsists through so long a succession of ages, its motions must certainly be directed by invariable laws: and, could we imagine another world, it must also have constant rules, or it would inevitably perish […]
>
> Particular intelligent beings may have laws of their own making; but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice. To say that there is nothing just or unjust, but what is

> commanded or forbidden by positive laws, is the same as saying that, before the describing of a circle, all the radii were not equal.
>
> We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as for instance, that, if human societies existed, it would be right to conform to their laws; if there were intelligent beings that had received a benefit of another being, they ought to shew their gratitude; if one intelligent being had created another intelligent being, the latter ought to continue in its original state of dependence; if one intelligent being injures another, it deserves a retaliation; and so on.
>
> But the intelligent world is far from being so well governed as the physical: for, though the former has also its laws, which of their own nature are invariable, it does not conform to them so exactly as the physical world. This is because, on the one hand, particular intelligent beings are of a finite nature, and consequently liable to error; and, on the other, their nature requires them to be free agents. Hence they do not steadily conform to their primitive laws; and even those of their own instituting they frequently infringe.[73]

First of all, Montesquieu's understanding of "law" is closer to what would be used in the sense of "scientific law" or "the laws of nature" today, in that they are principles organizing the relationship of things. These laws are such that each thing has its own laws relative to its being, and also there are relationships governing interactions between beings, e.g., there may be laws of conduct that govern interactions between human beings, and natural laws that govern the natural world, but the relationship between man and nature would depend upon natural laws. In this sense, the question is not about freedom vs law, in the sense that there is no such thing as freedom from the law of gravity. However, Montesquieu strictly opposes any kind of deterministic understanding of the world, especially considering how much of human nature revolves around choice and the necessary rejection of constraints. Thus, Montesquieu is rejecting any sort of law in a purely positivistic sense: laws are the products of their social contexts and, abstractly speaking, the concept of law exists independently from any created law.

Montesquieu continues a few pages later:

> Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied.
>
> They should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another.
>
> They should be relative to the nature and principle of each government; whether they form it, as may be said of political laws; or whether they support it, as in the case of civil institutions.
>
> They should be relative to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have a relation to the degree of liberty which the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all which different lights they ought to be considered.

[73] Montesquieu, *The Spirit of Laws*, Vol I, Book I, Chapter I, pgs. 1-2.

> This is what I have undertaken to perform in the following work. These relations I shall examine, since all these together constitute what I call the *Spirit of Laws.*[74]

The *spirit of law*, then is a complex series of interrelations in what is perhaps best thought of as political "sociology, anthropology, and social psychology"[75] for which Montesquieu has been rightly praised.[76] It is a difficult term, with an elastic and holistic meaning, and Montesquieu "has been described as being systematic without being systemic"[77] He has been thoroughly criticized, e.g., by Ran Hirschl:

> Montesquieu's methodology in *The Spirit of Laws* is not unproblematic. Crude taxonomy serves alongside his genuine quest for determining causal links between pertinent factors. His choice of comparative examples is biased: he cites either situation in which a government or law succeeded because it followed the approach Montesquieu advocates or in which a government or law failed presumably because the Montesquieu formula was not applied. This normatively driven selection of supposedly prototypical cases highlights the dual nature of *The Spirit of Laws* as both descriptive (comparative examples illustrate the taxonomy of regime types and their characteristics) and prescriptive (particular examples are brought to further Montesquieu's own arguments for effective means of governance). His information-gathering methods are best described as "armchair" constitutional ethnography. His analysis of non-European societies is haphazard and relies exclusively on secondary sources, primarily travel literature, Jesuit missionary propaganda, and biased reports by French and Dutch merchants. And, like many authors after him, Montesquieu was quite willing to overlook the attitude of authors he cited when it did not suit his purpose.[78]

Before penning his defense of Montesquieu and then continuing relevance of his ideas, Isaiah Berlin notes that his "knowledge of history, geography, ethnology, had lagged behind even in his own times" and the "conservative aspects of his teaching […] had surely been better and more eloquently stated by Burke, and integrated into a great synoptic metaphysical vision by Hegel and his followers. As for the liber aspects of his teaching […] these had long degenerated into commonplaces of liberal eloquence which begin with Tocqueville and Mill." Furthermore, Montesquieu's:

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[74] Montesquieu, *The Spirit of Laws*, Vol I, Book I, Chapter III, pg. 8.

[75] Isaiah Berlin. 2013. *Against the Current: Essays in the History of Ideas*. Princeton University Press: Princeton, pg.171.

[76] "Montesquieu's contribution as forerunner, if not founder, of modern sociology and anthropology was acknowledged by pioneers of these disciplines, from Auguste Comte to Emile Durkheim and Edward Evans-Pritchard. Latter sociological giants such as Max Weber, Alfred Radcliffe-Brown, Raymond Aron, and Louis Althusser have all emphasized the scientific nature of Montesquieu's scholarship. Likewise, Montesquieu may be considered the first master of modern comparative law. His attempt, tentative as it was, to draw upon comparative research to trace causal links between a polity's material, demographic, and cultural characteristics and the nature and organization of that polity's legal and political institutions was a major leap forward in the evolution of comparative law as a method, discipline, and science," Ran Hirschl. 2009. "Montesquieu and the Renaissance of Comparative Public Law." In Kingston, ed. *Montesquieu and His Legacy*, pg. 200; See also: Émile Durkheim. 1965. *Montesquieu and Rousseau: Forerunners of Sociology.* University of Michigan Press: Ann Arbor.

[77] Brian C. J. Singer. 2009. "Montesquieu on Power: Beyond Checks and Balances." In: Kingston, ed., *Montesquieu and His Legacy*, pg.97.

[78] Hirschl, "Montesquieu and the Renaissance of Comparative Public Law," pgs. 202-203.

> [M]ost original achievement of all – the adumbration of the sciences of sociology and anthropology, founded upon the comparative study of human institutions everywhere, had become "mere collection, of epigrams and maxims: his errors of fact were too numerous, his social history a string of anecdotes, his generalisations too unreliable, his concepts too metaphysical, and the whole of his work, suggestive though it might be in parts, and an acknowledged masterpiece of literature, was unsystematic, inconsistent, and in places regrettably frivolous.[79]

Berlin counters, however, that most of those who came after Montesquieu or who criticized him, such as Auguste Comte and Herbert Spencer, are themselves almost completely forgotten and unread, whereas Montesquieu's ideas and works have endured the test of time.[80]

Much of the criticism of Montesquieu seems to be a misunderstanding of what he was trying to achieve: he was looking for general principles that organize different societies, rather than establish a complete system or encyclopedia of knowledge, as the *philosophes* themselves did. In fact, Montesquieu himself admits that many of his details may be wrong,[81] but the overall pattern may still be right and the comparisons still valid. Properly understood, Montesquieu's project is one of continuous discovery of these laws. Cassirer advances the opinion that Montesquieu was ahead of his time, namely that "[o]ne can say of Montesquieu that he is the first thinker to grasp and to express clearly the concept of "ideal types" in history. *The Spirit of the Laws* is a political and sociological doctrine of types."[82] This is in complete contravention of Voltaire, who advocated the historicist thesis of the progress of civilization according to discoverable social laws, similar to what Newton did to organize physics.[83] The sense that we shall employ Montesquieu is as this forerunner of comparative, interdisciplinary work by Rousseau, de Tocqueville,[84] and Max Weber.[85] What this means concretely is outlined below.

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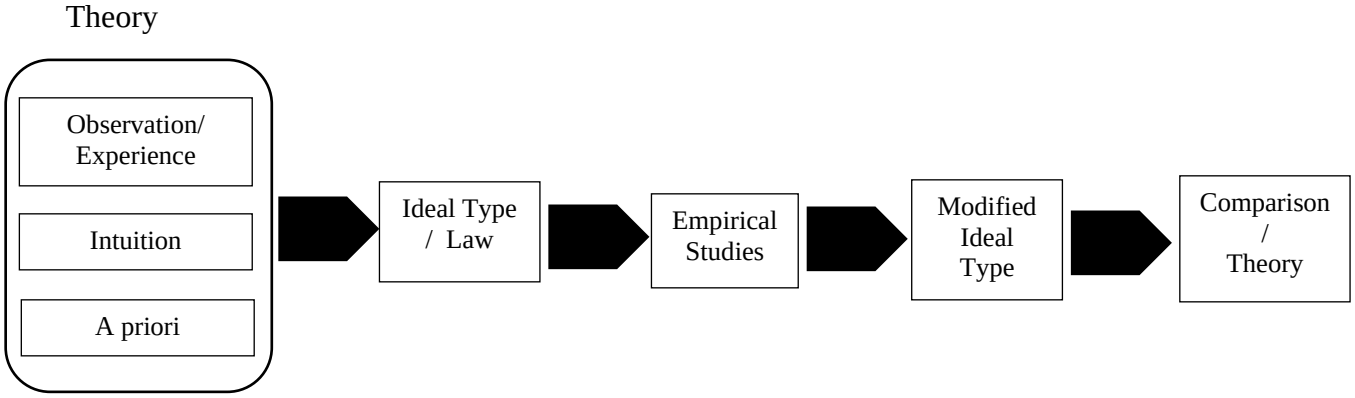
[79] Berlin, *Against the Current*, pg. 166.
[80] *Loc cit*.
[81] Volpillhac-Auger thoroughly examines many of those who have criticized Montesquieu's use of sources, only to find that, ironically, the critics' own review of Montesquieu and the sources that he used has been quite poor. See: Catherine Volpilhac-Auger. 2009. "On the Proper Use of the Stick: *The Spirit of Laws* and the Chinese Empire." In Kingston, ed. *Montesquieu and His Legacy*, pg.84, *inter alia*.
[82] Cassirer, *The Philosophy of the Enlightenment*, pg. 210.
[83] *Ibid*, pgs. 216-218.
[84] Melvin Richter praises de Tocqueville as Montesquieu's greatest disciple. See: Richter, "Comparative Political Analysis in Montesquieu and Tocqueville," pg. 130. On an extensive comparison of Montesquieu and de Tocqueville's approaches to "philosophical history', especially how de Tocqueville modeled himself after Montesquieu, see: David W. Carrithers. 2009. "Montesquieu and Tocqueville as Philosophical Historians: Liberty, Determinism, and the Prospects for Freedom." In Kingston, ed. *Montesquieu and His Legacy*, pgs. 149-151.
[85] Richter notes the similarities between Montesquieu and Weber:
"[T]here exists a version of comparative analysis that seeks to destroy the periodization or theory of general laws or categorical apparatus of those comparatists obsessed with similarity. This attack may take the form of insisting that all phenomena and arrangements are embedded within a unique context. It may, on the level of evidence, center its attention upon the dangers of generalization extracted from reports that have proved unreliable in even the most carefully studied societies. Finally, it may dismiss similarities on the ground that they are outweighed by differences. To round out the inventory of intentions that may prompt comparative

The Spirit of Laws as Ideal Type



The model is relatively straightforward. An individual or group of individual have certain observations or experiences, or perhaps a vague feeling that "something is missing". Furthermore, they may have some kind of expectations that come from a pre-conceived logical system, or perhaps by transplanting a certain way of thinking into a new situation. This are corner stones of conceptual formation, or what may be broadly considered theory. Returning to Montesquieu's example, this would be "the nature of things" themselves that he was observing. From this approach we then produce conceptions or expectations of how the world is organized and/or how phenomena *should* behave. This is what Montesquieu would consider his "laws" or Weber would consider as ideal types, or more precisely the application of said ideal types.[86] We shall refer to them as *constitutionalist archetypes-as-such*, as we shall return to in a later chapter, but the theme of an idealized principle or abstraction that is then empirically verified is the same. Only once this idealized expectation is created is empirical study possible. By checking the idea with the empirical, our understanding improves: we not only have a better instrument but a broader theory. This is the stage where comparison and "general theory" should be produced. It is here that our opposition to previous treatments of Polish-Lithuanian history is made clear: historicism is so interested in making the events of the past subordinate to the needs of the present that the past is not understood properly, that is there is a skip from theory straight to comparison, with some empirical anecdotes along the way, perhaps even the worst possible case of trying

analysis, two more must be mentioned. The first, which will be illustrated by reference to Max Weber, cares equally about the use of comparison to develop generalizations, although not universal laws, and its use to explain particular cases, although not limiting itself to them. The second, which will be illustrated by reference to Montesquieu, seeks by comparison the universal laws governing society and politics and yet at different moments, however inconsistently, uses the same technique to establish the permanent differences individuating human societies," Richter, "Comparative Political Analysis in Montesquieu and Tocqueville", pg. 135.

[86] The concepts of (the spirit of) laws for Montesquieu and Weberian ideal types are related, but not the same. For Montesquieu, the laws present the relationship between phenomena, or perhaps more accurately to say, our understanding of that relationship, whereas for Weber the ideal types are "thought-images" or "heuristic instruments used in historical investigation." That is, for Montesquieu the laws are themselves what are being discovered and explored, but for Weber the ideal type is what is being used in the process of discovery and exploration, though both Montesquieu and Weber are using somewhat idealized constructions that are then to both help verify as well as to be verified empirically. See: Max Weber. 2020. *Economy and Society*. Edited and translated by Keith Tribe. Harvard University Press: Cambridge, pg. 473.

to begin with comparison as justification for the whole exercise. Ahistoricism is arguably no better, since it circumnavigates any such scheme of organization whatsoever.

The only question remains: why constitutionalism as the specific area of this transhistoricist, comparative inquiry? To this, we now attend.

Constitutionalism as a Specifically Transhistoricist Palliative for Polish-Lithuanian Historiosophy

The question of "why is constitutionalism the specific area of our transhistoricist, comparative inquiry?" is in reality not one concrete line of inquiry, but two that are intimately connected. The first is why is constitutionalism specifically connected to the question of transhistoricism—compared to, say, the history of dance or any other social phenomenon. The second sense is practical: why is *this* particular interest focused on constitutionalism.

The second will be addressed first, because it is simpler to answer, and because it neatly adjoins several of the above themes, namely the poverty of how Poles and Lithuanians themselves may have perceived of their own history and contributions along with how Poland-Lithuania has been perceived and its contributions understood externally. Both neatly intersect on the problem of bibliography, in that much of the historic materials that survive from the Polish-Lithuanian period, and which are used as keys with which to interpret it, have themselves been the victims of the unfortunate history that has come afterward. As Halecki explains:

> The main reason for this prejudice, which has led even to the neglect of source materials, is to be discovered in the political situation of the nineteenth century and in the leading part which German historiography played at that time in the development of historical science. This development was dominated and directed by a great nation which not only had no sympathy with Poland, but had recently benefited from her partitions. The more moderate trend of German historical writing merely neglected everything Polish. It can be traced back to Ranke himself, who, beginning with his earliest writings,3 held to the view that only the Germanic and Romance nations formed a cultural unit and possessed a common history which he considered identical with the history of Europe. This view was accepted by German historiography as a whole, and consequently Poland was the first nation to be virtually excluded from any presentation of the political and cultural development of Europe. And because of the influence of German scholarship, all Europe east of Germany herself, including, of course, Poland, was regularly disregarded even in French or English studies of universal history.
>
> It is true that, since the end of the nineteenth century, German historians have been the first to realize that Eastern Europe possessed an interesting history of its own. But considering it from the viewpoint of the contemporary political situation, they identified it with the history of Russia, treating its earlier centuries separately from the development of the West and introducing only the modern Russian Empire into the organic whole of general history. Here again German scholars were followed by their Western colleagues, while themselves influenced by the opinions of Russian historiography. They adopted these opinions themselves especially in all questions concerning Poland, and there was a complete agreement between the leading Russian scholars and the second

> trend of German historiography, particularly the so-called Prussian school, which, instead of merely neglecting Poland, treated her with marked hostility.[87]

To put it plainly, that Poland-Lithuania produced the first "modern" European constitution in 1791, some several months before France did, is a historical fact. That Poland-Lithuania was conquered and its historical development altered by powers hostile to her, including the erasure of her achievements such as that same constitution is also a historical fact. Thus, reviving interest and re-exploring Polish-Lithuanian constitutionalism so as to correct much of that historical path is a simple and natural choice.

The second point on this bibliographic theme is similar to the first: over the last 50 years or so and certainly especially after the collapse of communism, there has been a deep reinspection of the Polish-Lithuanian Commonwealth by theorists in a variety of disciplines that has simply not been adequately reflected in the foreign literature. While English language histories have made immense improvement in accessing historical sources and archive material, following the monumental work of Davies, very often these historians are generalists and miss critical details, particularly when it comes to constitutional or political questions. Furthermore, while they cite the original source materials admirably, much of the commentary made by contemporary Polish historians or political scientists are not cited, even when they may perhaps provide some illuminating commentary. For historians not thoroughly versed in political or constitutional theory, what are in reality significant questions being asked or achievements that are being made may be downplayed, underappreciated, or simply overlooked.

It is worth giving concrete examples, though the reader is reminded that these historians are generalists who are interested in broad surveys, rather than political or constitutional historians. To begin with, we have Davies' *God's Playground*, which was first published in 1981 and thus it is understandable that there was little political or constitutional commentary on the Commonwealth, given that there was much less research or interest in the topic during the communist era. However, even so, there is at least one curiosity worth mentioning: Davies cites Władysław Czapliński, Janusz Tazbir, and Adam Vetulani, but curiously omits Zbigniew Ogonowski, who produced many important works about the history of religious toleration and political philosophy in the 1970s. Furthermore, Ogonowski was a contemporary of Tazbir, with the two men working on similar lines, sometimes debating each other, at other times working together. The second edition of Davies' book, however, was published in 2005 and omits many significant post-communist political writers working in the 1980s and 1990s, namely: Jacek Jędruch, Wacław Uruszczak, Anna Sucheni-Grabowska, Tadeusz Szulc, Wojciech Kriegseisen, Stefania Ochmann-Staniszewska, Anna

[87] Halecki, "Problems of Polish Historiography," pg. 224. For a comprehensive discussion of Polish vs German historiography, see: Adam Kożuchowski. 2015. "Contesting Conquests: Nineteenth-Century German and Polish Historiography of the Expansion of the Holy Roman Empire and the Polish-Lithuanian Union." *History of European Ideas* 41(3): 404-418; Wenceslas J. Wagner 1985. "Some Comments on Old 'Privileges' and the 'Liberum Veto'." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 52.

Grześkowiak-Krwawicz, and Rhett Ludwikowski. That several of them either wrote in English or had their works translated makes it puzzling that they were omitted. Jędruch's case is particularly strange, given that Davies himself wrote the foreword to the second edition of Jędruch's book *Constitutions, Elections, and Legislatures of Poland*.

The second example is the work of Daniel Stone, *The Polish-Lithuanian State* (2001), which does contain many references omitted by Davies, namely the addition of Jędruch, Ogonowski, Ochmann-Staniszewska, Henryk Olszewski, Stanisław Płaza, Andrzej Sulima Kamiński, Jerzy Lukowski, Samuel Fiszman, Andrzej Walicki, and Richard Butterwick-Pawlikowska, *inter alia*. However, Stone does not mention Grześkowiak-Krwawicz, Ludwikowski, Sucheni-Grabowska, Pietrzyk-Reeves, Uruszczak, Vetulani, or Zbigniew Ogonowski. However, Stone does provide an excellent bibliographical essay that shows that political and constitutional questions were treated deliberately.

The last example is the recent work of Robert I. Frost, *The Oxford History of Poland-Lithuania*. To be fair to Frost, his work is concerned with the period 1385-1569 and is a multivolume series, with the remaining volumes to be published. Thus, it is perhaps hasty to discuss who may or may not be omitted. A student of Davies, Frost himself expands on his teacher's work with a more thorough appreciation of political and constitutional questions, adding: Sucheni-Grabowska, Szulc, Uruszczak, *inter alia*. The work of Ludwikowski, Grześkowiak-Krwawicz, Pietrzyk-Reeves, as well as both Tazbir and Ogonowski are not included.

These authors are discussed not only because of the broad scope of their projects—which in many ways and in many dimensions exceeds our own—but also because of their august publishing houses. This is not meant as an indictment of any kind but rather to illustrate the paucity of scholarship on constitutionalism and political thought in the early modern Poland-Lithuania in the English language, rather than, say Holocaust studies, literature, or military history. In times of *constitutionalist* studies per se, this work is perhaps most strongly influenced by the work of, Dariusz Makiłła, Jacek Jędruch, Dorota Malec, and Mark Brzeziński. Of them, the most comprehensive work on Polish-Lithuanian constitutionalism as a whole—most certainly within the English language literature—was done by Jędruch, with Davies praising:

> Jacek Jędruch's study of Polish constitutionalisms can render a signal service. It is very thorough and systematic survey of a long, complex and interesting subject that has been sidelined all too often. It will attract readers not only among the specialists who need a reliable source of information about a hitherto inaccessible branch of history but also among all and sundry who appreciate the richness and variety of parliamentary traditions.
>
> Firstly, Jędruch documents the development and evolution of his subject over five hundred years. In this way, he shows that Polish constitutionalism's period of catastrophic decline in the eighteenth century, which was ridiculed by the philosophes of the Enlightenment and which is the only piece of the story to figure in general history books, forms one short stage in a much longer process. The Liberum Veto, which was greatly abused, was not necessarily half so stupid as Voltaire and others would have us belief. Whilst recognizing the failures and imperfections, one can only see the whole picture if one also

> takes into consideration both the "Golden Age: of the sixteenth century and the remarkable series of adaptations to adversity and foreign rule in the nineteenth and twentieth centuries.[88]

Jędruch clearly distinguishes the different kind of legal acts within the Commonwealth,
noting:

> Although it has a conventional meaning now, during the period of hereditary monarchy and the First Republic the word [konstytucja] denoted any law, except a tax law, passed by the Sejm. In any given Sejm as many as two hundred "constitutions" could be passed. On the other hand, if the subject matter of a law concerned the institutional arrangements of the country or the civil rights, such "constitutions" bore the name of "Cardinal Laws" (Prawa Kardynalne).[89]

Jędruch also specifically keeps the scope of his book narrow:

> [L]imited to the history of representative bodies elected in Poland and sitting in Poland. In selecting the material to be included, a conscious effort was made to deal with the history of the legislature proper and to mention the executive and the judiciary branches of the government of Poland only in so far as they were involved in the legislative process.[90]

While groundbreaking, Jędruch's work is thus unsatisfactory in three ways. First, though it introduces the difference between *konstytucje* as legal acts and *prawa karydnalne* as "constitutions" this distinction is smoothed over within the text, which occupies itself with parliamentary activity more generally. Secondly, it is something of a legislative history and does not concern itself with the executive and judicial branches of government, which themselves can be major contributors to any constitutional system. Finally—though this is the intention of Jędruch—there is virtually no discussion of constitutionalist theory in the book, comparative or otherwise. Jędruch's achievement is significant and certainly counter to the grain wherein nearly all academic discussion of constitutionalism or politics in Poland deal with the post-Soviet transition and questions of European integration, rather than longitudinal studies of Polish thought or institutions. However, while Jędruch's longitudinal and contextualist approach is something to be praised, it is a work of history and not a work of constitutionalist theory. Given such, our choice of constitutionalism for this study was consciously chosen to fill what the author believes is a very real need within Polish-Lithuanian academic scholarship.

The second point is the more metaphysical of the two, namely the question of why constitutionalism is itself particularly useful for transhistoricist approaches. The method that we outlined in Figure 1.1 should itself be thought of as a hermeneutic approach in that as the idealized categories are met with empirical data they themselves are subject to change, the realization that each law that is discovered is in reality based upon or connected to another

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[88] Norman Davies, "Foreword." In: Jacek Jędruch. 1998. *Constitutions, Elections and Legislatures of Poland, 1493-1993.* Revised Edition. EJJ Books: New York, pg. 10.
[89] Jacek Jędruch. 1998. *Constitutions, Elections and Legislatures of Poland, 1493-1993.* Revised Edition. EJJ Books: New York, pg. 21.
[90] Jędruch, *Constitutions, Elections and Legislatures of Poland*, pg. 17.

law that is then discovered. Polish-Lithuanian constitutionalism is particularly suited for such a method because it is a narrower subject of inquiry than say, cultural studies, philosophy, religion, etc. This is because every constitutional system has a limited number of parts; the question of what is or is not constitutional may be something that is constantly in flux and the identification and clarification of these constituting parts is something that is up for eternal debate, but "legal" or "legalistic" action is a comparatively small part of all possible human social interaction. Of legal interaction, the fraction that may be considered to be constitutional is comparatively yet smaller still, vastly so: if we think of laws as rules and constitutions as the rules of laws—the rules of rules, so to speak—then it is necessarily so that constitutional law is only a small fragment of law.

Furthermore, what is itself a constitution is also something that is limited, even if those boundaries are unclear. The vast majority of modern constitutions are written with the United States' Constitution being the foremost example. However, even though the United States Constitution has a fixed text as well as a fixed process for amending that text, the vast body of constitutional law and constitutional practice relies on extra-constitutional sources.[91] Furthermore, even a technically unwritten "constitution" like that of the United Kingdom, has strongly codified elements and not all legal acts have previous weight, e.g., the *Magna Carta* is broadly considered the foundation of British law, but is rarely cited today. Writtenness itself is an unsatisfactorily defined category for constitutionalism.[92]

The precise form of constitutionalism suitable for the comparative, transhistoricist work is something close to textualism, because that is what is most compatible with a hermeneutic approach. If Skinner and Pocock's sophisticated historiography produced the recovery of "political languages" that inform us of how individual eras and contexts understood themselves,[93] then we are interested in the recovery of the Polish-Lithuanian Commonwealth's "constitutional language".

It is worth illustrating this textualism further, leaning upon American constitutional theory, which the author believes has developed it the most comprehensively, at least in the

[91] Akhil Reed Amar. 2016. *America's Unwritten Constitution*: *The Precedents and Principles We Live By*. Basic Books: New York; Stephen E. Sachs. 2013. "The Unwritten Constitution and Unwritten Law." *University of Illinois Law Review* 1797-1846; Todd E. Pettys. 2009. "The Myth of the Written Constitution." *Notre Dame Law Review* 84(3): 991-1056; Antonin Scalia. 1989. "Is There an Unwritten Constitution." *Harvard Journal of Law and Public Policy* 12(1): 1-2; Suzanna Sherry. 1987. "Founders' Unwritten Constitution." *University of Chicago Law Review* 54(4): 1127-1177; Thomas C. Grey. 1975. "Do We Have an Unwritten Constitution." *Stanford Law Review* 27(3): 703-718.

[92] See J. Patrick Higgins. 2022. "Quasi-Writtenness and Constitutionalism: Socio-Historical Hermeneutics Between Text and Context *En Route* to Meaning." In: Łukasz Perlikowski, ed. *Uncodified Constitutions and the Question of Political Legitimacy*. Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń, pgs. 51-82.

[93] J. G.A. Pocock. 1960. *Politics, Language, and Time: Essays on Political Thought and Intellectual History*. University Press of Chicago: Chicago; Quentin Skinner. 1974. "Some Problems in the Analysis of Political Thought and Action." *Political* Theory 2(3): 277-303; Quentin Skinner. 1975. "Hermeneutics and the Role of History." *New Literary History* 7(1): 209-232; Quentin Skinner. 1998. *Liberty Before Liberalism*. Cambridge University Press: Cambridge, pgs. 105-106.

modern era.[94] Despite the writing of the United States Constitution being a long process of deliberation, the final draft version was largely prepared by James Madison, who has received the moniker "The Father of the Constitution".[95] He was also one of the authors of the *Federalist Papers*, which gives many insights into the development of the Constitution and the American Federal system, including justification for the Constitution's existence, separation of powers, the electoral college, and many other elements arcane to 18th century America. However, Madison's opinions on the Constitution in the *Federalist Papers* is *not* the Constitution, and while they may serve some role in constitutional interpretation, they are secondary to the text itself.[96] To interpret and weigh individual contributors' input into the Constitution as a method of constitutional interpretation proves to be an unsolvable Gordian knot: how much of it was Jefferson vs Madison vs Washington, how much of it borrowed from constitutions of individual states, how much—if any—should the records of state legislatures debating on whether or not to ultimately accept the constitution matter in our understanding of 18th century constitutional interpretation?[97] These problems are not

[94] It is worth briefly recounting that textualist approaches have been in existence as long as people have been writing. The science of literary interpretation developed in the ancient world, commonly referred to as exegesis, was extant in ancient times through the scholastic period, e.g., Egypt, Mesopotamia, the Jews, India, Islam, Christianity, *inter alia*. Many of these continue today, especially when religious text is the basis for law, such as canon law or in sharia. United States constitutionalism gave a new emphasis on textualist in association with the advent of modern constitutionalism that was explicitly written and very often directly opposed to the unwritten and vague legal sources of the traditional British constitution that was in force in 18th century America.

[95] All That's Interesting, Checked by Kaleena Fraga. 2021. "Who Wrote the Constitution? A Look Back at the Constitutional Convention." https://allthatsinteresting.com/who-wrote-the-constitution (Accessed 24 Dec. 2021).

[96] A similar debate that occurs within American constitutional jurisprudence is whether or not the Declaration of Independence should play a role in Constitutional interpretation, with "life, liberty, and the pursuit of happiness" generally held as key virtues that come from the Declaration, rather than from the Constitution. For more on this debate, see: Lee J. Strang. 2019. "The Declaration of Independence: No Special Role in Constitutional Interpretation." *Harvard Journal of Law and Public Policy* 42(1): 43-58; Adam Griffin. 2018. "First Amendment Originalism: The Original Law and a Theory of Legal Change as Applied to the Freedom of Speech and of the Press." *First Amendment Law Review* 17(1), pgs. 98-101; Lee J. Strang. 2011. "The Most Faithful Originalist: Justice Thomas, Justice Scalia, and the Future of Originalism." *University of Detroit Mercy Law Review* 88, pg. 880; Douglas W. Kmiec. 2006-2007. "Natural Law Originalism for the Twenty-First Century—A Principle of Judicial Restraint, Not Invention." *Suffolk University Law Review* 40(2): 383-418; J.M. Balkin and Sanford Levinson. 1994. "Constitutional Grammar." *Texas Law Review* 72(7), pg. 1787.

[97] The problem of dividing the acceptance of the United States Constitution into the "Framers"—those who wrote the Constitution—from the "Ratifiers"—those who voted to accept it at their local state legislatures—was a key problem of constitutional interpretation in the so-called "first generation" of originalist scholars, who were focused on the "intentions" of "the authors". Ultimately, the "intention" of a collective group of persons as well as the nature of authorship—who contributed, how much they contributed, etc.—were both unsolvable problems, leading to the push for a textualism emphasis for the "second generation" or New Originalists, led by Scalia, *inter alia*. See: Kiran Iyer. 2014. "Justice Scalia, Justice Thomas, and Fidelity to Original Meaning." *Dartmouth Law Journal* 12: 68-69; Lawrence B. Solum. 2013. "Originalism and the Unwritten Constitution." *Illinois Law Review* 5, pg. 1941; Lorianne Updike Toler, J. Carl Cecere, with the Assistance of Justice Don Willet. 2013. "Pre-'Originalism'." *Harvard Journal of Law and Public Policy* 36, pg. 290; Solum, Lawrence B. 2008. "Semantic Originalism." Illinois Public Law and Legal Theory Research Papers Series No. 07-24, pg. 14-15; Aileen Kavanagh. 2002. "Original Intention, Enacted Text, and Constitutional Interpretation." *American Journal of Jurisprudence* 4, pgs. 255-256; Earl M. Maltz. 1987. "The Failure of Attacks on Constitutional Originalism." *Constitutional Commentary* 4: 43-56; Paul Brest. 1980. "Misconceived Quest for the Original Understanding." *Boston University Law Review* 60: 204-238.

simply a question of insufficient data—the diaries of individual contributors as well as the minute meetings of these various bodies are often well-preserved—but it is a *concept* that can never be fully clarified, the impossibility of perfectly translating subjective intention into objective understanding or meaning. This is why the text must be taken itself[98] *as if it were* a complete document because it is the *least worst* option for beginning interpretation, rather than some universal truth itself.[99]

It is important to conclude by saying that even though our analysis is textualist—exegetical, to put it more properly—we are not married to it. With the exception of mathematics, every text has some ambiguity.[100] This leads to the necessary and inevitable question of interpretation vs construction,[101] with the former being a narrow creation of law and the latter trying to understand what to do "when the texts run out".[102] Thus, for us, while we primarily base constitutionalism on the texts themselves whenever possible, we must accept that there will be some instances when we must supplement our analysis with other sources, such as political discussion from the periods in question presented in treatises. The nature of this work as a prolegomena is that it is the search for a constitutionalism that is the minimum coherence from texts inscribed within a greater hermeneutics process, i.e., that constitutional texts serve as anchors for the discussion, but we must inevitably venture beyond them, yet at the same time there is not room for examination of every philosophical tract or political debate within an era. This selection of secondary, inscribing materials is an inevitably and unfortunately arbitrary process to some degree, a judgement decision by the

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[98] "The intent to be given effect is the objective intent as expressed in the words of the law being construed. Our fundamental law is the text of the Constitution as ratified, not the subjective intent or purpose of any individual or group in adopting the provision at issue," US Department of Justice, *Report to the Attorney General. Original Meaning Jurisprudence: A Sourcebook*, 12 March, 1987, pg. 14.

[99] This pragmatic approach is concomitant to what Scalia refers to as "faint-hearted originalism". See: Antonin Scalia. 1989. "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57(3): 849-866.

[100] "A code is not a herbarium, in which we deposit law like dried plants. Let a code be the fruit grown out of the civil life of a nation, and continue the seed for future growth. The impossibility of closing the law, as it were, has already been acknowledged […] Never has interpretation been dispensed with; never can it be dispensed with. This necessity lies in the nature of things, of our mind and our language," Francis Lieber. 1839. *Legal and Political Hermeneutics: Or Principles of Interpretation and Construction in Laws and Politics with Remarks on Precedents and Authorities*. C.C. Little and J. Brown: New York, pgs. 44-45.

[101] "Interpretation is the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey […] Faithful interpretation implies that words, or assemblages of words, be taken in that sense, which we honestly believe that their utterer attached to them. We have to take words, then, in their most probable sense, not in their original, etymological, or classical, if the text be such that we cannot fairly used the words with skill, knowledge, and accurate care and selection," Lieber, *Legal and Political Hermeneutics*, pgs. 23, 29; "Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text-conclusions which are in the spirit, though not within the letter of the text […] Construction is the causing of the text to agree and harmonize with the demands or principles of superior authority, although they are not, according to the immediate and direct meaning of the words constituting the text, contained in it," *ibid*, pgs. 56, 57.

[102] Randy E. Barnett and Evan Bernick. 2018. "The Letter and the Spirit: A Unified Theory of Originalism." *Georgetown Law Journal* 107, pg. 10-13; Yvonne Tew. 2014. "Originalism at Home and Abroad." *Columbia Journal of Transnational Law* 52(3), pgs. 790-791; Lawrence B. Solum. 2013. "Originalism and the Unwritten Constitution." *Illinois Law Review* 5, pgs. 1944-1945; Randy E. Barnett. 2011. "Interpretation and Construction." *Harvard Journal of Law and Public Policy* 34(1): 65-72; Lawrence B. Solum. 2010-2011. "The Interpretation-Construction Distinction." *Constitutional Comment* 27: 95-118.

author of what to include or not. However, after a thorough reading of the original texts, contemporary commentary on those texts by leading political thinkers at the time, as well as modern authors' surveys and commentaries on the material in order to "get a feel" for how constitutionalism developed in each epoch, specific texts are then presented throughout this survey to demonstrate how said constitutional principles developed concretely. That is to say, the author has attempted to balance both the need for uncovering the core constitutional principles via *textual* fidelity to the original sources as well as *contextual* situation of those texts to clarify and explain them.

Fortunately, while the concept of constitutionalism in the Polish-Lithuanian Commonwealth was not as tight as in the development of the American system, we are fortunate to have a focused end-point with the 1791 Constitution, which outlines several legal texts that it views as its specific predecessors. These provide some kind of skeleton, a framework to begin our study. It is admitted that perhaps we ourselves are involved in some kind of historicist enterprise by interpreting the 15th and 16th centuries through the lens of the 18th century. To this we can only offer a defense that pure history—what Skinner refers to as antiquarianism—[103] is ultimately meaningless. Our textual anchor in the 1791 Constitution helps to minimize any historicism as much as possible, rather than arbitrarily crisscrossing the entirety of the Commonwealth at random.

Indeed, the 1791 Constitution is used to give a vague sense of "how far back we should go" and "what are some significant signposts along the way". It is not intended as part of some Hegelian teleology looking for the end of Polish-Lithuanian constitutionalist history nor as some final word on how to use Polish-Lithuanian constitutionalism to inform present day questions, whether in Poland or elsewhere. Our intentions are much less ambitious.

We conclude by quoting Skinner as something of a model for this endeavor:

> The thought at which I am gesturing is that, if we examine and reflect on the historical record, we can hope to stand back from, and perhaps even to reappraise, some of our current assumptions and beliefs. The suggestion I want to end by exploring is that one of the present values of the past is as a repository of values we no longer endorse, of questions we no longer ask. One corresponding role for the intellectual historian is that of acting as a kind of archaeologist, bringing buried intellectual treasure back to the surface, dusting it down and enabling us to reconsider what we think of it.[104]

IV. Some Critical Clarifications and Caveats as Well as Necessary Historical Simplification

Having established the *spirit* of constitutionalism as a specific kind of transhistoricism, it is important to pause for some administrative and clarificatory points before our proper investigation can begin. This will occur in four, brief stages: first, that of the *historical* periodization that will be used and the justification for it; second, a brief distinction between *constitutional*, *political*, and *historical* levels of conceptualization; third, a specification of the geographical regions wherein the constitutional development occurred; and, finally, the clarification of some of the terminology used, especially the employment of

[103] Skinner, *Liberty Before Liberalism*, pgs. 106-109.
[104] Skinner, *Liberty Before Liberalism*, pg. 112.

Polish terminology. This *historical* (the "when") and *geographical* (the "where") are deeply connected conceptually, as Wolff has recounted for us.[105] The "what", "how" and "why" questions are reserved for *constitutionalist* investigation *per se*.

An inescapable problem with historically sensitive analyses is always that of periodization, which are unfortunate but necessary constructs that allows for any sense or meaning to be extracted. In his defining work on the history of Poland, Norman Davies presciently warns that historical periodization is reflective of the historian's own personal point of view.

> The events of a thousand years are as daunting to the historian who has to expound them, as to the reader who wants to learn about them. They are too complex to be comprehended in bulk; and served in one lump, are entirely indigestible. As a result, they are customarily divided into chronological groups, or periods. For some historians, this 'periodization' is no more than an empirical exercise, like the work of a chef who divides the meal into separate dishes, arranging the ingredients according to his individual art and the dictates of digestion. For others, it is a matter of high seriousness, guided by the laws of philosophy and science. It is one of the unavoidable tasks of the trade. The manner in which it is undertaken reveals much, not only about History but also about the historian.[106]

In other words, to some degree all history is the historian's autobiography. While the parameters of this study are driven by the search for constitutionalist principles as elucidated by various sources—legal texts, political tracts, historical anecdotes, etc.—rather than by more traditional historical approaches—such as history of thought, political history, or military history—it is nonetheless dependent on historical periodization and arrangement of the relevant materials. Given that our method is a hermeneutic one, the call for historical investigation as a partial autobiography of the historian is a substantive part of our research process, rather than some rhetorical flourish, given that this periodization as well as the constitutional archetypes by which it will be deciphered are both subject to change. Indeed, as we shall see, the very prism through which our investigation takes place indeed *does* change, but it is sufficient to say for now that our periodization and terminology employed will remain constant to provide a measure of conceptual stability.

It is worth briefly addressing several of the standard categorizations of Polish-Lithuanian historiography, before positing an alternative vision. Briefly and oversimply summarized, one standard view breaks down into the Piast-Angevin period (10th through the 14h century), the early Jagiellonian period (late 14th century through the early 16th century), the Golden Age (the reigns of Zygmunt I the Old and his son Zygmunt II August, 1500-1572), the Waza period of elected kings (Zygmunt III Waza, Władysław IV Waza, Jan II Kazimierz) and the period of national kings (Michał Korybut Wiśniowiecki and Jan III Sobieski), the Saxon period (1696 to 1764), and the reign of Stanisław II August (1764-1795).Though multiple subperiods exist within this approach,[107] a significant common

[105] Wolff, *Inventing Eastern Europe*, *passim*.
[106] Davies *God's Playground*, pg. 4.
[107] For the most modern and sophisticated periodization of Polish-Lithuanian history, see the work of historian Andrzej Nowak, *Dzieje Polski*, with Volume I covering up to 1202, Volume II Covering 1202-1340, Volume

denominator is the determining place of political events—interregna, coronations, beginning and ending of dynasties, civil wars, rebellions, invasions, etc.—that is *history* is subsumed by *political history*. A variation of this theme would be those who give a determinative role not to specific historical events, but rather the development of political ideas and systems, as Lelewel and Bobrzyński[108] did. Another periodization would be to look at the historical-materialist dimensions, most strongly connected with Marxist thought such as Stanisław Arnold,[109] though the first decades of the 20th century clearly saw an increasing interest in not only material questions, but also in positivism.[110]

The periodization that we will employ is specifically a *constitutionalist*[111] one, that is it seeks to understand the architectonic—or structuring—elements that shape the political and legal system. It thus seeks out specific principles and their concrete elucidation in both text and context. What this precisely means will be explored in the next two chapters, but for now it is critical to acknowledge that the domain of history and the domain of constitutionalism are not the same, that is they do not ask the same questions nor seek out the same answers. Our periodization covers roughly 150 years (1454-1609), 110 years (1607-1717), and then 27 years (1764-1791) respectively. However, this periodization is driven by *qualitative differentiation of constitutionalist principles* rather than by political events. It is also important to distinguish between *qualitative* and *quantitative* constitutional accomplishments, given that just because a constitutional or political event occurred does not mean that it is necessarily significant for the development of a constitutional principle. As a concrete example, the Polish-Lithuanian Commonwealth had a few rebellions against the king called *rokosze* as well as multiple times when the *szlachta* gathered together in limited,

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III covering 1340-1468, Volume IV covering 1468-1572, Volume V covering 1572-1632, and with another several volumes planned; Uruszczak gives a historical periodization of legal and political periods before supplying his own: See: Uruszczak, *Historia państwa i prawa polskiego*, pgs. 32-36; the series Volumina Legum, which is perhaps the best record of Polish-Lithuanian law, breaks down into: Volume I (1347-1547), Volume II (1550-1609), Volume III the reign of Zygmunt III (1611-1632), Volume IV , Volume V (1669-1697), Volume VI (1697-1736), Volume VIII (1764-1768), Volume IX (1782-1792), Volume X (1793); a more modern and also critical record of Polish law is given by the series Volumina Constitutionum , which breaks down into several volumes as well: Tom I, Vol. I. (1493-1526), Tom I. Vol. II (1527-1549), Tom II. Vol. I. (1550-1585), Tom II Vol. II (1587-1609), Tom III Vol. I (1611-1626), Tom III Vol. II (1627-1640), Tom IV Vol. I (1641-1658), Tom IV Vol. II. (1641-1668). Another categorization that follows a similar outline would be Paweł Jasienica's four volume series, Polska Piastów (1960), Polska Jagiellonów (1963), Srebrny Wiek (1967) and Dzieje Agonii (1972). Davies recounts: "[I]n the reigns of the last two Jagiellons one can talk of Poland's Złoty Wiek, her 'Golden Age', with no hint of hyperbole," *God's Playground*, pgs. 117-118; Marek Borucki agrees with the categorization of the las two Jagiellonians as the golden age. See: Marek Borucki. 1972. *Seymy i seymiki szlacheckie.* Książka i Wiedza: Warszawa, pg. 53.

[108] Again, we follow the excellent historiographical work by Davies, which explores these different historiosophical approaches, see. Davies, *ibid.*, pgs. 3-10.

[109] *Ibid*., pg. 12.

[110] *Ibid, passim*; Halecki, "Problems of Polish Historiography."

[111] Just as "constitutional" is different from "political" or "historical", so too "constitutionalist/constitutionalism" is different from "constitutional/constitution". For a more thorough development of this difference, see the next chapter, but for now it is sufficient to say that whether or not something is "constitutional" refers to whether or not it is connected with a specific constitution *per se*. On the other hand, "constitutionalist" refers to "constitutionalism", which is the broader concept of comparing different constitutions across constitutional systems, rather than an internal look within a constitutional system. Thus, a constitutional understanding helps inform broader constitutionalist implications for comparative work.

self-governing bodies without a king referred to as *konfederacje*, which were often—but not necessarily—in opposition to a king. *Konfederacje* were formed for temporary purposes where *szlachta* were free to leave or join as they wanted and were governed by majority voting rather than consensus or unanimity.[112] However, many of these events arose out of political disputes such as instability due to civil war, dynastic rivalry, disagreement with specific policies or reforms, *inter alia*. These ultimately did not leave a significant mark on the permanent organization of the Commonwealth or perhaps they were simply echoes of previous *rokosze* or *konfederacja*. For this reason, many of them are not mentioned here, with their absence being notable from a traditional political or military history.

Returning to the pace of quantitative constitutionalist activity, during the 15th and 16th centuries constitutional accomplishments were far and few between, with the pace accelerating in the latter half of the 16th century under Zygmunt I the Old and Zygmunt II August. The 17th century was an explosion of multiple wars, rebellions, invasions, changing of dynasties, religious tensions, and fraught with all their attendant intrigue and complications. However, from the point of view of *constitutional* development, the latter quarter of the 17th century through the first three quarters of the 18th century was quite bland. Indeed, one could say that the dominant constitutional practice of the *liberum veto*—where members of parliament could unilaterally stop proceedings whenever they chose—was something of an *anti-constitutional* mechanism. The last twenty-five years of the Commonwealth, however, were a complete flurry of constitutional reform and political debate that ended violently and abruptly. To sum up these points succinctly, understanding constitutionalist development is not merely cataloguing political or constitutional events or major historical events such as battles, change in dynasties, *inter alia*.

Following along this theme, though the terrain for exploring the development of Polish-Lithuanian constitutionalism is obviously historical, this work is not a work of history. Nor is it an exploration of the development of political and legal thought within Poland-Lithuanian intellectual circles *per se*, though some references to certain thinkers, works, and traditions will be necessary to elucidate this development. A particular thinker's opinion of a constitution or a piece of legislation is not the same as a *constitution*, which to a certain extent must stand alone as legal acts that speak for themselves. Antonin Scalia was the first to extensively outline such an approach that explicitly emphasized "the original public meaning" of a text, in that a constitution or a text that has constitutional value is one that is accepted by the majority of the society of its time, or would otherwise be well-known or intelligible to it.[113] Thus, our stopping point must be the 1791 Constitution rather than later acts such as the Konfederacja Targowica or the Act of the Kościuszko Uprising. What me mean by constitutionalism and a "Constitution" more precisely will be treated in the subsequent chapter, "Constitutions before Constitutionalism".

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[112] Juliusz Bardach, Bogusław Leśnodorski, and Michał Pietrzak. 1987. *Historia państwa i prawa polskiego.* Państwowe Wydawnictwo Naukowe: Warszawa, pgs. 98-99.

[113] Iyer, "Justice Scalia, Justice Thomas, and Fidelity to Original Meaning," pgs. 68-70; Lawrence B. Solum. 2008. "Semantic Originalism." *Illinois Public Law and Legal Theory Research Papers Series No. 07-24*, pgs. 18-19.

Nor is this work a political work, in the sense that politics is movement within a constitutional system, within the "rules of the game"—to borrow from contemporary constitutional economics[114]—but not generally a direct interaction with said rules, let alone a sophisticated attempt to alter or otherwise manipulate them. To put it simply, constitutions may be said to be laws, but not all laws are constitutions. Similarly, constitutions are *political acts*, but *not all political acts are constitutionalist*. Thus, every election does not give the new majority the power with which to reshape the nation and its institutions at its every whim, despite modern politicians' populist rhetoric about "mandates", "population", or "overwhelming electoral majorities".[115] Applying this distinction to the Commonwealth, the attempts by Queens Bona Szforza and Ludwika Maria Gonzaga to influence the events of the nation—frequently against their husbands or even their children in Szforza's case—were certainly interesting and vital from a political point of view, this does not mean that they had *constitutional* implications. Similarly, even though there was constant political tumult and activity during the Saxon period there was relatively little *constitutional* innovation. Finally, the middle of the 17th century through the Silent Seym in the18th century (1648 to 1717) saw nearly continuous warfare as the Commonwealth became embroiled with its neighbors' affairs, which were certainly important events in the history of both the nation as well as Europe, but these did not always translate—indeed nearly most of them did not—into systematic changes of institutions.

The easiest place to start in terminology is the choice of translation. Throughout the work, the Polish spelling of personal names—Jan rather than John or Paweł instead of Paul—and places are used, even if there is a common English equivalent—e.g, Warszawa and Kraków, rather than the Anglicized Warsaw or Cracow. This is a conscious choice by the author, consistent with the overall theme recognizing that the Polish-Lithuanian tradition is of equal academic importance to the Anglo-American tradition, which in the 21st century can overcome its orientalist past. If contemporary Polish scholars do not "Polonize" David Hume or George Washington, Anglo-American scholars are perfectly capable of using Jan I Olbracht instead of John I Albrecht. In places where the orthography of the Polish language has changed, the original spelling is preserved.

Secondly, Polish terminology will be used throughout even if there are close English cognates, e.g. Marszałek instead of Marshall, Trybunał instead of Trybunał, policja instead of police, konstytucja instead of constitution, województwo instead of voivodeship, wojewoda instead of voivode, kaztelan instead of castellan, etc. This includes their plural forms. This is done both to keep in fidelity with the theme of elevating Polish-Lithuanian tradition within English language discourse, but also simply to avoid an ahistoricist misunderstandings. For example, *komisja policji* naturally translates to "police commission" though policja did not have the same meaning in 18th century Poland-Lithuania as it does in Poland today and there is no direct correlation. These terms will be explained and clarified when they emerge as necessary.

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[114] James M. Buchanan. 1990. "The Domain of Constitutional Economics." *Constitutional Political Economy* 1(1): 1-18.

[115] Indeed, in most two-party systems, "overwhelming majorities" mean at most 60%-40% split of political power; such talk of popular mandates are even more absurd with parliamentary systems with coalition governments where no political party has anywhere close to a majority of anything.

The term *szlachta* will be preserved, rather than translated into "the nobility", "the knighthood", "the equestrian order" and any of its other variations; the term *szlachcic* (plural *szlachcice*) refers to an individual nobleman. Technically speaking, *szlachta* refers to a class of persons who were granted equal privileges and who held political power by participating in the Seym or being appointed as members of the King's administration. Though all held equal status before the law, in reality the political and economic power between them could be vastly different, with many of the more powerful families virtually ruling their own miniature kingdoms, some of whom were more powerful and wealthier than the actual kings of their respective times. At other times in Polish-Lithuanian history, a super powerful and super rich group of *szlachta* emerged known as the *magnateria* (single *magnat*, plural *magnaci*) who essentially ruled the nation as oligarchs, usually but not always allied with the Crown. This is an important point both in terms of terminology as well as substance, given that the usage of the word *magnateria* is inconsistent within the Polish literature itself.[116]The difficulty in translating *szlachta* into English has been well-documented by Davies, who notes part of the difficulty is that no peer system emerged during the Commonwealth.[117] Davies generally translates *szlachta* as "the nobility" directly, and notes—and then rejects—how traditional Polish scholars often distinguish *magnateria* from *szlachta*, with Davies remarking how they were all *szlachta*.

Davies is correct in a literal sense, but here we break with him in favor of the more traditional Polish convention of distinguishing *szlachta* (the nobility) from *magnateria* (the magnates) characteristic in the literature, because it is important to note the tension that existed between these two tendencies within Polish-Lithuanian constitutionalism. In general, the *szlachta* evolved from Polish knighthood, and thus created a more egalitarian and democratic political culture as modern audiences would understand democracy today. In fact, much of the political literature on the 16th century juxtaposes the Jagiełłonian dynasty and their magnate allies in the Senat against *szlachta* reformers in the Izba Poselska (Chamber of Deputies)[118]—broadly referred to as the tension of *szlachta democracy* vs *magnate* rule—and numerous other historical works critical of Polish-Lithuanian political history criticize the period of magnate rule or oligarchy that emerged in the 17th century.[119] It should be noted that not all *magnaci* were in favor of political autocracy and not all *szlachta* were interested in a more egalitarian distribution of political power, with *magnaci* Mikołaj Zebrzydowski[120]

[116] For example, Michał Bobrzyński frequently distinguished between *szlachta* and *możnowładztwo,* with the ladder standing in for *magnaci*. See: Bobrzyński, *Dzieje Polski w zarysie*.

[117] Davies, *God's Playground:* pgs. 160f, 170-171, 177, 184.

[118] Wojciech Kriegseisen. 2018. "Reformacja a geneza demokracji szlacheckiej w Polsce." *Rocznik Teologiczny* 3, pgs. 194-195; Anna Sucheni-Grabowska. 2007. *Odbudowa domeny królewskiej w Polsce 1504-1548.* Second Edition. Muzeum Historii Polski: Warszawa; Ewa Dubas-Urwanowicz. 2002. "Królestwo bez króla? Kompetencje monarsze w dwóch pierwszych bezkrólewiach po śmierci Zygmunta Augusta." *Przegląd Historyczny* 93(2), pg. 147; Sucheni-Grabowska 1988. *Spory królów ze szlachta w złotym wieku: wokół egzekucji praw,* Krajowa Agencja Wydawnictwa: Kraków, pg. 37.

[119] There is some debate as to when the period of oligarchy emerged precisely. For a fuller debate, see: Władysław Czapliński and Kazimierz Orzechowski, *Synteza dziejów polskiego państwa i prawa*; Stanisław Średniowski. 1953. *Historia państwa i prawa Polskiego*. *Cz.2, Oligarchia magnacka (1572-1764).* Państwowe Wydawnictwo Naukowe: Warszawa.

[120] This very point is emphasized by Wilson, see: Kate Wilson. 2002. "The Jewel of Liberty Stolen? The Rokosz of Sandomierz and Polish Dissent." Presented at "The Contours of Legitimac yin Central Europe: New

and Jerzy Sebastian Lubomirski staging prominent rebellions against their respective kings for their political excess and attacks on the *szlachta*'s "Golden Freedoms". Naturally, we should be cautious about merely accepting their altruistic motivations in supporting the "Golden Freedom" at face value, given that it was also a means with which to further their own goals, given that both were powerful men with a long history of personal disputes with the royal court. It would perhaps appropriate to compare the *szlachta* with Aristotle's conception of citizens, which the *szlachta* were both aware of as well as how they would have seen themselves:

> For this reason, when the constitution of a city is constructed on the principle that its members are equals and peers, the citizens think it proper that they should hold office by turns. At any rate this is the natural system, and the system which used to be followed in the days when people believed that they ought to serve by turns, and each assumed that others would take over the duty of considering his benefit, just as he himself, during his term of office, had considered their interest.[121]

On the other hand, the term *magnate* will generally be reserved for those who had significant political power and economic wealth and promoted more oligarchic vision of the state. The term *noble* will return to the entire noble estate, thus the *szlachta* and *magnaci*. While this is somewhat unfortunate and oversimplified, it is also necessary for pragmatic reasons, as introducing every member of the *szlachta* adjusted by a modifier—petty *szlachta*, greater *szlachta*, lesser *szlachta*, magnate and *szlachta*, landless *szlachta*, etc.—is more confusing than a simple two-way classification system.

Another problematic term is *konstytucja* (plural *konstytucje*), which is generally and uncritically translated into English as "constitution". As will be addressed in greater depth in the Chapter "Constitutions Before Constitutionalism", this is problematic because every legal act of the Seym was a *konstytucja*, but not every act of a parliament today is considered a constitution. Indeed, in practice, *konstytucja* is closer to "legal act" or "regulation" than to a "constitution",[122] though *konstytucja* and constitution share the same etymological descent from Latin *constitutio*,[123] which by the way was an administrative act. Given the significant rarity of constitutions under modern constitutionalism, the terms *konstytucja* and *konstytucje* will be preserved to denote official legal acts by the Seym, though of course both *konstytucje* and constitutions may be *constitutional* and both are within the umbrella of *constitutionalism*.

Another problematic word is that of *Seym* (plural, *Seymy*),[124] which was the highest legislative body of the Commonwealth with a Seym uniting both parts of the country. While

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Approaches in Graduate Studies." European Studies Center, St. Anthony's College, Oxford, 24-26 May 2002. http://users.ox.ac.uk/~oaces/conference/papers/Kate_Wilson.pdf. (Accessed 5 January 2021), pgs. 4-5.

[121] Aristotle. 1998. *Politics*. Oxford University Press: Oxford, pg. 99 [*Politics* 3.6, 1279a8].

[122] "The term 'constitution' is the historical name of 16th and 17th century parliamentary acts. Although such acts concerned the functioning of specific basic political institutions, they were not constitutions in the modern sense, that is, comprehensive and systematic definitions of the underlying values, structures and institutions of State and superior to all other legal acts. This term is thus the equivalent of today's 'statute,'", Zdiszlaw Czeszejko-Sochacki. 1996. "The Origins of Constitutional Review in Poland," pg. 17f.

[123] Charles McIlwain. 1947. *Constitutionalism: Ancient and Modern*. Cornell University Press: Ithaca, pgs. 23-24.

[124] The modern spelling is Sejm and Sejmy, but we will keep to the original orthography.

earlier *Seymy* were *ad hoc*, after the Henrician Articles they met regularly, generally for a six week term once every two years, that alternated between being held in the Crown as well as in the Grand Duchy.[125] The *Seym* had two houses, an upper house with members called *senators* who were either appointed by the king and who served in various administrative capacities when the *Seym* was not in session, or who were high ranking members of the clergy; the lower house was the Izba Poselska with deputies elected from a local assembly or parliament called a *Seymik*—literally small *Seym* (plural *Seymiki*).

V. For Whom is This Analysis Written?

At this point an astute reader may ask: for whom is this work intended? Why should we care about a state that failed nearly 225 years ago? Who cares about such a state? To put it succinctly, if history is for its own sake—that is, as a pure intellectual curiosity of the historians—then it may be meaningful, but practically useless, as in performance art. On the other hand, if it is too purposive—that is, history serves to reify a particular system of belief or social fact—then it is practical, but tautological and can never persuade, only affirm.[126] The author hopes to sidestep this dilemma as much as possible by affirmatively stating that this work is not intended to be a history *of anything per se*, but rather to use history as a canvas with which to establish the broad brushstrokes of Polish-Lithuanian constitutionalism as a neglected and understudied contributor to constitutionalism *per se*.

For over a millennium,[127] either the lands that became the Polish-Lithuanian Commonwealth or the later Commonwealth itself have stood as both a spiritual and physical crossroads of Eastern and Western Europe, fighting off Eastern Orthodox allied with Muscovy, the Turks, the Mongols, and the Tartars, as well as contributing to Humanism, Reformation, Counter-Reformation, Enlightenment, and, of course, the international Polish diaspora post-1795, post-1919, and post-1945. From the beginning, Polish political culture was unique, bucking many traditional understandings of medieval feudalism. Generally

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[125] Henrician Articles, Number IX. There are many different versions of the Henrician Articles. This one is taken from the Polish Historical Museum, Warsaw. It was translated by Tristan Korecki and Philip Earl Steele from the original Polish by S. Godek, M. Wilczek-Karczewska. *Historia ustroju i prawa w Polsce do 1772/1795: wybór źródeł*. Wydawnictwo Naukowe PLN: Warszawa, pgs. 89-91. For the Digital Version, See: https://polishfreedom.pl/en/the-warsaw-confederation/ [Accessed 23 June, 2022].

[126] For a more thorough and thoughtful investigation into the usage and nature of "history", see: Skinner, "Hermeneutics and the Role of History," *passim* and Skinner, "Some Problems," *passim.*

[127] The first historical leader of what is today Poland was Mieszko I, whose conversion to Christianity in 966 marks the traditional beginning of "Poland" as a nation, tying a deep bond between the Poles and Roman Catholicism that has persisted through the Reformation, the Counter-Reformation, weathering if not outright resisting multiple religious wars, occupations, and invasions, 18th century partitions by Protestant (Prussia) and Eastern Orthodox Muscovite rulers, and the militant atheism of both the Nazis and the Soviets. Mieszko, as a regional prince, inherited a union of Slavic tribes forged by his father and grandfather, and then spread out to conquer most of the land that is the current geographical boundaries of Poland. His alliance with the Church and the Holy Roman Empire both cemented his rule as well as established Poles' founding orientation toward both the West and to Christianity, despite often being characterized as part of "the East". For more on Mieszko, see: Davies, *God's Playground*, pgs. 17, 53-63; S. Kętzyński. 1978. "The Introduction of Christianity and the Early Kings of Poland." In W.F. Reddaway, J.H. Penson, O.Halecki, and R. Dyboski, eds. 1978. The Cambridge History of Poland: From the Origisn to Sobieski (To 1696). Octagon Books: New York, pgs. 16-42, *passim*.

speaking, the ratio of nobles to the general population was kept quite low in feudalism, as a king wanted to retain as much control over his lands as possible and the nobles jealously guarded their own power and wealth. Though over time the feudal systems throughout Europe became increasingly complex, with numerous ranks developing to more effectively manage the land and the population, generally speaking the nobles never reached higher than a few percent. However, the character of the *szlachta* in the Commonwealth was unique in that the population of nobles was much higher, as much as ten percent—certainly the largest in Europe at the time—and it was also relatively easy for foreigners to become ennobled, compared to other nations at the time. Supporters of the broad concept of the *szlachta* argued that suffrage was larger than it would be under the classical category of 'oligarchy', with modern estimates placing the total number of *szlachta* as over 200,000.[128] This large number of voting citizens as well as the *szlachta*'s nominal equality before the law, lead to a "democracy of nobles" of sorts, though critics also argued that such fluidity of the ruling classes led to instability.[129]

While the presence of a monarchy, serfdom, and special privileges for the nobles within a republic appear alien, even contradictory, to contemporary understandings of limited government and democracy, it must be recalled that the king in Poland-Lithuania was elected, rather than hereditary, and that the *szlachta* was such a large percentage of the population. Upon their election, each king had to swear to uphold and obey the laws and customs of the kingdom. Functionally, it was quite similar to the charters in the English system—with Magna Carta being the prime example—as well as the "ancient constitution", that inspiration and ancestor for the social contract, which bound the king, the church, the nobles, and to a lesser extent the people, in mutual relations to promote the public good.[130] Secondly, the United States and the United Kingdom did not begin with universal suffrage either, with participation in young America limited to a small elite in accordance with a genteel, aristocratic understanding of democracy, and selection to Parliament was originally by the Lords and for the Lords. Furthermore, the great guiding lights and pioneers of modern

[128] Józef Siemieński. 1985. "The Principle of Unanimity during the Renaissance." In: Władysław Czapliński, ed. 1985. *Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pgs. 57-58.

[129] Pudłowska, *Historia ustroju i prawa polski*, pg. 5; Peter Paul Bajer. 2012. *Scots in the Polish-Lithuanian Commonwealth, 16th-18th Centuries: the Formation and Disappearance of an Ethnic Group.* Leiden: Koninklije Brill; Robert I. Frost. 2011. "Ut unusquisque qui vellet, ad ilium venire possit.' Nobility, Citizenship and Corporate Decision-Making in the Polish-Lithuanian Commonwealth, 1454-1795." In Jörn Leonard and Christian Wieland, *What Makes the Nobility Noble? Comparative Perspectives from the Sixteenth to the Twentieth Century*, Vandenhock and Ruprecht: Gottingen, pgs. 142, 144; Daniel Stone 2001. *The Polish Lithuanian State, 1386-1795.* University of Washington Press: Seattle and London, pg.77; Kamiński, *Historia Rzeczypospolitej wielu narodów*, pg. 12; Alexander P. Saydak. 1996. "Rousseau's Imprint on Nineteenth Century Poland: The Impact of Jean-Jacques Rousseau's Philosophy on Józef Szaniawskim Joachim Lelwel and Cyprian Norwid." *The Polish Review* 41(3): 259-272.

[130] Zbigniew Rau, Przemysław Żurawski vel Grajewski and Marek Tracz-Tryniecki. eds. 2016. *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*, London and New York: Routledge; Edward Coke, *Selected Writings of Edward Coke*, 2010, "Online Library of Liberty", pgs. 838-839; F. Pollock and F. W. Maitland. 2010. *The History of English Law before the Time of Edward I*. Online Library of Liberty: Indianapolis; Ralph. V. Turner. 2003. *Magna Carta: through the Ages*. Harlow: Longman; William Blackstone. George Sharswood, ed.1898. *Commentaries on the Laws of England in Four Books*. J.B. Lipincott: Philadelphia.

government—the Dutch Republic, the United Kingdom, and the United States—were all significantly involved in the slave trade throughout the 16th-18th centuries.

Finally, the more abstract conception of the *pacta conventa* was complimented by a solid tradition of written legal acts, wherein the nobles solidified their privileges. For example, the Henrician Articles of 1573 explicitly recognizes several of the earlier medieval acts where the Kings granted the nobles privileges, and the 3 May Constitution—which was effectively the swansong of the Commonwealth—similarly mentions the *pacta conventa*, the Henrician Articles, as well as other legal acts. While Poland-Lithuania clearly had a written constitutional tradition that spanned its entire existence, it should be noted that it was different than the United States Constitution in that the notion of "supremacy"[131] is less clear in Polish-Lithuanian Constitutionalism. Though Poland-Lithuania had long followed the principle of *lex posterior derogate legi priori* (a later act repeals the bind force of an earlier act),[132] it was not always implemented fully. For example—and to which we shall return in greater depth in the 17th century—though the *Konfederacja Warszawska* of 1573 declared religious freedom throughout the nation, which was reconfirmed in the Henrician Articles and several *konstytucje* in the first half of the 17th century, by the middle of the 17th century older laws against heresy from the 15th century were revived with the express purpose of expelling religious dissidents. Thus, at least in terms of legal practice, the supremacy of the *Konfederacja Warszawska* and the Henrician Articles were not absolute.

Furthermore, the 3 May 1791 Constitution is complicated because it explicitly declares that "this present Constitution shall be the standard of all laws and statutes for future Diets"[133] but it is another legal act coterminous with the Constitution, entitled: "The Declaration of the States Assembled" that strongly asserts a principle of supremacy: "All laws and statutes, old and new, contrary to the present constitution, or to any part thereof, are hereby abolished; and every paragraph in the foregoing articles, to be a component part of the present constitution is acknowledged."[134] As such, while there was a clear list of juridical sources throughout the Rzeczpospolita, they possess no clear hierarchy.[135] This combination of an elected monarchy, a parliament composed of nobles where one house (the Izba Poselska) was elected by local assemblies, and a written, albeit chaotically so, constitutional system, places Poland-Lithuania in a strange place on our conceptual map of the 18th century as it appears to be a mix of British constitutional monarchism with Montesqueiean-inspired

[131] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Constitution, Article VI, Paragraph 2.

[132] Maciej Koszowski. 2019. *Dwadzieścia osiem wykładów ze wstępu do prawoznawstwa*. Wydawnictwo CM: Warszawa, pg. 100.; Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pg. 490.

[133] 3 May 1791 Constitution, Introduction.

[134] Declaration of the States Assembled, ¶ I.

[135] Anna Tarnowska. 2018. "'To Which Constitution the Further Laws of the Present Sejm Have to Adhere to in All…' Constitutional Precedence of the 3 May System." In Ulrike Müßig, ed. *Reconsidering Constitutional Formation II: Decisive Constitutional Normativity: From Old Liberties to New Precedence.* Springer International Publishing: Switzerland, pgs.113-172.

American division of powers, and it is not surprising that Polish reformers recognized the debt they owed to the Anglo-American world.[136]

Ultimately, the Commonwealth did fall, equally due to failures of its own reforms, foreign intrigue from neighbors who viewed a republic in the midst of three expanding imperialist powers as a kind of existential threat,[137] with no natural geography to defend her hopelessly flat lands.[138] This fall was neither a unique historical event, nor for lack of attempts at reforming the country within, nor forming an external alliance without. By 1800 and the rise of Napoleon, Geneva, the Netherlands, Venice, and Corsica had all been conquered or had collapsed from within. Furthermore, the other Central-European nations that had experimented with limited government and constitutionalism, most notably Hungary, were all absorbed into one of the ascendant absolutist states: the Ottoman Empire, Austria, Prussia, or Russia.[139] Modest and limited government and a constitutional and political system that respected individual freedom survived in Great Britain and Switzerland, and, even further away, in the United States, two protected by shields of water, one by mountains.[140]

Beleaguered reformers in the Commonwealth drew parallels between their dying republic and the twilight of Rome as they made several attempts at reforms throughout the 18th century,[141] perhaps most critically being the 3 May Constitution of 1791, which

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[136] Piotr Konieczny and John Markoff. 2015. "Poland's Contentious Elites Enter the Age of Revolution: Extending Social Movement Concepts." *Sociological Forum* 30(2): 286-304; Jerzy Jedlicki. 1986. "The Image of America in Poland, 1776-1945." *Reviews in American History* 14(4); Irene Sokol. 1967. "The American Revolution and Poland: A Bibliographical Essay." *The Polish Review* 12(3): 3-17.

[137] Richard Butterwick. 2005b. "Political Discourses of the Polish Revolution, 1788-1792." *The English Historical Review* 120: 695-731.

[138] James Breck Perkins. 1896. "The Partition of Poland." *The American Historical Review* 2(1): 76-92.

[139] Rau et al, *Magna Carta*, *passim.*

[140] The role that natural geography has played in the development of republican or limited government is something which has been historically underestimated. When the United States went through the painful period of failed compromises over reforming slavery and the eventual Civil War, and when England went through difficult period of managing the political rights of Scotland vs England and Catholics vs Protestant, both were shielded from invasion and foreign intrigue by natural geography. By contrast, if the Dutch Republic or Poland-Lithuania went through such a deep period of political soul-searching, powerful neighbors always had a hand in it. It could very well be that Poland-Lithuania's reforms in the 18th century were a case of "the right thing at the wrong time" in that the reforms that would have improved society also required a restructuring of it at the worst possible time, leaving it vulnerable to its neighbors who were in fact consolidating military and economic power. For a related reflection, see: R.R. Palmer. 2014. *The Age of Democratic Revolution: A Political History of Europe and America, 1760-1800*. Princeton University Press: Princeton, pg. 99.

[141] "Thus, the fundamental conceptual effort of 17th-century Polish political reflection was not limited to formulating a new vision of a political community or radically reconstructing it, but to determining how this Aristotelian community should respond to new, practical political challenges, especially the more frequent and more numerous wars with neighboring powers, Cossack revolts, rebels taking the form of civil wars or the progressive processes of the oligarchization of social life. This reflection based the political community on classical republican axiology and often referred to the categories used by eulogists of the Roman republic, i.e., to Polybius, and above all Cicero. The challenges themselves were perceived through the prism of the degeneration of the republic, as commented on by Roman historians who observed the retreat from the values, virtues and republican institutions of the principate era, primarily active participants or keen observers of public life who searched for specific political solutions. As such, the current political thought did not shy away from

attempted to build upon the experience of the United States Constitution as well as the ancient constitution of England[142]. Furthermore, the Polish reformers were not content to remain in the boundaries of their own nation. Kościuszko is archetypical of the Polish wandering gentleman rabblerousing reformer, being a hero of the American Revolution, friend to Thomas Jefferson, attempted to liberate the serfs, leader of uprisings against the Russians, and political revolutionary in exile. In terms of foreign policy, in the late 1780s to 1790s Polish diplomats were trying to build an international collaboration of republics that would be centered around France against the absolutist tide, though it was ultimately a utopian dream.[143]

Her loss was keenly felt by many of the champions of liberty in her time, with Edmund Burke noting that its division was: "the very first great breach in the modern political system of Europe".[144] This unbalancing was not simply important in terms of the political map of Eastern and Central Europe, however, but the loss of Poland-Lithuania's political and constitutional system had profound consequences for republicanism throughout the continent, as she had proven a kind of natural experiment for understanding how republicanism could navigate attempts at reform, internal revolts, wars, the constant pestering of foreign intervention and intrigue, as well as the ideas of the Enlightenment. Indeed, Venturi notes that a kind of chain can be stretched from Geneva and Corsica to the Commonwealth, the American colonies, Holland, Switzerland, and even France and the Italian republics.[145] Despite these, the political and constitutional system of the Polish-Lithuanian Commonwealth has generally been thought of as a footnote in 18th century European history, with the unification of the United Kingdom, the rise of Prussia, the Seven Years War, the American Revolution, the French Revolution, and the machinations of Catherine the Great generally taking higher prominence. As with other panoramic views of European history, the Enlightenment in Poland-Lithuania similarly takes a backseat, with Poles generally understood as passive recipients of the Enlightenment, rather than as contributors to it. Given its overall relevance for the major debate between republicanism and absolutism, as well as being the second-largest territory in Europe at the zenith of its power, it seems odd to think of it as being a topic reserved for Slavic or Eastern-European historians.

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formulating civic political projects, such as those of Michał Korybut Wiśniowiecki's camp, which postulated the introduction of term offices of communication channels between citizens and the central government, and above all the royal court, which was to broaden the debate and public participation," Rau, "Przedmowa", pgs. 12-13.

[142] "Conscious as the Poles were of the subordinate position to which they had been reduced, it would seem only natural that developments on the North American continent would be of the greatest interest. Both Poland and the American colonies, feeling the weight of external intervention in their internal affairs, were searching for a road which would assure them the status of independent, sovereign nation […] At no point in these discussions, however, was it ever suggested that Poles follow completely in American footsteps. Contemporary events in the United States were treated rather as a treasury of experience from which more than one lesson could be learned," Sokol, "The American Revolution and Poland," pgs. 6, 12; See also: Jedlicki, "The Image of America in Poland," pgs. 669-671.

[143] Franco Venturi. 1971. *Utopianism and Reform in the Enlightenment*. Cambridge University Press: Cambridge, pg. 91.

[144] Simms, Brendan. 2007. *Three Victories and a Defeat: The Rise and Fall of the First British Empire, 1714-1783*. Basic Books: New York, pg. 569.

[145] Venturi, *Utopianism and Reform*, pgs. 90-91.

Is the lack of attention to the Commonwealth an accident of history, or an accident of historiography? Generations of Polish scholars in academies occupied by absolutist powers were *discouraged* from researching into possible contributions of her republican past. Under the aegis of a Moscow-centric pan-Slavism, such research would have certainly been an *occupational hazard*. That Russian, German, or Austrian historians paint a picture of conquerors civilizing the anarchism of the Polish steppes are *certainly* credible historical sources as well! More insidious, perhaps, is that for much of the 19th and 20th centuries, these externally colored historiosophies were internalized within *Polish* historiographical discourse. That the First Republic was an anarchic, backward, conservative, reactionary, and un-Enlightened system altogether not worth giving much thought is something still common in Polish academe today, for some of whom 3 May 1791 is a point of curiosity, and for others of whom the point of departure for Polish jurisprudence is 2 April 1997 or 1 May 2004.

Indeed, the constitutional and political system of the Polish-Lithuanian Commonwealth, rather than understood as a complex and subtle continuity of ideas, institutions, and practice, is all too-often dismissed as "Sarmatism", which has become something of a barrier within the history of legal and political thought within Polish academic discourse.

As Rau notes:

> There is no doubt that the seventeenth century is often regarded as the quintessence of Sarmatism, which […] was a collapse in Polish intellectual development, which on the one hand severed all ties with Poland and the West, and on the other prevented its harmony from progressing from its native Renaissance to the Enlightenment. […] Such an assessment is neither a choice of only one worldview, nor a determinant of the intellectual climate of only one historical epoch [...] Undoubtedly, this common identification of Sarmatism with the absence of reflection or even stupidity was an effective barrier to the development of interests (scientific or public) with the achievements of Sarmatian reflection, including political reflection. As a result, on one hand is our knowledge of discourse in the 16th century, and of the 18th century on the other.[146]

To a very large degree, this barrier is artificial in the sense that it is determined from underdevelopment of a field of historical research, not from lack of sources or data, but rather either lack of interest due to assumed unimportance, or outright unreflective hostile opinions of an entire historical epoch, leaving the 17th century as something of "missing link" in Polish political and constitutional historiography.

Despite the poor track record of fighting on two fronts in Central Europe, this project attempts to do just so. Regarding premise, there is natural skepticism about whether the Commonwealth was a set of continuing institutions at all, rather than a hodgepodge of continuously changing, ill-defined legal acts and socio-political solutions. Concerning scope, many will undoubtedly be skeptical about such a comprehensive mix of political, sociological, and jurisprudential realms of inquiry. To them is referred the patron saint of such an inquiry:

[146] Rau, "Przedmowa," pgs. 9-10.

I beg one favor of my readers, which I fear will not be granted me; this, is, that they will not judge by a few hours of reading of the labor of [many] years; that they will approve or condemn the book entire, and not a few particular phrases. If they would search into the design of the author, they can do it no other way so completely as by searching into the design of the work.[147]

[147] Montesquieu, *The Spirit of Laws*, Vol I, pg. xxxvii.

CHAPTER ONE
"Constitutions" before Constitutionalism[148]

I. The Evolution of "Modern" Constitutionalism

A problem that is generally characteristic of contemporary social sciences specializing in various aspects of "early modern history" is that "modern", "modernity", and "modernness" are themselves categories more often than not implied or assumed, if only implicitly[149]. For example, though the *Magna Carta* (1215), the 1688 Bill of Rights or the 1707 Act of Union that created the United Kingdom are clearly considered to be part of "the British constitution" and are still used even today[150], the exact place of the *Magna Carta* seems to vary by year and whatever interpretative approach is dominating British jurisprudence at the time.[151] Is the *Magna Carta* not used as much because it somehow does not "feel" modern? What is the difference between a "charter" such as the *Magna Carta* and the documents used to create the American colonies in the 17th century, as well as a "constitution", properly understood? Furthermore, the Greek and Roman world had documents considered to be "constitutions" but are not "modern",[152] even though, as we noted earlier, they were used in part of the foundations for the American, Polish-Lithuanian, and French constitutions. To put it simply, "modernness" falls into some vague category of

[148] Significant portions of this chapter have been taken by the author's work: J. Patrick Higgins. 2022. "Quasi-Writtenness and Constitutionalism: Socio-Historical Hermeneutics Between Text and Context *En Route* to Meaning." In: Łukasz Perlikowski, ed. *Uncodified Constitutions and the Question of Political Legitimacy*. Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń, pgs. 51-82.

[149] "Much of modern history, historiography, and history of historiography has been concerned with what may be thought of as emphasis on "differences and innovations among historians than to similarities and constants", though there are many different schools of modern historiography that share much in common. See: Ignacio Olábarri. 1995. "'New' New History: A *Longue Durée* Structure." *History and Theory* 34(1): 1, *passim*.

[150] Pavlos Eleftheriadis. 2017. "Two Doctrines of the Unwritten Constitution." *European Constitutional Law* 13(3): 531; Wim Voermans, Maartan Stremler, and Paul Cliteur, eds. 2017. *Constitutional Preambles: A Comparative Analysis.* Edward Elgar: Cheltenham and Northampton, pg.13.

[151] Broadly speaking, the debate over the *Magna Carta* is whether it should be thought of as either the creation or the affirmative crystallization of the British "ancient constitution" as one of natural liberty with rights to property and to rebel against unjust king *inter alia*, or that it was an instrument of ambitious nobles seeking to consolidate their power against a vulnerable king. This former interpretation is the orthodox or standard view up through the 18th century until Bentham and others began to contest it more actively going forward into the 19th century. Ironically, the more critical reception was better received in England, whereas the more romantic vision was—and remains—very popular and broadly accepted in the United States. See: Robert Blackburn. 2016. *Foreword: Magna Carta: Our Common Heritage of Freedom*, [in] Zbigniew Rau, Przemysław Żurawski vel Grajewski and Marek Tracz-Tryniecki (red.) *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom,* London and New York, pgs. xlii-xliii; T. F. Plucknett. 2010. *A Concise History of the Common Law*. Liberty Fund: Indianapolis; R. V. Turner, *Magna Carta: Through the Ages*; R. C. Palmer. 1985. "The Origins of Property in England." *Law and History Review* 3(1): 1-50; W. P. McKechnie. 1914. *Magna Carta: A Commentary on the Great Charter of King John*, Glasgow; M. J. Horowitz. 1997. "Why is Anglo-American Jurisprudence Unhistorical?" *Oxford Journal of Legal Studies* 17(4), pg. 555.

[152] Pasquale Pasquino. 2013. "Classifying Constitutions: Preliminary Conceptual Analysis." *Cardozo Law Review* 34(3): 999-1020.

"sufficiently like us today", whereas what is or not "constitutional" at first glance appears to be somewhat arbitrary. As such, what "constitutionalism" or "constitutional" means must be satisfactorily narrowed over the course of the discussion.

Further evidence for this arbitrariness in determining "modernism", "constitutionalism", and by extension "modern constitutionalism" is given by the ongoing debate as to what the first modern constitution was. Generally speaking, the ordering is given: United States (1787), Poland-Lithuanian (1791) and France (1791), that it, assuming that Poland-Lithuania is even mentioned, which is certainly not a guarantee, as much of the "classic" literature on comparative constitutionalism skips over the Commonwealth entirely. In fact, the only time it is usually mentioned at all is briefly in passing, or as a footnote,[153] excepting the small but dedicated group of Polish scholars writing about Poland. Even such scholarship is generally a specific reaction to the 20th century, the fall of communism, and the post-communist transformation,[154] rather than accepting to understand Polish constitutionalism *per se*. However, another potential claimant to the title of first modern constitution could be the Danish *Lex Regia* of 1665, though this was notably written by an absolute monarch.[155] Another could be the Constitution of Pylyp Orlyk (also known as the Bendery Constitution or the Pacts and Constitutions of Rights and Freedoms of the Zaporizhian Host of 1710), which contains some "modern" constitutional edifices such as separation of powers and could be considered democratic relative to the time and place in which it was written.[156]

Thus, what it means to be "constitutional" is largely anachronistic and reflects what the Western, democratic world expects "the Constitution" to be *now*, rather than a more nuanced understanding of what constitutionalism *would have meant* in its own relative sociohistorical context. Indeed, much of the whole concept of "the Constitution" seems to be implicitly grounded in the presumed continuation of political thought and practice from the Greco-Roman world down through Western Europe, where the European and Anglo-American model began to diverge in the 16th century.

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[153] Linda Colley. 2014. "Empires of Writing: Britain, America and Constitutions." *Law and History Review* 32(2): 237-266; Charles Howard McIlawin. 1940. *Constitutionalism Ancient and Modern.* Cornell University Press: Ithaca; C.F. Strong. 1963. *History of Modern Political Constitutions*. New York: Capricorn Books.

[154] For a small subset of the recent literature in English, see: Artūras Tereškinas. 1996. "Reconsidering the Third Of May Constitution and the Rhetoric of Polish-Lithuanian Reforms, 1788-1792." *Journal of Baltic Studies* 27(4): 291-308; Marian Hillar. 1992. "The Polish Constitution of May 3, 1791: Myth and Reality." *The Polish Review* 37(2): 185-207; Mark F. Brzezinski. 1991. "Constitutional Heritage and Renewal: The Case of Poland." *Virginia Law Review* 77(1): 49-112; W.J. Wagner. 1991. "May 3, 1791, And the Polish Constitutional Tradition." *The Polish Review* 36(4): 383-395.

[155] Pasquino, 2013, "Classifying Constitutions", pg. 1003.

[156] Mączka Łukasz. 2012. "Filip Orlik i jego Konstytucja." Master's Thesis, Jagiellonian University Repository, Wydział Studiów Międzynarodowych i Politycznych; "June 28 – Constitution Day of Ukraine." Ministry of Foreign Affairs of Ukraine. Accessed 3- Feb. 2021 (https://web.archive.org/web/20170131051947/https://mfa.gov.ua/en/news-feeds/foreign-offices-news/48775-deny-konstituciji-ukrajini); Omeljan Pristak. 1998. "The First Constitution of Ukraine (5 April 1710). *Harvard Ukrainian Studies* 22: 471-496; "The Bendery Constitution (abridgment)." In Ralph Lindheim and George S.N. Luckyj. *Towards Intellectual History of Ukraine: An Anthology of Ukrainian thought from 1710 to 1995*. University of Toronto Press: Toronto.

In the 18th century the United States then broke off from English law as well as these larger trends in constitutionalism as the first "modern" (i.e., written) constitution, becoming a dominant force in 19th century constitutionalism. While the writtenness of the American Constitution and the general structure of distinguishing normative preambles from the main text is quite common,[157] the American system of separation of powers has not really been reproduced, with more governments combining some kind of written constitution with a parliamentary system, more a synthesis of the French and British systems.[158] In addition to structural differences, modern constitutions have become increasingly explicit in the establishment of positive, enumerated rights, with the American Constitution being mostly negative freedoms with a small addendum of positive freedoms in its bill of rights, to most recent "post-liberal" constitutions in Latin America or post-communist nations essentially consisting of hundreds of positive rights.[159] Regardless of where a modern constitution exactly fits on this spectrum, there may be said to be many attendant "norms"—such as separation of church and state (the religious from the political-constitutional), internal divisions of political and institutional power (the political from the constitutional), and favoring written law from oral or customary law, *inter alia*—precluding the political and legal thought of societies that violate one or more of these norms from being considered "constitutional" *per se*, such as the Islamic world, the Far East, pre-colonial Latin America, Polynesia, Africa, etc.

If the concept of "modern constitutionalism" is sufficiently narrowed as some mix of American or French style written constitutions combined with a British parliamentary structure, much of this concept follows Paine's assertion that constitutionalism precedes government.[160] However, this would not explain why the Ukrainian one is not considered more highly, as it seems to broadly follow many of these principles outlined above, even if perhaps the structure may be different. Another question could be whether "modern" constitutions are those which have long duration, carrying over from the past into the "modern" era. If so that certainly explains the American one, but not the absence of the 1791 Polish-Lithuanian Constitution in favor of the 1791 French one. Perhaps, it is merely the case that constitutional history—as arguably all histories—merely reflects the (international) power structures of the time when they were written. Poland-Lithuania and Ukraine have been considered backward, unimportant, and/or insufficiently Western for much of their history; furthermore, for much of their history their constitutional past has been left without defenders, especially under the rule of foreign empire.

The most recent phase of foreign empire over what was once Poland-Lithuania was the Soviet sphere of influence, which generally—though not always—took a systematic approach to the destruction of local history and pre-Soviet constitutional and political

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[157] Voermans et al., 2017, *Constitutional Preambles*, pgs. 1-2, 13-14.

[158] Rogers M. Smith. 2020. "Conclusion." In Rogers M. Smith and Richard R. Beeman, eds. *Modern Constitutions*. University of Philadelphia Press: Philadelphia, pg. 298.

[159] Jorge Farinacci-Fernós. 2018. "Post-Liberal Constitutionalism." *Tulsa Law Review* 54(1): 1-48; Jorge Farinacci-Fernós. 2017. "When Social History Becomes a Constitution: The Bolivian Post-Liberal Experiment and the Central Role of History and Intent in Constitutional Adjudication." *Southwestern Law Review*, 47(1): 137-178.

[160] Jan-Erik Lane. 1996. *Constitutions and political theory.* Manchester University Press: Manchester; McIlwain, *Constitutionalism, passim*.

institutions or at the selective reinterpretation of them as part of an overall thesis of historical stages of development toward the inevitability of socialist triumph. Despite Marxism and socialism—particularly the centralized vision of Stalin as a kind of neo-Russian imperialism—being weaker in Poland compared to other Eastern bloc nations such as Eastern Germany or Ukraine, [161] there is no doubt that it played a role in shaping stereotypes and understanding about Polish-Lithuanian Constitutional history, particularly the 3 May Constitution, often in a contradictory manner.[162]

Unfortunately, the problem of placing the Polish-Lithuanian Constitutional tradition is not such a simple historiographical problem of lying outside what is properly considered to be "the Western constitutional canon." Instead, it is a deeper problem: the question of determining constitutionalism itself.

II. Problematizing the Concept of a "Constitution"

The term "constitution" is quite problematic for modern political and legal theory due to its multiplicity of meanings. When considering "constitutional" questions, constitutions are treated as both *explanans*—that which explains or answers a question—and *explanandum*—that which is being explained or asked about. In the former case, a "constitution" would be the reason why a legal outcome is the way that it is, whilst in the latter a "constitution" is that which is determined through the process of legal questioning or reasoning. A common understanding of a constitution is what determines or organizes the institutions or ideas within a society: to be "constitutional" in the legal system means to be compatible with the constitution, whereas "unconstitutional" has the opposite meaning. However, if the constitution is that which holds all legitimacy and is that which shapes or produces—literally *constitutes*—society, then where is the source of *its* legitimacy? Where is the foundation of its foundation? How does one know that which legitimates is itself legitimate? To understand the importance of the Polish-Lithuanian Commonwealth's impact on constitutionalism, it is necessary to delve deeper into the concept of a constitution itself, that is, to not accept a constitution as "given" but to think of how and why a constitution is. It is therefore necessary to problematize the concept of "constitution" by acknowledging a distinction between "constitution" and "constitutional" on the one hand and "constitutionalism" and "constitutionalist" on the other. A constitution is an internal, specific definition in that it applies to one specific constellation of institutions, whereas constitutionalism is an external definition, general definition to compare across constitutions in various countries or political contexts. For example, both Poland and the United States

[161] Apocryphally, Stalin once compared the imposition of communism on Poland to putting a saddle on a cow. To put it mildly, Poland and Lithuania had difficult relations with Muscovy, living under the specter of invasion for the better part of a thousand years. For a more in-depth treatment of the topic, including more detailed analysis of political and economic institutions' persistence, see: J. Patrick Higgins. 2020. "Exogenous institutional change as coercion and the ideological neutrality litmus: The case of Polish communism." In Maciej Chmieliński and Michał Rupniewski, eds. 2019. *The Philosophy of Legal Change: Theoretical Perspectives and Practical Processes*. Routledge: New York and London, pgs. 183-199.

[162] For example, celebrating the 3rd of May as Polish Independence Day was obviously banned, but from time to time publications were allowed to be published that viewed the 3 May Constitution in a positive light, for example: Emanuel Rostworowski. 1966. *Ostatni król Rzeczypospolitej: geneza i upadek Konstytucji 3 maja*. Warszawa: Warszawa Wiedza Powszechna, pgs.219-240.

have constitutions, but they are both within the category of written constitutionalism: within the United States or Polish constitutional law "the type" of constitution is not important for any given case, the type only becomes important in constitutional theory when comparing across political systems.

Before approaching more general conceptions of constitutionalism, it is important to briefly and critically address some contemporary understandings of it. First of all, modern constitutionalism is often (over-)simplified into broad categories such as "written" and "unwritten" or "civil law" vs "common law" or "common law vs continental law", "canon law vs civil law", etc. The written vs unwritten distinction refers to whether or not a central "constitutional" text exists, while the latter distinctions are categorizations according to legal sources. The second matter is perhaps more easily dealt with by acknowledging that such categories are too simplistic. Scholars such as Julia Rudolph,[163] R.H. Helmholz,[164] and J.G.A. Pocock,[165] *inter alia*, have pushed back against such a strong distinction, arguing that England was always a complex overlapping of legal systems, with natural law, civil law, canon law, and Roman law all contributing to the evolution of the common law away from its medieval foundations. Thus, the distance between common law and civil law is not so great as one may simply presume.

Returning to the question of "writtenness" is something more problematic. The most-often cited and easiest differentiation between "written" and "unwritten" constitutions is the United States Constitution and the "British Constitution." Nations that have a central, codified document such as a civil code, act, or, most simply, a Constitution are clearly categorized as written, whereas those nations possessing several documents are clearly categorized as unwritten. This is somewhat misleading in that what is most important is not the name of the main document, nor the existence of multiple documents, but rather the relationship between the legal texts. In the case of the United States, each state has its own constitution, and many are also in possession of civil codes.[166] Similarly, there is also a US Federal Code, to which all the states are obliged to follow. In addition, there are separate regulations issued by executive branch agencies, as well as decisions by Federal courts, and treaties to which the United States becomes a party.[167] The United Kingdom has a similar list of constitutional documents, such as the *Magna Carta* (1215), the Bill of Rights (1689), the Act of Union (1707), the Human Rights Act (1998), Acts of the Scottish Parliament (1999-

[163] Julia Rudolph. 2013. Common Law and Enlightenment in England, 1689-1750. Boydel and Brewer: Woodbridge, pgs. 164-169.

[164] R.H. Helmholz. 2016. "The Myth of Magna Carta Revisited." North Carolina Law Review 94(5): 1475-1494; R.H. Helmholz and Vito Piergiovanni, eds. 2009. *Relations between the ius commune and English Law*. Soveria Mannelli (Catanzaro) : Rubbettino; R.H. Helmholz. 2001. *The ius commune in England: Four Studies.* Oxford University Press: Oxford and New York; R.H. Helmholz. 1990. "Continental Law and Common Law: Historical Strangers or Companions?" *Duke Law Journal* 6: 1207-1228.

[165] J.G.A. Pocock. 1957. *The Ancient Constitution and the Feudal Law*. Cambridge: Cambridge University Press. For a discussion of Pocock's "New British History" as reconceiving Great Britain as a fluid and dynamic system in constant dialogue with Europe and the Americas, see: David Armitage. 1999. "Greater Britain: A Useful Category of Historical Analysis." *The American Historical Review* 104(2): 427-445.

[166] "State Civil Codes." Legal Information Institution. Cornell Law School: New York. Accessed 1-Feb. 2021. (https://www.law.cornell.edu/wex/table_civil_code).

[167] For the most recent US Code, see: *United States Code*, 2018. United States Government Publishing Office. Accessed 1-Februrary 2021. (https://www.govinfo.gov/app/collection/uscode/2018/).

present), Acts of the Northern Ireland Assembly (2000-2002, 2007-Present), European Union (Notification of Withdrawal) Act (2017), etc. So if both the United States and the United Kingdom both have a sophisticated complex of legal acts covering national law, devolved local law, and international obligations, why is the United States' Constitution so distinctly considered to be "written" whereas the British one is considered unwritten? Why is not the most recent act of Parliament considered as "the" current United Kingdom Constitution? Given that many nations fall into the same category of having complex international and domestic legal entanglements, the question is not trivial.

The solution is to problematize the concept of constitutionalist "writtenness" itself: the true goal of a written constitution is to prevent arbitrariness. As Thomas Paine described it:

> A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government.[168]

His defense of writtenness is also an opposition to arbitrariness. Writtenness is a partial antidote to said arbitrariness, but it itself is an insufficiently clear criterion. Better would be to replace writtenness with "stand-alone-ness" in the sense of a fixed text. How "stand-alone" the United States Constitution is is something that is up for debate. If it is accepted that the United States Constitution does not stand alone, but rather requires a variety of secondary texts to elucidate its meanings, then we may suggest something of a "constitutional system" in which other texts may be "constitutional" in that they shed light on or clarify the "Constitution" but are not *the Constitution* themselves. These constitutional texts remain inferior in the sense that their "constitutionalness" is granted to them by their *a posteriori* connection and usefulness as instruments for interpreting "the Constitution".

So far, our analysis has restricted itself to an external view of a constitution, but distinguishing constitutionalism from a constitution begs the question: what if we extend such distinctions into a constitution itself? In other words, is a constitution an ontologically level playing field, or are there different levels of constitutionality *within* a constitution? If we reflect back on the United States Constitution, such distinctions become clear. Some sections are *architectonic* in that they are structuring how and why the various functions of government operate, such as the House having "the sole power of impeachment."[169] Others provisions seem to be purely arbitrary: why are there only two senators elected from each state[170] and why does one have to be twenty five years old to become a Representative, thirty years old to become a Senator, and thirty five years old to become President? There is nothing particularly significant about these numbers: each state could have four senators, and there could be a minimum of 25 years old to hold all public offices. Perhaps there is some unspoken constitutional norm captured by Oscar Wilde that "with age comes wisdom", but to this one

[168] Thomas Paine. 1945. *The Complete Writings of Thomas Paine*. Collected and edited by Philip S. Foner. The Citadel Press: New York, p.278.
[169] U.S. Con., art. I, §2.
[170] U.S. Con., art. I, §3.

should remember that the second of the half of the quip continues: "But sometimes age comes alone."[171] Age itself is not a sound constitutional principle. Still, some scholars take such provisions seriously simply because they are "found in the Constitution". This may be thought of as a *literalist* understanding of the Constitution: being in a constitution makes a law or provision constitutional.

Another way of thinking about constitutions and constitutionalism is connected with the sense of living constitutionalism as outlined above: that the constitution is not something that is fixed but something that can be changed or altered. In fact, it *is* always changing and developing. This may be associated with constitutions as commands, that is a constitution is what the government does, or perhaps better—the constitution is whatever the current government administration or political consensus says that it is. This is quite close to the ancient understanding of constitutions as command of the sovereign, which shall be explored a little more later.[172]

It is sufficient for now to say that divorcing constitutions from constitutionalism has revealed several different possible constitutionalist schemes for understanding what a constitution is:

1. *Architectonic*: that a constitution is what shapes the political and legal system. This is often associated with written constitutionalism and narrow constitutional interpretation. As we shall see later, this is quite close to—and is something of an heir to the Greek conception of constitutionalism or *politeia*. It is also associated with "modern constitutionalism" beginning with the 18th century: the 1787 American Constitution and the 1791 French Constitution, and so forth. It *may* be thought of as conservative (strict) constitutional jurisprudence, but not necessarily so. The schools of thought that would be most commonly associated with it are textualism, deference to precedent, and originalism.
2. *Instrumental*: that a constitution is what a government does and/or the laws that it makes, that is the law has no intrinsic value or standards but is always in service to another phenomena, e.g., social pressure, political ideology, the whims of a ruling party or dictator, *inter alia*. An extension of this position is that laws are merely social reflections of the time, place, and needs of when they are created and that constitutions should be extremely elastic. This is associated with the classical understanding of synonymity of power with sovereignty such as the Roman Empire and the divine rule of kings but is also consistent with parliamentary supremacy absent any meaningful process of judicial review. It *may* be thought of as liberal (loose) constitutional jurisprudence, but not necessarily so. The schools of thought that would be most commonly associated with it are Marxism, feminism, social constructivism, those that promote social justice, and "living constitutionalism".
3. *Literalist*: that a constitution is a document and that whatever is within that document is automatically constitutional. Here the constitution is clearly the explanandum, wherein a constitution is assumed or taken for granted. A constitution is held to have inherent meaning in of itself. This shifts most of the burden away from speculation about constitutional principles toward constitutional interpretation. It is associated with constitutional approaches

[171] Sreechinth C. 2016. *Oscar Wilde and His Wildest Quotes*. UB Tech, pg. 142.
[172] *Infra* n 185-190.

that heavily rely on texts. An example would be the differing age requirements for certain government offices.[173]

Finally, it is useful to apply these observations to produce a schema to organize constitutional principles, which are associated attempting to understand *what a constitution does*. This particular way of organizing—as presented in the following table—is not the product of some deep theory, but what the author hopes is a reflection of "common sense" constitutionalism, beginning with reflecting on the nature of any structure or action and generalizing various archetypes from it. If an action is to occur, it is only natural to ask the questions: What is to be done? Who is to do it? How are they to do it? And, Why should it be done? The first two may be broadly categorized under the meta-archetypical principle—or borrowing from Jung—the archetype-as-such[174]of *ontology* (what/who/whom?), the third is *epistemology* (how?), and the third is *teleology* (why?). These can broadly be thought of as *constitutionalist archetypes*[175] as such, which are then the basis of the archetypes, with their actual real-world manifestation as constitutional phenomena.

One critical caveat worth considering is that the modern sense of a constitution *vis-à-vis* Thomas Paine presumes the modern conception of the government or state as distinct from both the concept of nation or of the ruler, i.e. that the state is a permanent constellation of institutions that endures beyond any one particular dynasty, ruler, political party, *inter alia*. This is somewhat distinct from *politeia* in that in classical republican thought the concept of community also encompassed modern definitions of politics, religion, economics, *inter alia*, which the modern world has tried to divorce into separate categories. It is also problematic for comparing with the medieval period, in that often the state was entirely

[173] U.S. Const., art. I, §2 and §3.

[174] While the terminology is Jungian, there are major significant differences. Jung distinguished the archetype (as such) from archetypal ideas, with the archetype being an *a priori*, "archaic remnant" or "primordial image" that originates in the human unconsciousness, and is qualitative, rather than qualitative, since in the (unconscious) mind empiricism has no meaning. It is noumenal in the Kantian sense, of which we can only see its impact and extension in the phenomenological world as archetypal ideas. Nevertheless this *a priori* and noumenal nature also means that archetypes have to be clarified within a dialectical structure, that is they are *discovered* and *invented*. Jung also gives something of a history of archetypes in philosophy, tracing Platonic and neo-Platonic ideas down to Kantian empirical categories that simply organize how we think about various phenomena. While Jung places himself closer to Platonic and neo-Platonic ideas, we borrow his terminology whilst placing ourselves closer to the Kantian approach to categories of thought. See: C.G. Jung. 1975. *The Collective Works of C.G. Jung*. Volume 8, *Structure and Dynamics of the Psyche*. Second Edition. Princeton University Press: Princeton, pgs. 154, 167, 179, 182, 265, 277-278, 294-295, 298-299, 584; C.G. Jung. 1980. *The Collective Works of C.G. Jung*. Volume 9, Part I: *Archetypes and the Collective Unconscious*. Second Edition. Princeton University Press: Princeton, pgs. 5, 5f, 30, 40, 43; Carl G. Jung, ed. 1988. *Man and his Symbols.* Anchor Press: New York, pg. 67; C.G. Jung. 2017. *Psychological Types*. Routledge: New York and London, pgs. 348, 369.

[175] The *constitutionalist* vs *constitutional* distinction is yet again important and necessary for clarification and distinguishing from similar ideas, such as David S. Law's work on "constitutional archetypes". Here, he uses archetype in a similar way to refer to "models", but considers constitutions as reflections and derivatives of their political situation. Thus, "constitutional archetypes" are very much dependent on political typology, whereas our approach of constitutionalist archetype seeks to understand what are the components of constitutions *per se*. To refer back to our previous discussion of constitutionalism, ours is in an architectonic sense, whereas Law's is in an instrumental sense. See: David S. Law. 2022. "Constitutional Archetypes." *Texas Law Review* 95(2): 153-243.

dependent on the king as either the holder of all the land with the nobles and the political order entirely dependent on him. Similarly, the king would be connected to the Church,[176] which together would hold all moral authority as well as the capacity to both judge and execute the law, with what we now consider the secular and the religious to be overlapping. As we shall see, many legal acts or specific provisions throughout the development of Polish-Lithuanian constitutionalism actually facilitate the separation of the personage of the king from the "state" as a constellation of institutions, while others serve to limit the power of the church from involving in affairs of property, crime, etc. that do not have explicitly religious foundation. In other words, Polish-Lithuanian constitutional development was in the process of shifting toward *modern, secular* understandings of constitutionalism, politics, law, society, etc. How much to an extent 18th century Poland-Lithuania became a "modern state" is a question that will remain unclear, so it is important to remember that the application of these constitutionalist archetypes is imperfect. A more expansive theory of "meta-constitutionalism" or multiple operational levels of constitutionalism would be necessary to more precisely examine the evolution of "modern" constitutionalism with pre-modern (e.g., "ancient" and "medieval") and non-Western constitutionalism, which is far beyond what we can accomplish here.

[176] Wacław Uruszczak. 2021. *Historia państwa i prawa polskiego. Tom I (966-1795)*. Fourth Edition. Lex a Wolters Kluwer business: Warszawa, pgs. 139-141.

Categorization of "Modern" Constitutional Archetypes and Phenomena

Constitutional Archetype-as-Such	Constitutional Archetype(s)	Phenomena (Examples)
Ontology (What and Who?)	Representation, Participation, and Citizenship	Naturalization
		Role/Rights of Foreigners
		Defining Political Estates
	Sources of Law	Constitutional Continuity with Proceeding Legal Systems
		Engagement with Other Legal Systems
		Religious or Other Legal Doctrines
		Supremacy of a Central Constitutional Text
	Horizontal Organization of Institutions	Separation of Powers
		Personal Union of Kingdoms
		Confederation
	Hierarchical Organization of Institutions	Federalism
		Devolution
	Individual Rights	Enumerated Rights (Positive Freedom)
		Limiting State Power (Negative Freedom)
	Consent and Legitimacy	Will of the People
		Transparency
		Rule of Law
Epistemology (How?)	Decision-Making	Majoritarian Voting
		Supermajoritarian Voting
		Veto Processes
	Court Procedure	Warrants and Arrests
	Attributes or Criteria of Legal Interpretation	Narrow vs Loose Constructivism
		Judicial Review
	Legitimate Processes of Constitutional Change	Amendment Processes
Teleology (Why?)	The Purpose of the State	National Defense
		Justice
		Equality

Given that the author himself is an American, it must be acknowledged that these categories strongly emerged from reflection upon the United States Constitution and the distinctions between the American and British legal systems, however, it is the author's intentions that they are sufficiently broad categories to apply to constitutional systems in general. In other words, in keeping with our method of seeking out the spirit of constitutionalism, the intention and hope is to look at broad constitutionalist archetypes as ideal types. However, the method for this analysis will be hermeneutics in the attempt to create dialogue not only between texts and their histories, but also between the categories of constitution and constitutionalism. As such, these constitutionalist archetypes are not themselves fixed categories, and will be subject to change upon deeper reflection, with the chapters of 16th century, 17th century, and 18th century Polish-Lithuanian constitutionalism providing the opportunity for such a reflection.

Before hermeneutics can approached, however, it is important to produce a more concrete genealogy of the concept of constitutionalism than the one just provided, the intention of which was to paint with as broad of brush strokes as possible. This is the task of the next several sections.

III. Which "constitution"? *Politeia*, *Constitutio*, and Beyond

Any proper discussion of a constitutional text or the set of political and legal institutions that enshrine it should begin with a thorough concept of constitutionalism. Unfortunately, it has quite often been the case that such discussions within politics and constitutional law have left out just such a theoretical specification, much to the impoverishment of the discourse; instead, the meaning of a "constitution" or "constitutionalism" is often merely assumed.[177] However, a casual perusal of the last two thousand years of Western civilization reveals that the *meaning* of a constitution, that is, its place as a *type of law* within the constitutional system, has never been affixed, and, indeed incompatible or outright conflicting understandings have been employed within the broad conceptual umbrella of "the constitution" across societies. Fortunately, there has been something of a renaissance in contemporary constitutional law, where theorizing the nuanced differences between "a constitution", "constitutional" [law], and "constitutionalism" has been taken more seriously, with such diverse subgenres as: renewed interest in classical Greco-Roman constitutionalism,[178] the evolution of Anglo-American constitutionalism and the revival of classical republican ideas in the 17th and 18th centuries[179], the association of

[177] N.W. Barber. 2018. *The Principles of Constitutionalism*. Oxford University Press: Oxford.

[178] Benjamin Straumann. 2016. *Crisis and Constitutionalism: Roman Political Thought from the Fall of the Republic to the Age of Revolution*. Oxford University Press: Oxford; Scott Gordon. 2002. *Controlling the State: Constitutionalism from Ancient Athens to Today*. Cambridge: Harvard University Press; Andrew Lintott. 2002. *The Constitution of the Roman Republic*. Oxford University Press: Oxford; M.J.C. Vile. 1998. *Constitutionalism and the Separation of Powers*. Indianapolis: Liberty Fund; Charles McIlwain. 1947. *Constitutionalism: Ancient and Modern*. Cornell University Press: Ithaca.

[179] Andrea Buratti. 2019. *Western Constitutionalism: History, Institutions, Comparative Law.* Second Edition. Springer: Chatham; John Bowie. 2015. *Hobbes and His Critics: A Study in Seventeenth Century Constitutionalism*. Routledge: New York; Mark A. Graber. 2013. *A New Introduction to American Constitutionalism*. Oxford University Press: Oxford; George Athan Billias. 2009. *American Constitutionalism*

traditional constitutionalism with classical liberal political theory and ideology[180], "revolutionary" or "global" constitutionalism, taking into account the contribution of the Global South and non-Western constitutionalisms in resistance or opposition to Western dominance of international institutions[181], post-Soviet constitutionalism in Eastern Europe[182], post-national or super-national constitutionalism in the European Union,[183] *inter alia*. Though not the direct emphasis of our investigation *per se*, it is nonetheless useful to contextualize this project within this greater discourse and diversifying interest in theoretical approaches to "constitutionalism", as it gives an opportunity to give the achievements of the Polish-Lithuanian Commonwealth a pragmatic dimension, rather than something that is only of interest to Slavists or legal historians.

The beginning of discourse around the concept of "the constitution" and its overall role within the political and legal system—or "constitutionalism", crudely and broadly defined—is connected with the origins of democracy itself in ancient Athens. Though little surviving legal documents exist, much of what is known is through Aristotle's *Athenaion*

Heard Round the World, 1776-1989: A Global Perspective. New York University Press: New York and London; Gary L. McDowell and Johnathan O'Neill, eds. 2006. *America and Enlightenment Constitutionalism*. Palgrave MacMillan: New York; Elizabeth Wicks. 2006. *The Evolution of a Constitution: Eight Key Moments in British Constitutional History*. Hart Publishing: Oxford; George Nolte. 2005. *European and US Constitutionalism*. Cambridge University Press: New York; Robert Justin Lipkin. 2000. *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*. Duke University Press: Durham and London; Bernard Bailyn. 1992. *The Ideological Origins of the American Revolution.* Enlarged Edition. Harvard University Press: Cambrdige, MA and London, pgs. 22-28; David A. J. Richards. 1989. *Foundations of American Constitutionalism*. Oxford University Press: New York; J.G.A. Pocock. 1975. *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition*. Princeton University Press: Princeton.

[180] Barber, *Principles*; Michael W. Dawdle and Michael A. Wilkinson, eds. 2017. *Constitutionalism beyond Liberalism*. Cambridge University Press: Cambridge; Richard A. Epstein. 2014. *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*. Harvard University Press: Cambridge and London; Rusell Hardin. 2003. *Liberalism, Constitutionalism, and Democracy*. Oxford University Press: Oxford; Gordon J. Schochet. 1979. "Introduction: Constitutionalism, Liberalism, and the Study of Politics." In J. Roland Pennock and John W. Chapman, eds. *Constitutionalism*. New York University Press: New York, pgs. 1-15; Charles McIlwain. 1947. *Constitutionalism: Ancient and Modern*. Cornell University Press: Ithaca.

[181] Richard Albert, ed. 2020. *Revolutionary Constitutionalism: Law, Liberty, Power*. Hart Publishing: Oxford; Martin Belov, ed. 2020. *Global Constitutionalism and its challenges to Westphalian constitutional law*. Hart Publishing: Oxford; Salvatore Bonfiglio. 2020. *Intercultural Constitutionalism: from human rights colonialism to a new constitutional theory of fundamental rights*. Routledge: London and New York; Gary Jeffrey Jacobsohn and Yaniv Roznai. 2020. *Constitutional Revolution*. Yale University Press: Hartford; Andrew Arato, Jean L. Cohen, And Astrid von Busekist, eds. 2018. *Forms of Pluralism and Democratic Constitutionalism*. Columbia University Press: New York; Hakeem O. Yusuf. 2014. *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government.* Routledge: London and New York; Said Amir Arjomand. 2007. *Constitutionalism and Political Reconstruction*. Leiden: Boston.

[182] Czeszejko-Sochacki, Zdzisław. 1996. "The Origins of Constitutional Review in Poland." *Saint Louis-Warsaw Transatlantic Law Journal* 1996: 15-32; Ulrich K. Preuss. 1995. *Constitutional Revolution: The Link Between Constitutionalism and Progress*. Globe Pequot Press: Guilford, Connecticut; Douglas Greenberg, Stanley N. Katz, Steven C. Wheatley, and Melanie Beth Oliviero, eds. 1993. *Constitutionalism and Democracy: Transitions in the Contemporary World*. Oxford University Press: Oxford.

[183] Gráinne de Búrca and J.H. H. Weiler, eds. 2011. *The Worlds of European Constitutionalism*. Cambridge University Press; J.H.H. Weiler and Marlene Wind, eds. 2003. European Constitutionalism beyond the State. Cambridge University Press: Cambridge.

Politeia, with *politeia* often being translated into "constitution".[184] Within the context of Aristotle's understanding of politics as a society governing itself, the classical conception of "constitution" is quite close to one of the contemporary uses of "constitution" as meaning "the overall health and wellness of a person", that is the "constitution" is a set of principles, institutions, behaviors, and practices that "constitute" the society and determine its wellbeing. This understanding of constitutionalism as *politeia* continued down into the Roman Republic into the thought of both Cicero[185] and Polybius.[186] The Roman term *mos maiorum* was sometimes equated with *politeia*[187] though sometimes *mos maiorum* has been translated as "constitution".[188] However, when Rome began to transition into an Empire, a different set of laws began to emerge, *the constitutio*, the etymological origin of the modern word "constitution."[189] In his seminal work on constitutionalism, McIlwain points out that there was indeed a change within the understanding of constitutionalism with this etymological shift:

> In the Roman Empire the word in its Latin form [*constitutio*] became the technical term for acts of legislation by the emperor, and from Roman law the Church borrowed it and applied it to ecclesiastical regulations for the whole Church, or possibly from the Roman lawbooks themselves, the term came back into use in the later middle ages as applicable to secular enactments of the time […] At this time, and for centuries after, 'constitution' always means a particular administrative enactment much as it had meant to the Roman lawyers.[190]

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[184] Louise Hodgson. 2017. *Res Publica and the Roman Republic*. Oxford University Press: Oxford, pg. 6; Aristoteles. 2016. *The Politics and the Constitution of Athens*. Translated by Stephen Everson. Cambridge University Press: Cambridge; Verity Harte and Melissa Lane, ed. 2013. *Politeia in Greek and Roman Philosophy*. Cambridge: Cambridge University Press, *passim*; Walter Nicgorski, ed. 2012. *Cicero's Practical Philosophy*. University of Notre Dame Press: Notre Dame, *passim*; Duncan Cloud. 2008. "The Constitution and Public Criminal Law." In J.A. Crook, Andrew Lintoss, and Elizabeth Rawson, eds. 2008. *The Cambridge Ancient History. Volume IX: The Last Age of the Roman Republic, 146-43 B.C.* Cambridge University Press: Cambridge, pgs. 491-530; J.A. Crook, Andrew Lintoss, and Elizabeth Rawson, eds. 2008. *The Cambridge Ancient History. Volume IX: The Last Age of the Roman Republic, 146-43 B.C.* Cambridge University Press: Cambridge, pg. 492; Gordon, *Controlling the State*, pg. 63; Susan Ford Wiltshire. 1992. *Greece, Rome, and the Bill of Rights*, University of Oklahoma Press: Norman, pg. 99; M. I. Finley. 1983. *Politics in the Ancient World*. Cambridge University Press: Cambridge, pg. 25; J.G.A. Pocock. 1975. *Florentine Political Thought and the Atlantic Republican Tradition*. Princeton University Press: Princeton, pg. 169; M.I. Finley. 1971. *The Ancestral Constitution*. Cambridge University Press: Cambridge, pg. 6.

[185] Jerzy Zajadło. 2019. "Fragment Oratio pro Cluentio Cycerona – pierwowzór idei rządów prawa." *Przegląd Konstytucyjny* 2019(1), pg. 28; Eckart Schütrumpf. 2014. "Cicero's View on the Merits of a Practical Life in De republica 1: What is Missing? A comparison with Plato and Aristotle." *Etica & Politica / Ethics & Politics* 2, pg. 396; Nicgorski, *Cicero's Practical Philosophy*, *passim*.

[186] Craige B. Champion. 2013." Polybios on Government, Interstate Relations, and Imperial Expansion." In Hans Beck, ed. 2013. *A Companion to Ancient Greek Government.* John Wiley & Sons, Ltd: West Sussex, pgs.131-145; Craige B. Champion. 2004. *Cultural Politics in Polybius' Histories*. University of California Press: Berkeley and Los Angeles.

[187] Edwin Carawan. 2020. *Control of the Ancient Democracy at Athens*. John Hopkins University Press: Baltimore, pg. 11; Champion, "Polbyius on Government."

[188] J. D. Minyard. 1985. *Lucretius and the Late Republic*. E.J. Brill: Leiden, pg. 11.

[189] Notably, Straumann contests against the simple division of *politeia* as Greek thought passed down into Roman republicanism and *constitutio* as emerging with the Roman empire but argues for a more subtle crossfertilization and transition between the two concepts. See: Straumann, *Crisis and Constitutionalism*, *passim*.

[190] McIlwain, *Constitutionalism*, pgs. 23-24.

Another significant difference between Greek and Roman understanding of law is that the Greeks made no distinction between public law (*ius publicum*) and private law (*ius privatum*) because for the Greeks there was no distinction between the state and society, thus *political* and *social* were one and the same.[191] As the Greeks before them, the Roman conception of the state was rooted in the state as a natural phenomenon, which was very different than modern conceptions that differentiate nature, society, and the state, and therefore tend to focus on whether social order can be deliberately created, as in Smithian-inspired research into spontaneous order[192] or Weberian-inspired[193] research into legitimacy as state monopoly on violence, [194] *inter alia*. Still, the transformation of Rome from a

[191] "The difference just noted between our notion of constitutionality and the antique one is only one aspect of the difference between the modern and the ancient view of the state in general. Before the Stoics, Greeks apparently drew no clear distinction between society and the state, between the social and the civil […] Since under the older conception, the *politeia*, or constitution as we may call it, included not merely a *jus publicum regni* but the whole life of the state, two or three great practical differences between ancient and modern states seem to be logically incident to it, differences that even a slight comparison of ancient and modern constitutional history clearly discloses. First, in the ancient regime there is no remedy for an unconstitutional act short of actual revolution. Secondly, such revolution, when it occurs, is usually no mere modification of the 'public law,' such as Whitelocke's *jus publicum regni*, but a complete overturn of the state's institutions, a change in its whole way of life. It is a social as well as a merely 'political' revolution in our modern narrower sense of 'political.' Aristotle refers to such revolutions as a dissolution of the polities in which they occur; the 'constitutions' and with them the states themselves are destroyed, or rather, actually 'dissolved'. Thirdly, it is this fundamental and far-reaching character of most actual revolutions in Greece, in so many cases touching everything in the state, social, economic, and intellectual, as well as governmental." McIlwain, *Constitutionalism*, pgs. 37, 38.

[192] Adam Ferguson argued that institutions were the "result of human action but not of human design," while fellow Scot Adam Smith formulated his famous "invisible hand" analogy. In his Nobel Prize speech, F.A. Hayek remarked that mistaking well-ordered human interaction resulting from rational planning rather than from emerging from human action without human design was a chief concern of hubris in modern science. For a brief overview of the immense literature on the topic, see: Adam Ferguson. 1767. *An Essay on the History of Civil Society*. T Cadell. pg. 205; Adam Smith. 1776. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Cannan Edition: Metheun, pg. 421; F.A. Hayek. 1974. "The Pretense of Knowledge." *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1974 Lecture.* https://www.nobelprize.org/prizes/economic-sciences/1974/hayek/lecture/ [Accessed 29 July 2022]; Evelyn L. Forget. 2001. "Jean-Baptiste Say and Spontaneous Order." *History of Political Economy* 33(2): 193-218; Steven Horowitz. 2001. "From Smith to Menger to Hayek: *Liberalism in the Spontaneous-Order Tradition*." *The Independent Review* 6(1): 81-97; Peter J. Boettke and Christopher J. Coynne. 2005. "Methodological Individualism, spontaneous order and the research program of the Workshop in Political Theory and Policy Analysis." *Journal of Economic Behavior & Organization* 57(2): 145-158.

[193] Max Weber. Edited and translated by Keith Tribe. 2020. *Economy and Society: A New Translation*. Harvard University Press: Cambridge, pgs. 109, 111, 115-117, 136.

[194] Uruszczak, *Historia państwa i prawa polskiego,* pgs. 29-32; András Sajó and Renáta Uitz. 2017. *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford University Press: Oxford, pg. 23-26; Massimo La Torre. 2017. *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*. Springer: Dordrecht, pg. 59; Bernardo Gonçalves Fernandes and Thomas Bustamante, eds. 2016. *Democratizing Constitutional Law: Perspectives on Legal Theory and the Legitimacy of Constitutionalism*. Springer: Switzerland; Kelly L. Grotke and Markus J. Prutsch. 2014. *Constitutionalism, Legitimacy, and Power*: *Nineteenth-Century Experiences*. Oxford University Press: Oxford; Antoni Abat I Ninet. 2013. *Constitutional Violence: Legitimacy, Democracy and Human Rights.* Edinburgh University Press: Edinburgh; Chris Thornhill. 2011. *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective.* Cambridge University Press: Cambridge; Martin Loughlin. 2010. "What Is Constitutionalism?" In: Petra Dobner and Martin Loughlin. *The Twilight of Constitutionalism?* Oxford University Press: Oxford, pg. 52;

republican city state to a transcontinental Empire necessitated a broader conception of the state and the law than the communitarian terms employed by the Greeks and early Roman republicans. Indeed, Cicero's writings at the twilight of the Roman Republic appears to demonstrate that there was this subtle shift away from an organic to a contractarian understanding of the state:

> Today a constitution is easily identified with a legal document of the same name, arranging public institutions of government. This has not been the traditional meaning. While the Greek city-states had a foundational law, the constitution was about the relationship among social groups: a regulated living together in the political community of people of radically different social status. *Politeia*, in Greek, means the community of citizens in a city/state. It also refers to how the city is run politically. In substance," "this is the meaning of 'constitution' today. In the circumstances of republican Rome, the statesman Cicero (106 bce–43 bce) seems to have used the term first as a reference to a frame of government (*haec constitutio*). Later on it was understood as a compact, an arrangement that enables a society to satisfy certain general requirements of peaceful living together. This remains the function of the contemporary constitution. It can offer 'living together' as 'the guarantee of subsistence-level existence', 'living together' on the basis of mutual respect among equals, or 'living together' based on privilege and submission. In constitutional democracies 'living together' is understood as living in freedom in a manner compatible with the freedom of others.[195]

In other words, for the Greeks *politeia* could mean both a form of government as in Aristotle's typology as well as could also mean how that society was organized. This is similar to how another Greek term is used today: democracy is used in the sense that there are democratic governments, theocracies, dictatorships, *inter alia*, but also that we often say: "we live in a democracy" or "we live in democratic society". It was this particular understanding of constitutionalism as *constitutio* rather than as *politeia* that became the basis for Roman and canon law and eventually medieval constitutionalism,[196] which itself persisted into the 16th and 17th centuries. However, in the 16th and 17th centuries the flourishing of republican political experiments in Europe brought about renewed interest in classical republicanism, and there was a revival of the concept of *politeia* in thinkers such as Thomas Hobbes, John Locke, Jean Bodin, Montesquieu, John Adams, etc.[197] with Pocock drawing attention to the transmission of republican thought from Florence[198] as well as from the Dutch[199] to the Anglo-American tradition. With the advent of the modern distinction between the state/the political and the community/the social, the word "constitution" retained this understanding as a framework for the political and the legal, of constituting these institutions, but in a much narrower and artificial sense, rather than the holistic and natural classical sense. This notion of constitutionalism as limiting the power of the state was part of an emerging

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Louis Henkin. 1994. "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects." In Michael Rosenfeld, ed. *Constitutionalism: Identity, Difference, and Legitimacy*. Duke University Press: Durham and London, pgs. 41-42; Gilles Tarabout and Ranabīra Samāddāra. 2020. *Conflict, Power, and the Landscape of Constitutionalism*. Routlege: London and New York; Michael Rosenfeld, ed. 2004. *Constitutionalism: Identity, Difference, and Legitimacy*. Duke University Press: Durham and London.

[195] Sajó and Uitz, *The Constitution of Freedom*, pgs. 20-21.

[196] Gordon, *Controlling the State*, pg. 116.

[197] Straumann, *Crisis and Constitutionalism*, pg.19; Pocock, *The Machiavellian Moment, passim*.

[198] Pocock, *ibid, passim*.

[199] Pocock, "The Atlantic Republican Tradition," pg.6.

contractarian understanding of the state and political power, and existed in various forms across Europe though often in an incomplete or informal form,[200] but was most pronounced in the Anglo-American or French sense of a (written) constitution, separation of powers, an explicit list of individual rights, etc., which has become dominant in the modern understanding of the term.[201] This constitutionalism goes by several names, "negative

[200] Makiłła distinguishes "fundamental laws" from "constitutions", where the former are often partial or incomplete. These fundamental laws did order the sources of law and give some order to the hierarchy of state institutions, but this was often to confront whatever was the latest problem at the time, rather than anything that could be thought of as a deeper, organizing principle:

"The development not so much of the concept of fundamental laws, which by synonymy began to refer over time to various acts of constitutional importance, but primarily the emergence of laws of this kind fell during the period of the state. The essential feature of the system of this state was the existence of two opposing factors, each of which constituted a separate subject of public law. This dualism was expressed, among other things, in the formation of systemic relations in such a way that the relations between the various factors of the system, especially in the settlement of matters of importance to the state, were necessarily based on contractual relations. The expression of these relations was the adoption and enactment of certain acts, in the content of which, and above all in their purpose, a certain juridical order was established. At the same time, due to the lack of full knowledge, as well as awareness of the possible scope of regulation, these acts were not necessarily comprehensive. Much more often they were partial solutions, ordering only a part of state relations, those in particular that were perceived and considered at the time to be the most important and in need of appropriate regulation. In this sense, it can be assumed that fundamental laws, both as a concept but also as a type of legal acts, preceded the emergence of formal constitutions. However, if it is assumed that the Henrician Articles were fundamental laws, then the decisive issue for determining their nature will be to determine the generic characteristics of both French fundamental laws and also laws, commonly found in Europe, which, due to their nature, were considered fundamental laws.

"Thus, in the process of forming new statutory solutions, in which the concept of "fundamentality" occurred, there was a departure from their original forms of establishment, which were appropriate to the state-dualist model of government. The process of forming laws of this kind was connected with the perception of the states, referred in the theory to the concept of nation or people, as one of the parties to the arrangement already having access to power, or pretending to acquire it based on its corporate nature."

"The evolution of using the term "fundamental" in individual acts from this old formula thus shifted towards the application of the concept of fundamental rights to acts of constitutional significance in the sense of fundamental laws, which have a more general public - or were applied to acts creating a certain more general order of international significance. As a rule, these laws were also already given their own national names, some of which were merely translations of the concept of *leges fundamentales*, such as the German *Grundgesetze*, which included, for example, the norms of the Treaties of Westphalia (1648) relating to internal order in the Reich. In addition to these, provisions began to already appear in this period in acts of a fundamental nature, which included also rights of individuals within the framework of fundamental laws, issued in the form of laws that subjected them to special protection (Grundrechte, English laws)," Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pgs. 375, 388.

[201] MJ.C. Vile clearly draws a thread from Greek and Roman republican traditions down to the modern Anglo-American understanding prevalent today: "The detail of the theories of constitutionalism may be rejected as no longer applicable, but the *ethos* of constitutionalism remains; we still believe in "limited government," but we do not yet see how the limits are to be applied in modern circumstances," Vile, *Constitutionalism and the Separation of Powers*., pg. 12. Steven B. Smith also gives support to this idea: "Constitutions in this modern sense are fundamentally devices for controlling power. The modern constitutional republic is unique in embodying an idea of self-restraint in the name of freedom. It is based on a distinction between private and public, between civil society and the state, between individuals acting as private persons and citizens acting as members of the body politic. This culture of separation—attacked by some, celebrated by others—is the key to modern constitutional government. Constitutional government is necessarily limited government. It deliberately restricts itself to certain public functions, ruling out the governance of such areas as religion, art, science, and

constitutionalism" according to N.W. Barber, "new constitutionalism" according to Tamas Gyorfi, "legal constitutionalism" according to András Sajó and Renáta Uitz,[202] *inter alia*, but common points of criticism are its emphasis on negative freedom and limitation of the state associated with political liberalism and Weber's analysis of the monopoly of force as the basis for the modern state's legitimacy. Instead, its critics argue that this modern sense of a *constitution* needs to be divorced from *constitutionalism* per se, in order to allow for a more positive, active role of the state, whether a return to the original sense of *politeia* or modern emphasis on positive freedoms in socialism, progressivism, feminism, antiracism, or other such broad approaches that embrace a more active state.

Thus far, we have outlined four distinct understandings of "constitutionalism": the sense of *politeia*, that is as a set of principles and institutions that constitute the society/community; the sense of *constitutio*, that is as commands given by the ruler; Anglo-American "negative" constitutionalism that is a modified form of *politeia* albeit one tempered through modern distinction between state and society with the express purpose of limiting the former; and of "positive" constitutionalism, which in some sense seeks to return to *politeia* but emphasizes an expansive role of the state. Interestingly, though *constitutio* dominated Western thought for nearly a millennium, the modern, Western world[203] appears to be interested in a revival of *politeia*, though camps differ whether to emphasize it as a set of defining (limiting) principles or as a wholistic approach to power. To this list should be added a legal positivist sense of constitutionalism, in that any legal provision written in a constitution itself should be understood as "constitutionalism", which would be closer to *constitutio*. We will return to this later in the discussion but suffice it to say for now that even within a constitution, the "constitutionalness"[204] of every provision will not be equal.

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morality. Politics is politics. It is not about telling people how to live their lives, what or how to worship, or what philosophy to adopt. But the decision to self-limit is itself a political decision. It is not written in stone or inscribed in the laws of nature. The distinction between the political and the nonpolitical is not historically fixed. It has varied across time and place, particularly with regard to religious practice and belief. The point for constitutional government is not where the line is drawn, but that it be drawn somewhere. This regime of constitutional self-restraint—like Odysseus having himself bound at the mast—is the highest form of statecraft." Steven B. Smith. 2021. *Reclaiming Patriotism in an Age of Extremes*. Yale University Press: Hartford, pgs. 148-149. However, others are quite critical of the dominance of the Anglo-American model. See: Buratti, *Western Constitutionalism*; Sajó and Uitz, *The Constitution of Freedom.*

[202] Barber, *The Principles of Constitutionalism*; Sajó and Uitz, *The Constitution of Freedom*; Tamas Gyorfi. 2016. *Against the New Constitutionalism*. Edward Elgar: Cheltenham and Northampton.

[203] It should be noted that 20th century imperial models—such as constitutionalism in fascist states, the Soviet Union, China, Africa, or other parts of the non-Western world—would presumably favor the *constitutio* model.

[204] The word "constitutionalness" is somewhat semantically awkward, ugly, and contrived, but also necessary given that the more semantically natural form, "constitutionality" has the common meaning of the determination whether a statute is compatible with a constitution. It is therefore a category of judgment, the semantic version of exercising judicial review. What we are concerned with here is an "ontology of constitutions" in that "a constitution" is not something fixed, but rather an elastic category and highly dependent on specific institutional and historical context. Thus, just as "democracy" has come to mean a broad matrix of potential ideological and institutional factors that nonetheless share some common characteristics such that two or more democracies can be recognized as distinct from each other but still "democracies"—for example, when democracy is taken as a set of internal characteristics, "German democracy" and "Polish democracy" are different flavors, so to speak, but both are generally recognized as closer to each other than either would be to China or to Saudi Arabia. In sum, *constitutionality* asks whether a law is or is not compatible with a *constitution*—and to what degree of

While the distinction between *politeia* and *constitutio* may appear to be academic, it is actually quite important for properly understanding the evolution of the Polish-Lithuanian Commonwealth as a constitutional system. As in other European nation states, the constitutional system of the Rzeczpospolita evolved from a mix of medieval institutions, canon law, and Roman law. When the Seym gathered, it often produced "constitutions" (*konstytucje*), but this was in the sense of *constitutio* rather than *politeia*.[205] However, contemporary scholarship in Polish constitutional history often refers to certain legal acts—1505 *Nihil Novi*, 1573 Henrician Articles, *inter alia*—as constitutional in the modern sense, that is somewhere between *politeia* and "negative" constitutionalism, that is as a document that founds the political and legal order.[206] Indeed, as we shall address in a later chapter, whether or not the Henrician Articles are themselves to be considered as the first constitution (in the "negative" sense) of Poland-Lithuania is a major component of Polish constitutional and political scholarship over the last 150 years.

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either option—, *constitutionalness* asks whether a constitution is compatible with a given understanding of *constitutionalism*—e.g., one-party, totalitarian constitutions as a distinct family from democratic constitutions, and within "democracy" constitutions that govern presidential systems are a different family than those governing parliamentary systems. For more on "constitutionality", see: Gabrielle Appleby and Anna Olijnyk. 2017. "Constitutional Dimensions of Law Reform." In Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge, and Margaret Thornton, eds. *New Directions for Law in Australia: Essays in Contemporary Law Reform*. Australian National University Press: Canberra, pgs. 387-395.

[205] "Today, the term 'constitution' refers only to fundamental law, while in the modern era it is denoted every law passed by Parliament (Seyjm)," Robert Kołodziej. 2021. "Process legislacyny na seymach w czasasach Jan III Sobieskiego (1674-1696)." *Przegląd Sejmowy* 6, pg. 141 n1; "Only in matters hitherto unregulated did the parliament enact individual constitutions, mainly normalizing special proceedings, and intervening in existing civil and criminal law," Izabela Lewandowska-Malec, ed. 2013. *Demokracje polskie: tradycje—współczesność—oczekiwania*. Kraków: Księgarnia Akademicka., pg. 90.

[206] Paweł Wiązek. 2020. "Dwie pierwsze nowożytne, europejskie konstytucje-podobieństwa i różnice." *Opolskie Studia Administracyjno-Prawne* 3: 131-152; Dariusz Makiłła. 2019a. "O doktrynalnych źródłach konstytucjonalizmu w XVI-wiecznej Polsce." In Łukasz Cybulski and Krzystof Koehler, eds. *Retoryka, polityka, religia w Pierwszej Rzeczypospolitej*. Warszawa: Wydawnictwo Naukowe UKSW, pgs. 39-51; Marek Tracz-Tryniecki. 2019. "Wstęp." *In Andrzej Maksymilian Fredro. Andreæ Maximiliani Fredro. Gestorum populi Poloni sub Henrico Valesio, Polonorum postea verò Galliæ Rege = Andrzeja Maksymiliana Fredry Dzieje narodu polskiego za czasów Henryka Walezego króla Polaków potem zaś Francji*. W tłumaczeniu przez Józefa Macjona. Wstępem i przypisami opatrzył przez Marek Tracz-Tryniecki. Narodowe Centrum Kultury: Warszawa, pgs. 11, 19-20, 125-126, 192-193, 211, 218, 256, 339, 345, 513, 515; Ryszard M. Małajny. 2019. „Geneza konstytucji." *Annales Universitatis Mariae Curie-Sklodowska, sectio G—Ius*. 1: 307-319; Dariusz Makiłła. 2016. "Pole manipulacji czy walka o egzystencję? Realizacja prerogatywy królewskiej wobec sejmików w drugiej połowie XVI i na początku XVII w." *Opolskie Studia Administracyjno-Prawne* 3:45-58; Dariusz Makiłła. 2014. "Artkuły henrykowskie (1573-1576). Zakres wprowadzanych zmian w ustroju Rzeczypospolitej oraz ich ocena." In Jan Dzięgielewski, Krzysztof Koehler, and Dorota Muszytowska, eds. *Rok 1573: dokonania przodków sprzed 440 Lat*. Wydawnictwo Uniwersytetu Kardynała Stefana Wyszńskiego: Warszawa, pgs. 155-168; Wacław Uruszczak. 2013. "Ustawy okołokonstytucyjne Sejmu Wielkiego z 1791 i 1792 roku." *Krakowskie Studia z Historii Państwa i Prawa* 6(3): 247-258; Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa; Izabela Lewandowska-Malec. 2012. "Demokracja deliberacyjna w Rzeczypospolitej Obojga Narodów." *Z Dziejów Prawa* 5(13): 57-91; Piotr Czarny. 2010. "Poland's History and Adoption of the Constitutional Law." *East Asian Law Journal* 1(1): 105-116; Dorota Pietrzyk-Reeves. 2010. "O pojęciu 'Rzeczpospolita' (*res publica*) w polskiej myśli politycznej XVI wieku." *Czasopismo Prawno-Historyczne* LXII: 37-63; P. Skwarczyński. 1958. "The 'Decretum electionis' of Henry of Valois." *The Slavic and East European Review* 37(88), pg. 120.

16th century Poland was something of a crossroads, constitutionally speaking, in that both *constitutio* and the modern conception were present. As Uruszczak observes, the legislative proposals that the *szlachta* brought to parliamentary sessions were known as *petitions* (petyty) that would be put for approval by the king, a council of lords, and the deputies. If approved, they would be turned into *statutes*, which became known as *constitutiones* beginning at the end of the 15th century.

> The *szalchta* used the general Seymy to present their own issues and, in particular, to submit their legislative demands, which became the rule in the 16th century. They usually did so in the form of so-called articles (formerly petitions) addressed to the king and the Senat, which initiated the issuance of new statutes at the assemblies with the common consent of its participants - that is, the king, the council lords and the deputies. From the end of the 15th century they began to be called constitutions (*constitutiones*). From the reign of Jan Olbracht (1492-1501), the legislative activity of the Sejm gained particular momentum. Beginning in 1493, most of the Sejmy held until the end of the Jagiellonian era ended with the adoption of constitutions.[207]

Wagner adds futher clarification:

> The term 'constitution' did not have the same meaning attached to it as it does today. Although it was an act having an important significance for the state, it did not regulate all politico-legal relations of the society. It was a broad statute which laid down the principles of one of the main problems of collective life.[208]

These *constitutiones* formed a sort of "common law" (*ius commune*) that was uniform throughout the entire country, other times only to the *szlachta* as a series of privileges (*przywileje*) that they held. Thus, both legal acts from the Seym (konstytucje) and privileges granted by the king were important sources of law. The *ius commune* evolved alongside cannon law as part of the process where the state began to centralize and consolidate.[209] This common law was in some sense very close to *politeia* in that it helped develop a shared solidarity and identity among the *szlachta* and was foundational to their self-understanding as citizens within a community and republic. This role of constitutions as a central point in the formation of the political and national identity of a people continued into the modern age, though notably modern constitutional principles extend to the whole population, rather than a certain group or class.[210]

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[207] Wacław Uruszczak. 2014. "Prawo celem polityki w Polsce Jagiellonów." *Krakowskie Studia z Historii Państwa i Prawa* 1: 159-168.

[208] Wagner, "Some Comments", pg. 56.

[209] "The idea of ius commune appeared in Poland along with canon law. It probably developed in the 15th century, as the centralization of the state progressed. It expressed a growing sense of community among all the nobility of the Kingdom. Ius commune in the legal field corresponded with the idea of "community" (communitas) and "republic" (respublica) in the sense of a common state for all who gained citizenship in the second half of the 15th century and decisively prevailed in the 16th century, when the name Rzeczpospolita began to be used to denote the state.," Wacław Uruszczak. 2008. "Species privilegium sunt due, unum generale, aliud speciale. Przywileje w dawnej Polsce." *Studia z Dziejów Państwa i Prawa* 1, pg. 27.

[210] It should be noted, however, that in the beginning of Anglo-American constitutionalism, rights and privileges were either held out to *de jure* nobility in England and later the United Kingdom and *de facto* nobility by wealthy, white, male landowners in the thirteen colonies and then the United States. In this sense, the oligarchic republican model was present in both the Polish-Lithuanian commonwealth as well as in the Anglo-American worlds.

Uruszczak informs us that this *ius commune* was quite close to contemporary constitutionalism in that it was a government where the law was supreme, even limiting the power of the king. All acts of the king had to be consistent with a higher principle: the rights and freedoms of the people. According to Uruszczak the 1505 *Nihil novi* had many elements that were "constitutional" according to our modern understanding of constitutionalism.[211] Makiłła agrees with Uruszczak, noting how the Henrician Articles were quite similar to other political and legal reforms occurring at that time in Europe as the relationship between ruler and the people became more and more contractarian.[212] However, he goes further than Uruszczak when he comments how the 16th century constitutionalism in the Crown and later Poland-Lithuania feels uncanny to us in that to some degree many of these institutions are quite familiar, surprisingly so. He notes that in many ways, Polish constitutional thought and institutions should be considered to be ahead of their time. For him, the specifically "modern" constitutional instrument is the 1573 Henrician Articles.

> The question of constitutionalism in the political and constitutional traditions of sixteenth-century Poland is both a legitimate question and, perhaps a simultaneously surprising one for some, given that it regards such a remote era. Nevertheless, the statement that we had constitutionalism in the former Republic, seems especially more relevant, given that in the common European tradition, the concept of constitutionalism, as well as its practical functioning, is generally reserved for much later times. It can be assumed, however, that the Polish experience in many systemic or political solutions often preceded European ones. Thus, in the case of constitutionalism, too, it should be considered that it may be similar.[213]

> In the oncoming situation of interregnum, in the Articles was located a source for a different, legal, but at the same time constitutional regulation. They became the *de facto*—although admittedly incomplete—clear foundation of the Republic's system, which in its content was stuck among the other acts existing in the European tradition, which had the character of only fundamental laws. The Articles in their own right already fulfilled the role of a formal constitutional act, thus preceding other similar European solutions.[214]

Makiłła's assessment is problematic in many ways, most significantly in that it risks

[211] "Respecting and duly applying the Polish common law, formed in the 15th century, became in the 16th century the main goal of politics practiced by the *szlachta* through the state's parliamentary institutions, that is, at sejmiki and assemblies, as well as at illegal assemblies, held in particular on the occasion of the common riot, an example of which was the Lwów rokosze of 1537. The king and officials were forbidden to make law a tool in politics and were induced to strictly respect the common law. The politics cultivated in the state that was to serve the law. Note that this idea is close in essence to today's constitutionalism. The modern legal system of the state is based on the Basic Law, or constitution, which should be respected by every act of the authority establishing or applying the law. The same was believed in the Jagiellonian era. The king could issue legal acts, but only those that did not violate the rights and liberties of the commoners. This principle is unequivocally implied in the *Nihil novi* constitution of the 1505 Sejm in Radom," Wacław Uruszczak, "Prawo celem," pg.165.

[212] "The Henrician Articles, as an act of a constitutional nature, thus found its place in the general ideological construction of the Republic's political system, on which it sought to build internal relations in the Republic, linking the ruler with the nation, especially when the basis for the formation of these relations was the election, carried out during the interregnum. Clearly, the essence of the relationship between the ruler and the people making his election became a contract, in which it came close to the models functioning in Europe at the time," Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pg. 366.

[213] Makiłła, "O doktrynalnych źródłach konstytucjonalizmu," pg. 39.

[214] Makiłła, *Artkuły henrykowskie,* pg. 168.

being an anachronistic evaluation, rather than looking at Poland-Lithuania in its own historical context. It was not the only country to demonstrate some of these "modern" elements, and, in fact there are many similarities between 16th and 17th century Polish republicanism and the revival of republicanism throughout Europe during this period. Thus, rather than Poland-Lithuania having unique institutions for the 16th and 17th century, a more plausible hypothesis is to acknowledge that Poland-Lithuania was one of the few surviving members of a dying political tradition on the continent of Europe, a member of an endangered species, rather than a unique unicorn, so to speak. In this sense, the only reason why the Commonwealth was "ahead of its time" was because its would-be siblings were cut off earlier in their development than she was.

Elsewhere, Makiłła is more nuanced and acknowledges that the Henrician Articles' constitutionality was only in a very specific sense, and thus while they served to frame the political and legal system, only did so in a limited way, rather than modern constitutionalism's sense of a single text that founds the entire system. Thus, the Henrician Articles are something of a "half-constitution".[215] Regardless, both Uruszczak and Makiłła highlight this tension and ambiguity within the constitutional discourse of the Rzeczpospolita in the 16th century. This tension persisted throughout the life of the Commonwealth, though by the 18th century it was quite clear that the 1791 Constitution was following the modern understanding of constitutionalism. Nevertheless, it is interesting to note that while the colloquial name became the Constitution of the Third of May, its official title was the *Government Act of the Third of May* (*Ustawa Rządowa z dnia 3 maja*), which is much more aligned with the earlier conception of constitutions as government statutes.

Unfortunately, scholarship within the Polish history of law community seems to follow the broader trend in constitutional and legal scholarship in regularly underspecifying "constitutionalism". This is particularly true for English-language historical scholarship, with Davies for example conflating "constitutional" and "legal" historians.[216] Similarly, while Davies, Frost, and Stone discuss the importance of "constitutional" problems or questions, none of them give a strong definition of what a "constitutional" question is in the first place, and the legal acts such as 1440, 1454, 1501, 1504, 1529, 1543, 1573 are variously referred to as "constitutions" or "constitutional". [217] However, the modern sense of "constitutional" would be most directly applicable to the Henrician Articles (1573), though it is not universally accepted that they were in fact a "constitution." This ambiguity in meaning is quite important, given that the modern understanding of a constitution is a rare event in the history of a nation. Translating *konstytucje* or *constitutiones* as "constitutions" is somewhat misleading, given that there are hundreds of such *konstytucje* contained within the *Volumina Constitutionum*. It would certainly be completely contrary to the modern constitutional

[215] "Thus, it can be considered that the Henrician Articles were, so to speak, acts halfway stuck, primarily formally, and partly ideologically, in acts proper to the late Middle Ages - functionally and partly ideologically, they were already acts of a constitutional nature. Outwardly, they were shaped in the form of a privilege - in fact, they were already a constitutional act, that is, a constitution," *Artkuły henrykowskie*, pg. 393.

[216] Norman Davies. 2005. *God's Playground: A History of Poland. Volume I: The Origins to 1795. Revised Edition.* Oxford University Press*: Oxford*, pgs. 8-9.

[217] *Ibid., passim*; Stone, *The Polish-Lithuanian State*, *passim*. In fairness, none of them are constitutional lawyers nor legal historians, and none were specifically working on a constitutional history of the Polish-Lithuanian Commonwealth.

experience for a new "constitution" to be written every couple of years!

Indeed, we must be wary of an etymological trap of associating "constitutional" and "constitutionalism" with the word "constitution", and indeed the former two concepts may be found within the literature, though under a variety of names such as fundamental laws [*leges fundamentales*][218], cardinal laws [*prawa kardynalne*],[219] basic law [*ustawa zasadnicza*][220], and systematic law [*prawa ustrojowe*].[221] In other words, even though the Polish-Lithuanian Commonwealth did not use the term "constitutional" and the literal translation of "constitution" for them had a different meaning from us today, did not in fact mean that there was not a distinction between laws that were architectonic—that is they shaped the political and legal institutions of their time—and laws that were practical and procedural in nature. The author is certainly not the first to notice the ambiguity within the term *konstytucja* nor the problem with directly translating it, but rather hopes to synthesize these tensions present within the literate as part of an attempt to construct a coherent theory of constitutionalism, and thus contribute to a growing interest in the history of constitutionalism in the Polish-Lithuanian Commonwealth.[222]

For our purposes, "constitutionalism" will follow the modern sense and lie between "negative" constitutionalism and *politeia*. However, it should be noted that this sense of modern constitutionalism is an ideal type and is something that must be constructed, rather than asserted. In other words, we cannot *presume* that simply because the 1791 Polish-Lithuanian Constitution was a "modern" constitution according to the same constitutionalist understanding of the 1787 American and 1791 Constitution that therefore *all* constitutional texts within the history of the Commonwealth follow that same understanding. This

[218] Czarny, "Poland's History and Adoption of the Constitutional Law," *passim*.

[219] The phrase "cardinal law" is generally associated with the latter half of the 18th century. It is addressed in more depth in a later chapter. See also: Jan Godowski. 1941. *Konstytucja Trzeciego Mają: w 150-Lecie Powstania*. Książnica Polska: Glasgow.

[220] Łukasz Godlewski. 2013. "Spory szlachty o dziesięciny i jurysdykcję duchownych na sejmach egzekucyjnych 1562-1565." *Białostockie Teki Historyczne* 11: 51-70.

[221] This is the sense that Pietrazyk-Reeves uses in her book *Ład Rzeczypospolitej*, but in the in the English translation version of the book, *Polish Republican Discourse in the Sixteenth Century*, the section titled "The Political and Constitutional Order" does not actually distinguish these two terms. However, in Stanisław Grodziski's introduction to *Volumina Constitutionum: Volumen 1*, prawa ustrojowego (systematic law) is meant in the sense of legal supremacy and hierarchy of the Crown's laws vs those of the provinces or incorporated areas, rather than as the distinction between laws that are architectonic of the legal and political system. In other words, it was creating a political system, rather than a constitutional order: "ustawodwastwo w zakresie prawa ustrojowego (regulacja stosunku Korony do terytoriów inkorporowanych i łączych się z nią na zasadzie unii)." See: Dorota Pietrzk-Reeves. 2020. *Polish Discourse in the Sixteenth Century*. Oxford University Press: Oxford, pgs. 28-42; Dorota Pietrzyk-Reeves. 2012*: Ład Rzeczypospolitej Polska myśl polityczna XVI wieku a klasyczna tradycja republikańska*. Księgarnia Akademicka: Kraków; Stanisław Grodziski. "Wstęp." In: Stanisław Grodziski, Irena Dwornicka, and Wacław Uruszczak, eds. *Volumina Constitutionum: Volumen 1: 1493-1526*. Wydawnictwo Sejmowe: Warszawa, pg. 31.

[222] Krzystof J. Kaleta, Małgorzata Nowak, and Konrad Wyszkowski. 2019. *Konstytucyjne interregnum: Transformacje porządków prawnych*. Polskie Wydawnictwo Ekonomiczne: Warszawa; Robert Kłosowicz, Beata Kosowska-Gąstoł, Grzegorz Kowalski, Tomasz Wieciech, and Łukasz Jakubiak, eds. 2016. *Konstytucjonalizm, doktryny, partie polityczne: księga dedykowana Profesorowi Andrzejowi Ziębie.* Wydawnictwo Uniwersytetu Jagiellońskieg: Kraków; Marek Piechowiak. 2012. *Dobro wspólne jako fundament polskiego porządku konstytucyjnego*. Biuro Trybunału Konstytucyjnego: Warszawa.

construction will follow a very specific undertaking, a kind of *constitutional hermeneutics*.

IV. Constitutional Hermeneutics as Marriage Between Textualism and Socio-Historical Positivism

To (over) simplify a complex investigation into epistemology, ontology, and phenomenology, among others, what is meant by hermeneutics is simply a process of interpretation that leads to ever-deepening understanding through *disclosure*, that is by bringing the individual to be aware of the context of their own being through conscious reflection and interaction with the world. This process allows one to reach greater authenticity and freedom in their own life, at least in the subjective sense of increasing knowledge of their own condition. Hermeneutics is thus more than interpretation of texts or communication of ideas, but of using these methods correctly in a process of self-actualization.

In law, hermeneutics is useful both within legal theory as well as in practice. In theory, bringing the individual into ever-deepening reflection of themselves as well as the subject that they are studying allows for transcending of traditional dichotomic ways of human thinking about concepts, research programs, methodological hold-ups, etc. In practice, hermeneutics as a method can help judges improve their interpretation by allowing them to engage with law as both concept and text on an ever-deepening level. Both theory and practice bear fruit together in improving how legal scholars and legal practitioners, namely judges, conceptualize and then practice law. This ongoing dialogue is the process of juridical *hermeneutics*, as it is not meant abstractly, but for personal engagement by the individual. The ultimate goal of hermeneutics is to transform local and contextual points of view into general principles, to move away from the subjective to the objective.[223]

> Hermeneutics, however, runs the risk of being unprepared to offer an articulate methodology for legal reasoning. Its main device indeed is that of transforming *topoi*, traditional and contextual points of view, in general principles of law […] In particular, we might say that hermeneutics based on prejudices and very little else is inappropriate to render the justificatory enterprise which judges and lawyers are called to enter into in the context of a *constitutional* political order. Textual "fit" is not sufficient to make citizens aware of judicial decisions' legitimacy claims. The principled core of their ruling should be somehow exposed in order to satisfy those claims and to make also possible widespread understanding and criticism by citizens. A modern constitution – as we have seen in the previous chapter – is not "just" a text or a source; it is an enterprise and a foundational discourse. It is not an "*auctoritas*" only to be "interpreted" and not to be questioned; it is rather the memory of a practice, which in order to be still binding needs to be somehow repeated or "rehearsed". Now, such practice is eminently a discussion about basic principles of justice.[224]

[223] Aharon Barak. 2004. "Hermeneutics and Constitutional Interpretation." In Michael Rosenfeld, ed. *Constitutionalism: Identity, Difference, and Legitimacy*. Duke University Press: Durham and London, pgs. 253-260.
[224] Massimo La Torre. 2017. *Constitutionalism and Legal Reasoning: A New Paradigm for the Concept of Law*. Springer: Dordrecht, pg. 59.

A basic hermeneutic circle[225] is illustrated in Figure 1.1, and broadly consists of three parts. The first is the context (*being-in-the-world* in Heideggerian terminology), in which we are born (*thrown*) and always present. It largely shapes us unconsciously, though we do gain intuition from it (*care*) that compels us forward to know a something through understanding. This object, in the case of law a text, is that which we encounter and interpret. This leads to the second phase of reflection or deeper understanding where our intuition has been transformed into ever-deepening understanding, allowing us to open up a new context (*clearing*). This begins the hermeneutical cycle again. This beginning and ending of the hermeneutical circle is an iterative process without beginning or end in the human condition, though one that has the potential to become more self-aware (authentic) if we think about it clearly and thoroughly. This can be thought of as a hermeneutic spiral, as illustrated in Figure 1.2 below.

Figure 1.1. Constitutional Exegesis

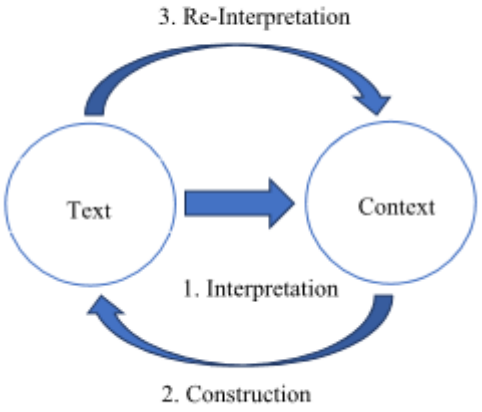
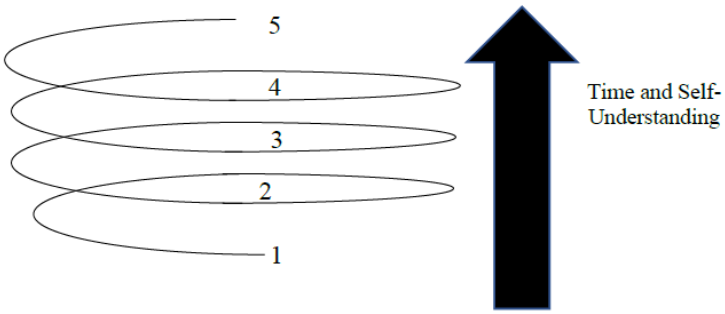


Figure 1.2 Basic Hermeneutic Spiral



The hermeneutic spiral[226] emerged from the work of Wilhelm Dilthey and Martin Heidegger. It represents a never-ending process of iterative hermeneutic circles. As time goes on, the individual progresses from the initial context, 1, through circles 2, 3, and 4 until reaching point 5. However, this process is theoretically infinite, depending on the complexity of the subject matter and the will of the individual to continuously self-reflect. As time increases, self-understanding increases, and the individual is able to "look down" (reflect back) at their progress across time and space. This gives some sense of objectivity, but objectivity as accumulation of one's own experiences and interactions, rather than in some neutral, positivistic sense.

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[225] Though as a concept, the hermeneutic circle is found throughout the works of prominent philosophers Dilthey and Heidegger, among others, this simplified version is inspired by: Anne-Laure LE Cunff. "The hermeneutic circle: a key to critical reading." Ness Labs. Accessed 31 Jan. 2021. (https://nesslabs.com/hermeneutic-circle).

[226] Robert J. Belton. 2017. *Alfred Hitchcock's Vertigo and the Hermeneutic Spiral*. Palgrave MacMillan: Cham; Grant R. Osborne. 1991. *The Hermeneutical Spiral: A Comprehensive Introduction to Biblical Interpretation*. InterVarsity Press. Downers Grove.

The difficulty with the hermeneutic spiral is that it is, by design, an infinite process, or at least one with an ending that is not always immediately obvious or clear. While such an approach is useful for scholars to build research programs throughout their entire careers, it is not practical for what we are looking for: jurisprudential hermeneutics that can actually be used to interpret law, as the interpretation of law, whether in a criminal case or in a more abstract and constitutional sense, cannot be a project of infinite duration. The task then falls to setting boundaries in order to limit the hermeneutic iterations to a manageable process, that is to say, the one who is to be doing the interpretation must know what they are "looking for". This "something that is searched for" can be intuited in two broad senses: first, *internally*, that is to say, the desires or needs of the searcher; secondly, *externally*, that is to say, the nature of that which is being searched for. But which of these options to choose from?

Original-law originalism provides such a method of limitation. Born from the ideologically heated disputes around originalism in the contemporary United States, original-law originalism eschews normative and conceptual questions to focus on practice as much as possible, with William Baude and Stephen E. Sachs developing a "big tent" approach to originalism that is compatible with many different philosophical and constitutional approaches, and which seeks to reconcile interpretation and construction. Further, they argue that legal practice makes originalism dependent on social facts and thus there is no clear, one-size fits all model of constitutional interpretation that will hold for all practical or theoretical cases.[227] Perhaps most importantly, Baude and Sachs conclude that legal facts are historical facts, but that ultimately legal reasoning and historical reasoning must remain distinct.[228]

> Thinking about originalism this way helps redefine the relationship between law and history. If originalism is based on our rules for legal change, then it isn't just about recovering the meaning of ancient texts, a project for philologists and historians. Instead, it's about determining the content of our law, *today*, in part by recovering Founding-era doctrine. That means learning some history, but it also means exercising legal judgment […] originalism is just ordinary lawyer's work.[229]

This allows for the creation of what Sachs refers to as originalism as a theory of legal change, wherein text, interpretation, and history are all able to come together in a meaningful way. Here, Sachs is building upon his earlier work on the concept of "Constitutional Backdrops",[230] which is worth briefly exploring in further detail. According to Sach's theory, when reading a constitutional text, one sometimes notes ambiguities or uncertainties in a text. However, rather than relying on linguistic or public meaning in order to reconcile these ambiguities, which would increase the sphere of construction, the solution is to use these "gaps" in either the text or its meaning to point toward the current background or context in

[227] William Baude and Stephen E. Sachs. 2019. "Grounding Originalism." *Northwestern University Law Review* 113(6): 1455-1492; Barzun, 2017, "The Positive U-Turn".
[228] William Baude and Stephen E. Sachs. 2017. "The Law of Interpretation." *Harvard Law Review* 130: 1079-1147.
[229] Stephen E. Sachs. 2015. "Originalism as a Theory of Legal Change." *Harvard Journal of Law and Public Policy* 38(3): 822.
[230] Stephen E. Sachs. 2012. "Constitutional Backdrops." *George Washington Law Review* 80(6): 1813-1888

order to explain the law. This is not a closed textualist approach, but rather is establishing a dialogue between the text and the context.[231] Baude and Sachs apply their approach to trace out the development of current United States Constitutional law, arguing that it is one system based around the Constitution. Here we are modifying the approach in two ways: first, the span of time works from the 1791 Constitution and works its way backward; secondly, the Polish-Lithuanian "constitution" is understood between the United States and British constitution, i.e., that it is a constitutional system that evolved rather than a specific text. The advantages of such a system, however, are that by creating a kind of closed, textual system, the evolution of a constitution can be assessed neutrally and positively, or at least with ideology given a back seat. That we begin with the text and work our way backward through time, rather than begin with context and work our way forwards, as is how hermeneutics and history is typically understood, is because the unique terrain of our search is defined by the field of law that we practice. In other words, to avoid the infinite iterative pattern of going further and further into the past in order to understand the genealogy of whatever phenomenon interests us at present, we use history in a narrow, targeted way to limit our search.

This is, essentially a reverse of the traditional approach to (constitutional) hermeneutics and is actually closer to classical approaches of exegesis. This constitutional exegesis is illustrated in Figure 1.3, beginning with the text as social fact (present-at-hand) in that we do not, at the beginning, think about it, but take it "as-is". In the act of (1) interpretation we discover that there are points in the text that are unclear: they are ambiguous, they are ill-defined, they explicitly refer to another legal document, they have internal contradictions on points of doctrine or ideology, etc. From here, we must search through the context or constitutional background in or to reconcile or clarify these problems. This leads to a process of (2) construction, with the choice of either "loose construction" or "strict construction" depending on what we could find in the background. This then allows us to re-engage with the text itself in a meaningful new way and produce an entirely new interpretation.

Whereas our previous hermeneutic circle produced a spiral that had the danger of dragging us deeper and deeper into reflection and further and further away from practice, because we already begin with a grounded, narrow social fact (rather than the world *per se*), the result is instead a much narrower, limited "history of legal change". As displayed in Figure 1.3 below, we begin with legal environment 2, which we recognize is not the "first" legal environment, as it has one phenomenon that has endured from the past: the Constitution. The Constitution serves as our "gateway" or lodestar with which to look into the past in a way that is channeled and constrained. As we gaze into the past, other fragments of the constitutional system emerge that we find that persist, parallel to the Constitution, into our own day and age, fragments that help contextualize and clarify the Constitution. Though they are not officially part of "The Constitution" *per se*, they are part of the "Constitutional system" as "Constitutional backdrops" who are elevated to semi-constitutional status by and through the Constitution itself retroactively. Thus, when discussing the continuity of a constitutional system, the Constitution serves as a reference point to orient both the past and

[231] Stephen E. Sachs. 2017. "Originalism without Text." *Yale Law Journal* 127(1): 156-169.

the present: in the former it serves as site for the anchoring of meaning, in the latter as a bridge of meaning that persists into future situations.

Figure 1.3. Constitutional Exegesis

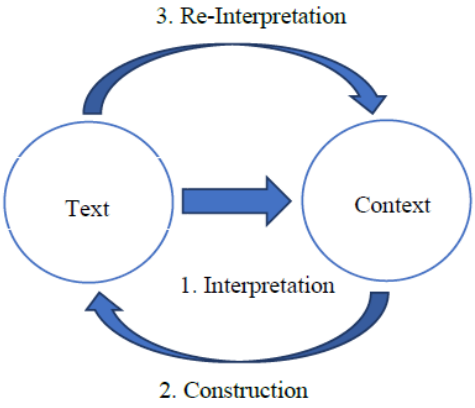
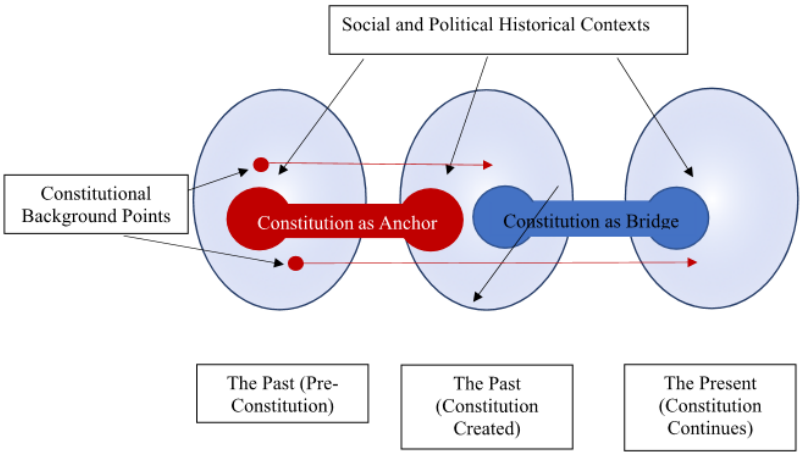


Figure 1.4 The System of Legal Change / Continuity



This method thus allows a rethinking of the distinction between *politeia* and *constitutio* in that whenever *politeia* may become obscured to us, we can use historical background, including *constitutio* in order to illuminate it more clearly. Thus, rather than follow the typical modern distinction of a written vs unwritten constitution, the more appropriate question is the "stand-alone-ness" of a constitutional text versus its dependence on its legal and political context, which acknowledges constitutions as dependent on their environment. Instead of a sharp distinction, it is a sliding scale, a grey area of "quasi-written" constitutionalism, dependent on how easily discernible the core constitutional text is versus its socio-historical and legal context. Constitutions as social constructions to some degree are always partial solutions to contemporary social problems. Historically accidental responses

to equally accidental social facts are neither particularly interesting nor particularly useful in drawing up a constitutional continuity, their political or other uniqueness notwithstanding. All constitutions have pragmatic, political statements necessary for their implementation such as length of terms, specific duties of offices with each division of power, number of government officers, etc. Purely "constitutional" elements would be such as: sources of law, the internal balance, boundaries, and relationships of components to the constitutional system, decision-making mechanisms, mechanisms for constitutional change, etc.

18th century constitutionalism's contribution was making the distinction of constitutional (structure) versus political (content) more explicit: though the Romans did not have a separate constitution as would emerge in the 18th century, there are many comments by Cicero that a *constitutio* is:

> [A] set of rules which were to determine the process of organization and functioning of the Roman state at all levels of the government. These rules were not only considered as legal norms, but primarily as unwritten customs.[232]

Post-Revolutionary America, in a very real sense, was putting new wine into an old bottle, given that this distinction had lasted for thousands of years, albeit in slightly different forms. The main difference was that the rules that shaped the creation of law were not norms, customs, nor some kind of unspoken agreements among the political elites achieved by moral education and public virtue, but an explicit document itself. The Greeks and Romans did not separate the execution of law from the creation of law in terms of branches of government, but instead separated the creation of "general rules" from "particular rules".[233] Montesquieu himself distinguishes *political law* from *civil law*.

> Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. […] [Laws] should be relative to the nature and principle of each government; whether they form it, as may be said of political laws; or whether they support it, as in the case of civil institutions.[234]

> As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions, and the same political law.[235]

This final narrowing of a "constitution" leads us to a direct re-engagement with constitutional literalism—that any law found within a constitutional text is constitutional law— as well as of legal positivism—that law is man-made and must be formally defined by a legal authority that is considered to be socially legitimate. Such *legal* positivism is quite

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[232] Renata Świrgon-Skok. 2020. "Do the Origins of the Constitution Can be Sought in Roman Law? — A Few Comments on the Side Noble of the Cicero's and Polybius' Selected Works." *Przegląd Prawa Konstytucyjnego* 5(57), pgs. 290-291.

[233] Vile, *Constitutionalism and the Separation of Powers*, pgs. 26-27

[234] Charles Louis de Secondat, Baron de Montesquieu. 1777. *The Spirit of Laws*, Vols. I and II in *The Complete Works of M. De Montesquieu*. Translated from the French in Four Volumes. Evans and W. Davis: London, Vol. I, Book I, Chapter III, pg. 8.

[235] *Ibid*., Vol II, Book XXIX, Chapter XIII, pg. 349.

distinct from our own marriage of textualism with socio-historical positivism, which recognizes that much of what is present with the current constitution may be influenced by the surrounding environment or some kind of constitutional background principle that persists, although not always clearly or explicitly. To put it another way, in accordance with broadly understood "negative constitutionalism" a constitutional principle is that which frames or shapes the political and legal spheres.[236] By extension, a provision within a constitution that does not fulfil such a role would not be "constitutional" per se. What would allow such a judgement to be made? It can be nothing other than the juxtaposition of a text with its context, its own history. Hermeneutics allows evaluating the "constitutionalness" of a "constitutional" provision by more properly and more accurately establishing its place within the internal historical development of that constitutional system. Hermeneutics facilitates the transition from the *spirit of law* to the *spirit of constitutionalism*. What does such an exercise entail in practice? To use a simple example from the United States Constitution, the Third Amendment to the Constitution states:

> No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.[237]

It is not only the least-cited of all the ten original amendments to the US Constitution, it has never been the basis of any Supreme Court decision.[238] It is a direct response to the activities of British soldiers on American soil before and during the Revolutionary War, under the Quartering Acts.[239] As such, it clearly seems to only be a "constitutional" provision purely by virtue of existing in the United States Constitution, and is nearly purely a historical artefact. To understand its place in the Constitution, hermeneutics would move backward from the text to its historical and legal background. The context of the Revolutionary War is clear, but what about constitutional background? Much of the American Bill of Rights is in fact inspired by the English Bill of Rights (1689), which occurred as a result of the English Civil War. Despite the strong historical parallels and that the Bill of Rights (1689) is clearly a source for substantial parts of American constitutional law[240], there is no provision in that bill against quartering. As such, it fails to be a "constitutional" provision.

A more complex example is the significant amount of effort that the 18th century Poles-Lithuanians dedicated to the principles of the electoral process in a document published alongside the 3 May Constitution known as the Law on Seymiki [in the original translation of the 3 May Constitution it is referred to as the Law Concerning Dietines or primary Assemblies of Poland] which covered: the time and duration of parliamentary sessions, eligibility of voting at a parliament, how one may become a candidate, how parliamentary

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[236] For a rejection of the clear constitutional-political distinction, see: Marco Goldoni. 2014. "Political Constitutionalism and the Question of Constitution-Making." *Ratio Juris* 27(3): 387-408.
[237] U.S. Const. amend. III.
[238] Radley Balko. July 1, 2013. "How did America's police become a military force on the streets?" *American Bar Association Journal*. https://www.abajournal.com/magazine/article/how_did_americas_police_become_a_military_force_on_the_streets [Accessed 25 March 2021].
[239] "Parliament passes the Quartering Act." *History.com*. http://www.history.com/this-day-in-history/parliament-passes-the-quartering-act. [Accessed 3-25-2021].
[240] Higgins, "Quasi-Writtenness and Constitutionalism," pg. 61.

sessions were to begin, how candidates are qualified, how the leader (or Marszałek) of each parliamentary session is to be elected, how votes are to proceed, how votes are to be counted and who counts them, what to do when a tie occurs, etc. [241] As suggested earlier, the 3 May Constitution was not designed as a standalone document but as more of a constitutional system wherein multiple texts supported each other. At first glance, these particulars of the parliamentary process are easy to overlook as purely historical anecdotes, with little constitutional value, just as the case with the Third Amendment. This was certainly the author's first impression, as the act of voting itself should be a fairly straightforward practice, at least according to modern understanding.

However, a thorough exegesis of Polish-Lithuanian legal and political texts reveals that the situation was substantially more complex and that the process of voting itself evolved significantly over the course of the Commonwealth throughout the 16th and 17th centuries. Whereas parliamentary assemblies and some degree of self-government was common in the American colonies for hundreds of years, the Seym only became a truly independent, functioning body with the *Nihil Novi* constitution in 1505, two generations before the Henrician Articles. In fact, a major political and constitutional struggle over the 16th century was the process of holding Seymy—with kings often refusing to hold them together—and free election was a result of the Great Interregnum, where the issue of voting and voting procedures was extremely contested, such that they became constitutional issues. [242] Thus, while the Seym was a parliamentary body with three estates and two houses and some form of representation over the entire lifespan of the Rzeczpospolita, the period of 1505 to 1573 was when wherein parliamentary rules and the roles of each estate were particularly hotly contested. In this case voting rules and procedures were not simply historically incidental, but in fact fundamental to the evolution of the Polish-Lithuanian constitutional system. Without a detailed hermeneutic inquiry, such could be easily overlooked.

This double-movement can be represented as movement within the historical dimension and as movement within the dimension of meaning, though both movements are narrowing: the historical circle is becoming smaller with each pass through the literature, with interpretation being a serious of concentric constructions of meaning. The historical-textualist interpretation highlights the "opening up" of the literature, allowing for "digging deeper" into the text. On the other hand, the exegetical approach is a way of "digging deeper" or "drilling down" into meaning.

This is illustrated in Figure 1.5 below. On the other hand, the hermeneutical spiral is also decreasing as we drill deeper into meaning, in that the textual provisions of the 1791 Constitution are becoming more specific as they are placed within their proper context. This is illustrated in Figure 1.6.

[241] "Law Concerning Dietines, or primary Assemblies of Poland," *New Constitution*., pgs. 43-82, 88-89.
[242] Makiłła, *Artykuły henrykowskie*, pgs. 18, 38.

Figure 1.5 Historical-Textualist Interpretation of Constitutional Exegesis

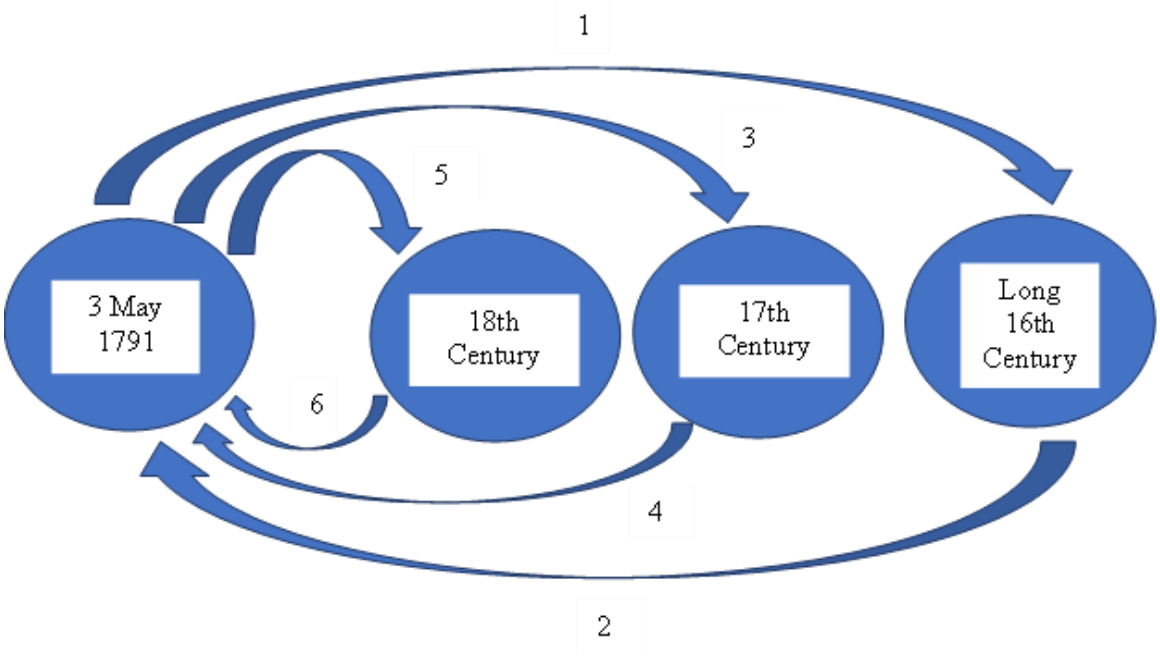
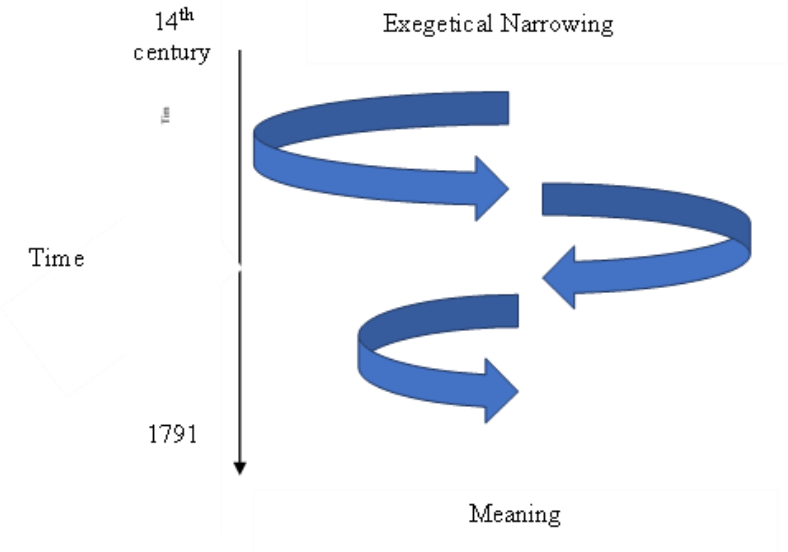


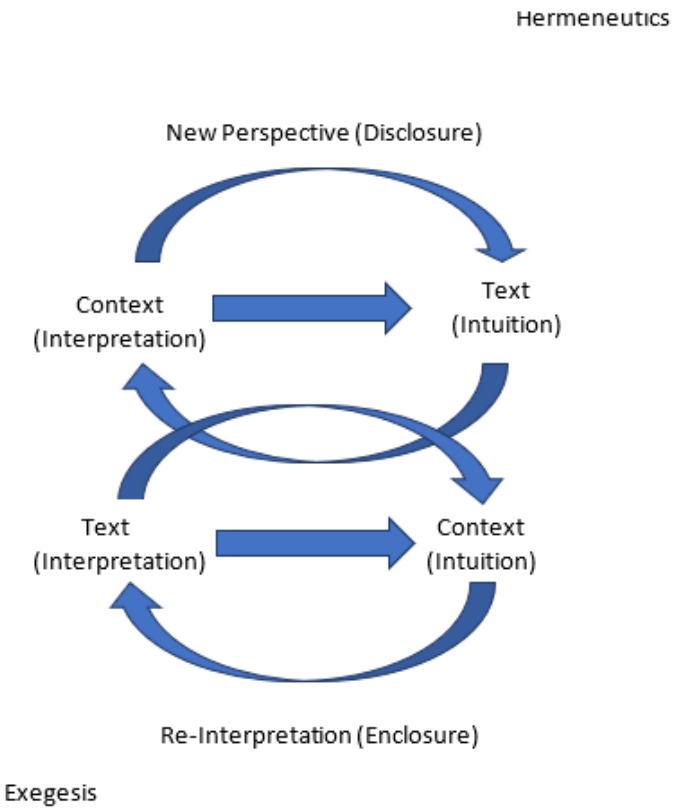
Figure 1.6 The Process of Exegetical Narrowing



Of course, even a perfect exegesis cannot help but be anachronistic to some degree, as all historical comparisons across time are inevitably best attempts at approximate reconstructions of previous eras. As such, while we are actively digging through the past to reverse-engineer our constitutional system, we are also subject to the context in which we

live, are exposed to ideas, develop our biases, etc. Constitutional hermeneutics is thus a simultaneous, double movement from text to context (exegesis) and context to text (hermeneutics), or our conscious, empirical, epistemology of constitutional development vs. our largely unconscious, ideal ontology of socio-historical development. Figure 1.7 demonstrates the totality of constitutional hermeneutics as simultaneous processes.

Figure 1.7. Constitutional Hermeneutics



Even knowing that such a task is never perfectly achievable, the remainder of this study is dedicated to the construction of constitutional exegesis, text to context. As it is an iterative process, the end of each periodization will allow for another return of the interpretative cycle, moving back to the 1791 Constitution as hub of the wheel of constitutional continuity, with each passage deepening our understanding of the original text, its context, and the historical development of the whole constitutional system. Rather than a traditional model of an ever-outward-expanding spiral of hermeneutical circles, this narrow exegesis is intended as a kind of *hermeneutical tightening or contraction of meaning*, beginning with a broad, under-defined understanding of a constitutional provision located within a text and then narrowing its meaning as its internal history—that is the history of a specific constitutional system—is reconstructed.

CHAPTER TWO

Constitution Lost, Constitution Regained: From Constitutionalist Hermeneutics to Constitutionalist Exegesis

I. From 1791 to 1573 and Back Again: A Constitution's Journey

Having established a hermeneutical method that organizes a very specific, instrumental approach to the past, it follows to put it to work in the actual delineation of a constitutional period to analyze. As remarked upon earlier, the last universally accepted constitutional accomplishment of the Polish-Lithuanian Commonwealth was the 3 May Constitution. Thus, the end point of the chronology (the starting point for our historical reflection) is clear, but the beginning of the Polish constitutional system is significantly *less* so. The concept of continuity necessitates the existence of "end points" that are easily recognizable as belonging to the same ontological or conceptual class. In other words, to determine the beginning point of a constitution system, working backward from an actual "modern constitutional" text, we must determine which legal texts are in the same ontological class, that is the same understanding of constitutionalism.

To achieve this, it is necessary to be clear about what is meant by "modern" and a "constitution". While the latter has been established in the previous chapter as a text or act that lays the foundation and rules for the political and legal systems, this will have to be established specifically within the context of the Polish-Lithuanian Commonwealth. That is, we can *assert* that the 3 May Constitution and the Henrician Articles were both constitutions, but what this specifically *means* is an open question. Historiographically speaking, it is worth briefly commenting on the dilemma of "modernness," given that this is the standard by which the history of the Rzeczpospolita has been so often judged. Its critics often posit that it was chaotic or backward or somehow *did not keep up with the times*, while those who defend counter that it has been misunderstood, that it was not behind the times in the 16th-18th centuries, but rather that it was too *far ahead of its time*.[243] Both approaches suffer from the same broad historiosophical error in not properly evaluating it according to its *own* time.

The Polish-Lithuanian Commonwealth was a period of political and constitutional change, and has remained an intense subject of debate and research by Poles and Polonist scholars. Predictably, the debate more or less falls into two camps: those who acknowledge the Henrician Articles as a separate constitution, versus those who do not. Throughout most of the 18th through 20th centuries, the Henrician Articles have generally not been accepted as a constitution and have been interpreted overwhelmingly negatively as something that fatally "set" the system of the Rzeczpospolita in institutional bedrock; instead of being an attempt at codification and reform, it was thus a restriction on the development of the nation and a

[243] Dariusz Makiłła. 2019a. "O doktrynalnych źródłach konstytucjonalizmu w XVI-wiecznej Polsce." In Łukasz Cybulski and Krzystof Koehler, eds. *Retoryka, polityka, religia w Pierwszej Rzeczypospolitej*. Warszawa: Wydawnictwo Naukowe UKSW, pg. 39.

contributor to its downfall.[244] As outlined earlier, when events, ideas, institutions, or practices are viewed ahistorically, rather than contextually, depending on what we are comparing with what, virtually any social achievement can be viewed negatively. To put it concretely, when viewed from 19th century Romanticist or 20th century progressive or Soviet-inspired ideological utopianism, basically every institution that the Poles or Lithuanians developed led to the collapse of the eventual collapse of the Republic. In this sense, the Henrician Articles have been treated no more poorly than most other institutions developed by the Polish-Lithuanian Commonwealth or its attempts to contribute to the political and moral discourse of early modern Europe. Lest one be in doubt that ideas have consequences, Dariusz Makiłła, the most substantive, contemporary advocate of the Henrician articles as a constitution in their own right, has noted how this negative mythology, even though long-since disproven by more thorough and careful historical research, remains powerful, perhaps even the consensus, within Polish public discourse:

> Views of this kind, although corrected in later years by more reliable knowledge, supported by more extensive source research, and freed from the emotional connotations that were in force during the difficult years of the non-existence of the Polish state, generally persisted in Polish science. The evaluation of these acts in the political history of Poland remained *apriori*, permeated by the awareness of the intentions of the drafters of the Articles during the first *viritim* election in 1573.This was also not without influence on the consolidation of their negative reception. A critical assessment of the Henrician Articles was accepted as an axiom in the rich literature on the subject. Generalizing assessments on the Henrician Articles - scattered in many works - were put against the background of the epoch and in the context of knowledge about the future history of the Republic. The negative sense of the Henrician Articles was revealed in the understanding of them, as acts of the political system, adopted and imposed on the elect under conditions of coercion applied to him, which once approved - were to become acts permanently in force in the future.[245]

Fortunately, as Makiłła acknowledges, the tides seem to be turning in this regard, with scholars over the last 30 years or so looking at the Articles and their context with fresh, unbiased eyes.[246] However, one does not have to interpret the Henrician Articles and the Polish-Lithuanian constitutional system negatively to reject the conceptualization of the Henrician Articles as "a constitution", rather than as merely "an important historic document".[247] To answer the question of why the Henrician Articles should be considered as

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[244] "The deprivation, however, of the political system that occurred over time, associated with the weakening of the Republic, was the result of later events. It is not entirely possible to explain the fate of the Republic of Poland by stating that in this, which was manifested in the creation of the Henrician Articles, and not in another approach to the matter, all evil has already begun, leading inevitably towards its collapse. The Henrician Articles, while expressing a certain view of the matter - which was made by the *szlachta* participating in the election - and the subsequent process of their adoption and approval before coming into force, did not at the same time - despite their intention to limit the king's power - or, in fact, to clarify its limits - have to mean such a bungling of the king as to make it impossible for him to exercise his power," Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pgs. 19-20.

[245] *Ibid*, pg. 10.

[246] Juliusz Bardach, Bogusław Leśnodorski, and Michał Pietrzak. 1987. *Historia państwa i prawa polskiego*. Warszaw: Państwowe Wydawnictwo Naukowe, pgs. 216-217.

[247] For example, Paweł Rzewuski gives a relatively positive view of the Polish constitutional system, but acknowledges the Konfederacja Warszawska, the Pacta Conventa, and the Henrician articles as all, more or less

a "constitution" is intimately connected with a particular understanding of what constitutionalism means. At several points in his exhaustive work on the Henrician Articles, Makiłła demonstrates how they were separate legal acts, that is Henryk Walezy (Henry Valois) and Stefan Báthory swore to uphold the articles separately to the oath of the Crown and to the *pacta conventa*.

> Thus, the original function of the Articles as a resolution of the States, which was a draft law containing rights important to the szlachta community at a given time, which they sought to present to the king-elect in the form of a privilege to be issued by him, ceased to apply. Now the Henrician Articles, with all their contents, became a Sejm Act, i.e. a law already in force, which, unless revoked or repealed, was to be in force permanently. The circumstances of the swearing in, and subsequent approval of the acts, concerning rights, liberties and privileges, which took place at the time of King Stephen's coronation, indicated that there was a change in the nature of the Articles. The evolution of the legal form of the Articles from a privilege to a law was essential. Thus, the temporary power of the Articles, which stemmed from a resolution of the States of the Republic, once passed under conditions of interregnum and created to meet the needs of revising laws, was coming to an end, and they were becoming an official act.
>
> Such an understanding of the Henrician Articles, as a separate law appearing in the form of the Sejm constitution, was established in the later practice of both the interregnum and the reigns of subsequent rulers. The rights contained in the Henrician Articles constituted a separate constitution, which as a whole, as well as its individual provisions, had never been repealed individually. Instead, they increased the number of rights to be confirmed at the coronation. Thus, the original assumptions of the interregnum, which were related to the Articles that were prepared during the interregnum as part of the discussion on the revision of laws, were implemented. In practice, however, as the future interregnum showed, the confirmation of the Articles depended on the content of the convent's pacts, understood as an elect's agreement with the people, which was subject to change in each interregnum. The rule remained, however, that each elector person ascending to the throne undertook to confirm the laws in force, among which there was also an act called the Henrician Articles, mentioned, alt admittedly in one sequence with other laws, but having a separate status. [248]

At the same time, it is also a historical fact that the 3 May Constitution does not specifically mention the Henrician Articles themselves. Instead, what it *does* list is a series of legal acts *shared in common* with the Henrician Articles. On the other hand, the Henrician Articles do not reference any specific pre-existing legal acts, and instead refer to prior laws in general. It is instructive to compare the texts side by side:

equally important documents. See: Paweł Rzewuski. 2013. "Umowa Społeczna w Rzeczypospolitej Obojga Narodów." *Przegląd Filozoficzny – Nowa Seria* 3(87): 27-42.

[248] Makiłła, *Artykuły henrykowskie*, pg. 78.

May Constitution 1791[249]

Revering the memory of our ancestors with gratitude, as the first founders of our liberties, it is but just to acknowledge, in a most solemn manner, that all the preeminence and prerogatives of liberty, both in public and in private life, should be insured to this order; especially laws, statues, and privileges, granted to this order by Casimir the Great, Lewis of Hungary, Ladislaus Jagellon, and his brother Witoldus, Grand Duke of Lithuanaia; also by Ladislaus and Casimirus, both Jagellons; by John Albertus, Alexander, Sigismundus the First [Zygmunt I], and Sigismundus August[Zygmunt Augustus] (the last of the Jagellonic race) are by the present act renewed, confirmed, and declared to be inviolable [original Polish spellings added].

Henrician Articles, 12 May, 1573[250]

Therefore, we and our descendants are not to establish anything on our own authority, but instead are most diligently to endeavour that we bring all into unison, considering all the arguments which prove to be in accord with the law, and common liberties, and for the greater benefit of the Rzeczpospolita, and [discarding those] which do not prove to be in accord with the freedoms, laws, and liberties as bestowed to all the States. And if we be unable to bring all to a single and concordant opinion, then our conclusion shall be that which most adheres to the liberties, laws, and customs, according to the laws of every land and the good of the Rzeczpospolita, save for the matters of the Sejm, which are to be settled by way of regular custom, to the knowledge and permission of all the Estates.

[249] *New Constitution of the Government of Poland, Established by the Revolution, The Third of May, 1781*. Article II. 1991. 2nd Edition. Zamek Królewski w Warszawie: Warszawie, pgs. 6-7.
[250] *The Henrician Articles*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. https://polishfreedom.pl/en/the-warsaw-confederation/ [Accessed 23 June 2021].

The text of the 3 May Constitutions stops where the Henrician Articles begin, which certainly presents a puzzle for those who advocate for the Henrician Articles as the first Constitution: if it was held in such a high regard throughout the 17th century, as we will see[251], then why is it not mentioned directly? Did the creators of the 1791 Constitution want to politically distance themselves from the Articles when drafting the new constitution even though many ideas were carried forward, just as the American Constitution does not explicitly mention the failed Articles of Confederation? Or is it a case of "super-precedent" [252] in the sense that they were so well-known and accepted that the drafters of the 1791 Constitution did not see the need to mention them explicitly? The 1791 Constitution does mention the *pacta conventa* and, as Makiłła notes, most of the Henrician Articles became absorbed into the *pacta conventa*.[253] This mystery of constitutional history, *inter alia*, is to be explored in greater detail later, but suffice it to say for now that the key to unlocking it lies within the conception of "constitutionalism" itself and the importance of the distinction of "the political" vs "the constitutional" level of analyses.

Our brief discussion will end by noting that even if one does not consider the 1573 Henrician Articles, to be "a constitution" *per se*, our analysis makes little practical distinction between "a constitution" and a law that is "constitutional". This is certainly the case with the 1791 Constitution, as similar to England, the Polish constitutional system prior to Lithuania was an assemblance of legal acts created by the national legislature the Seym, pronouncements by past Kings, and documents detailing privileges of the *szlachta*, chartered towns, the rights of universities, etc.[254] Many of these are explicitly enumerated in the 3 May Constitution itself while others are stated generally or thematically, as will be outlined below in the next section.

Having established the broad, textual bases for the analysis, it is necessary to outline the thematic bases that will enrichen the analysis borrowing Braudel's concept the *longue durée*[255] in that we are more concerned with themes, concepts, and institutional structures than with precise—and, objectively speaking, arbitrary—dates as mere accounting of how

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[251] Władysław Konopczyński. 1930. "Rząd a Sejm w dawnej Rzeczypospolitej." In *Pamiętnik V Zjazdu Historyków Polskich w Warszawie*. Nakładem Polskiego Towarzystwa Historycznego: Lwów, pgs. 201-215; Tadeusz Piliński. 1872. *Bezkrólewie po Zygmuncie Auguście i elekcya króla Henryka.* Drukarni Uniwersytetu Jagiellońskiego: Kraków, pg. 111; Z. Kaczmarczyk, B. Leśnodorski, Historia państwa i prawa, s. 117; Kallas, Marian. 2019. *Historia ustroju w Polsce.* Wydawnictwo Naukowe PWN: Warszawa, pg. 121; Z. J. Winnicki, Artykuły henrykowskie –pierwsza polska konstytucja „pisana", w: Między historią a prawem. Tom studiów dedykowany pamięci profesora Bronisława Pełczyńskiego (1890–1978), pod redakcją Pawła Leszczyńskiego, Romana Nira i Marka Szczerbińskiego, Gorzów Wielkopolski 2007, s. 41–49; Fredro, *Gestorum*, pgs. 124-125.
[252] Michael J. Gerhardt. 2006. "Super Precedent." *Minnesota Law Review* 90(5): 1224l; Michael Sinclair. 2007. "Precedent, Super-Precedent." *George Mason Law Review* 14 (2): 363-412.
[253] Makiłła,*Artykuły Henrykowskie,* pg. 83.
[254] Dorota Malec. 2016. "The nobility's privileges and the formation of civil liberties in old Poland." In Zbigniew Rau, Marek Tracz-Tryniecki, and Przemysław Żurawski vel Grajewski, eds. *Magna Carta: A Central European perspective of our common heritage of freedom*. Routledge: London and New York, pgs. 127-146.
[255] Fernand Braudel. 1980. *On History*. Translated by Sarah Matthews. The University of Chicago Press: Chicago; Fernand Braudel. 1958. "Histoire et Sciences sociales: La Longue durée." *Annales, Histoire, Sciences Sociales* 4 : 725-753 ; Walt W. Rostow. 1959. "Histoire et Sciences sociales: La Longue durée." *Annales, Histoire, Sciences Sociales* 4: 710-718.

many times the earth has revolved around the sun,[256] or that we are concerned with what is sometimes remarked as "social time".[257] If one broadly follows the tenants of legal positivism that law is a human creation[258] and that there is a distinction between rules that provide the architecture for political, legal, or social behavior (constitutionalness and constitutionalism, morals and ethics) vs rules as instrumentally governing social conduct (political processes, criminal codes, parliamentarianism, procedure, habit, etc.), then the story of the development of a constitutional continuum—that is both constitutionalism and its application via constitutionalness and constitutionality—becomes one of identifying specific events of "constitutional time" or constitutional history. The constitutional history of Poland-Lithuania is quite deep, with many privileges established as far back as the 13th century.[259]

Our discussion begins with establishing the 1791 Constitution as the lens with which to gaze into the past, as the starting point for our constitutional history, before continuing deeper into the historical past.

II. The 1791 Constitution as Lens into the Past

Neither the American nor Polish-Lithuanian constitutions emerged *sui generis*, but as part of an overall constitutional context, built onto foundations that run quite deep. In the United States, beginning with the Puritans, who were some of the first settlers in America as well as the backbone of Cromwellian England.[260] Similarly, the political and legal system in

[256] To clarify, the passage of time is itself not an arbitrary act, but what arbitrariness is instead what arises when one attempts to conflate the pure physical accumulation of objective time with the dynamics of social time. That the French Revolution began in 1789 and lasted for approximately ten years has no significance as a fact unto itself. "Human or social" time may be quite fast or quite slow, depending on the situation, as revolutions can be sharp and quick or slow and bloody. What is important when making such historical periodization is only to be aware of this fact, that while looking at the world decade by decade or century by century is a "cleaner" way to organize the world, in reality looking at the themes that determine a "long-century" may last significantly longer, as the phrases "the long 18th century" generally expands in British historiography from the Glorious Revolution to Waterloo (1688 to 1815), whereas the "long 19th century" only lasts 125 years such as 1789 to 1914. See: Frank O'Gorman. 2019. *The long eighteenth century: British political and social history, 1688-1832.* London: Bloomsburg Academic; Maarten Van Ginderachter and Marnix Beyen. 2012. *Nationhood from below: Europe in the long nineteenth century*. New York: Palgrave Macmillan; Paul Baines. 2004. *The long 18th century.* Bloomsbury Academic: London; David Blackbourn. 1997. *History of Germany: 1780-1918: The long nineteenth century.* Fontanna: London.

[257] In his synthesis of Windelband and Baudel, Wallerstein argues that sociologists should distinguish "historical time" (ideographic approaches) or history as sequences of events from "social time" (nomothetic approaches) or history as a change in social structures. Such distinguishment was intended to allow a greater dialogue between these two approaches, and though Baudel and Windelband's audience was sociologists of history, our work here is sufficiently sociohistorical so as to be consonant with it, though our hermeneutics finds a more concrete socio-historical anchor in "constitutional texts" that are more or less "given". See: Immanuel Wallerstein. 1988. "The Inventions of TimeSpace Realities: Toward an Understanding of our Historical Systems." *Geography* 73(4): 289-297.

[258] H.L.A. Hart. 1994. *The Concept of Law.* Second Edition. Clarendon Press: Oxford, *passim*.

[259] "The Polish Sources." In Rau et al, *Magna Carta*, 2016, pgs. 147-166; "The Lithuanian Sources." In Rau et al, *Magna Carta*, 2016, pgs. 191-226.

[260] There was a particularly strong tradition of constitutionalism in New England, beginning with documents such as the Mayflower compact and onward. See: Nikolas Bowie. 2019. "Why the Constitution Was Written down." *Stanford Law Review* 71(6): 1397-1508; Ryszard M. Małajny. "Geneza Konstytucji." *Annales*

Poland and Lithuania went quite far back as well, into the 13th century and legal, constitutional, or political historians are often concerned with whether these documents should be considered as "constitutions" in their own right. Many of these latter are particularly concerned with questions about the intersection of Polish constitutionalism with Polish parliamentarianism.[261]

As Paweł Wiązek notes, "the constitutional character" that separates a constitution from a regular governmental act has three broad dimensions: first, that it retains a superior position in the hierarchy of legal and political sources such that no act by a lower constitutional order should contradict it and that all acts by a lower order should be interpreted in accordance with the constitutional text; second, that the specific scope of matters regulated by the constitution are what create the principles for organizing the state; finally, that it has a unique name among all legal acts and a specific procedure in which it may be altered.[262] The first idea is clearly referring to what is referred to as the "supremacy" of the United States Constitution as higher than all other legal texts within the nation. The second point is Paine's broad point of constitutions as what constitute the government. The final point is the uniqueness of the text and a specific, legitimate process by which law can

Universitatis Mariae Curie-Sklodowska, sectio G-Ius. 1: 307-319; Klaus Stern. 1985. "The genesis and evolution of European-American constitutionalism: some comments on the fundamental aspects." *The Comparative and International Law Journal of Southern Africa* 18(2): 187-200; David Thomas Konig. 1984. "The Theory and Practice of Constitutionalism in Pre-Revolutionary Massachusetts Bay: James Otis on the Writs of Assistance, 1761." *Dalhousie Law Journal* 8(3): 25-42; Karl Lowenstein. 1969. "Constitutions and Constitutional Law in the West and in the East." *The Indian Journal of Political Science* 30(3): 203-248; Charles Borgeaud. 1892. "The Origin and Development of Written Constitutions." *Political Science Quarterly* 7(4): 613-632.

[261] Paweł Wiązek. 2020. "Dwie pierwsze nowożytne, europejskie konstytucje-podobieństwa i różnice." *Opolskie Studia Administracyjno-Prawne* 3: 131-152; Małajny, "Geneza konstytucji," pgs. 307-319; Błażej Popławski. 2019. "Wystawa '550-lecie Parlamentaryzmu Rzeczypospolitej' w Zamku Królewskim w Warszawie." *Przegląd Sejmowy* 1: 317-328; Andrzej Zakrzewski. 2019. "Between the Union of Lublin and the Mutual Pledge of the Two Nations." *Zapiski Historyczne* 4: 5-40; Wacław Uruszczak. 2018. "Czy rok 1468 można uznać za początek polskiego parlamentaryzmu i z jakich powodów?" *Przegląd Sejmowy* 1: 194-208; Dominik Szulc. 2017. "Nie tylko Piotrków, czyli miejsca polsko-litewskich zjazdów w sprawach unii i granic na tle porównawczym." *Piotrkowskie Zeszyty Historyczne* 2: 59-88; Izabela Lewandowska-Malec. 2012. "Demokracja deliberacyjna w Rzeczypospolitej Obogja Narodów." *Z Dziejów Prawa* 5(13): 57-91; Piotr Czarny. 2010. "Poland's History and Adoption of the Constitutional Law*." East Asian Law Journal* 1(1): 105-116; Wacław Uruszczak. 2008. "Species privilegium sunt due, unum generale, aliud speciale. Przywileje w dawnej Polsce." *Studia z Dziejów Państwa i Prawa* 1: 19-38; Daniel H. Cole. 1998. "Poland's 1997 Constitution in Its Historical Context." *Articles by Maurer Faculty*, 589 https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1592&context=facpub (Accessed 9-Feb. 2021);. Zdziszław Czeszejko-Sochacki. 1996. "The Origins of Constitutional Review in Poland." *St. Louis-Warszawa Transatlantic Law Journal* 1996: 15-32; Jan P. Muczyk. 1991. "One of the First Bills of Rights: Poland's." *Cleveland Bar Association* 62(9): 361-363; Peter Siekanowicz and Vladimir Gsovski. 1964. *Legal Sources and Bibliography of Poland*. New York: Published for Free Europe Committee, Inc.

[262] "Summing up, the constitutional nature of a normative act is determined by three basic features. Firstly: the superior position in the hierarchical system of the state's legal sources, which means that no act of lower order may be inconsistent with it, and that acts of lower order should be interpreted in a way that ensures its implementation. Secondly: the specific scope of matters regulated by this act, which are the principles of the organization of the state, law and the status of the individual and authority. Finally, thirdly: a specific name and a procedure for preparing and adopting, possibly amending or revising its provisions, separate from other acts," Wiązek, "Dwie pierwsze nowożtyne," pg. 136.

be changed and the basis for determining which laws are valid or not.[263]

Having established this difference, what are we hoping to glean from the 3 May 1791 Constitution, exactly? Recall the distinction between "constitutional" and "political" levels of discourse as determining the architecture of the situation vs the activity within the situation itself, we are restricting to the constitutional level, though such a pure separation is impossible, as the previous discussion of hermeneutics has made clear. Out of necessity constitutions have pragmatic, political statements necessary for their implementation such as length of terms, specific duties of offices with each division of power, number of government officers, etc. Purely "constitutional" elements would be such as: sources of law, the internal balance, boundaries, and relationships of components to the constitutional system, decision-making mechanisms, mechanisms for constitutional change, etc.

A complete list of constitutional principles is never possible, as the exact boundaries of human society and its needs are never fixed, neither are they completely expressible, but a modest attempt is made below. This is not intended as a critique of more elaborate attempts to enumerate such rights and their concomitant principles, as what is needed is more careful and thorough historical research, rather than less.[264] Rather, reiterating Lieber, it is a critique of the idea of a perfectly fixed, perfectly enclosed constitutional text in the first place that reduces questions of judgement and interpretation to merely mechanically selecting which is the best law to apply. Instead, it is the frailty and limited nature of the mind and imagination and the complexity of human society that makes such a fixed enumeration impossible, as there will always remain a place for extra-textual sources within judgement.[265] Putting it another way, while we can argue that *a* treatment of the topic of constitutionality is more comprehensive than another, we can never make this claim *definitively* or to judge which degree of comprehensiveness vs. generality is appropriate for each and every research question *a priori*.

III. Turning the Spirit into the Letter: Enumerating Principles in the 1791 Constitution

Naturally, a complete and exhaustive examination of such principles within the sociohistory of the Polish-Lithuanian constitutional and political system is impossible, though an honest attempt will be made to analyze these principles, how they emerged, and how they were altered over time. As two final points: first, simply because these principles are presented as part of one system *does not imply that the system is perfectly internally consistent*. Indeed, such "gaps", inconsistencies, and lack of clarity require contextualization and serve as the whole beginning point of the inquiry. Secondly, due to the constitutional focus of the investigation, every right and privilege will not be listed. Furthermore, these

[263] Sachs, "Originalism as a Theory of Legal Change," *passim*.
[264] For examples of more elaborate legal histories with more extensive commentary, see: Dariusz Makiłła. 2019b. *Historia prawa w Polsce*. Warszawa: Wydawnictwo Naukowe PWN SA; Uruszczak, *Historia państwa i prawa polskiego*.
[265] Francis Lieber. 1839. *Legal and Political Hermeneutics: Or Principles of Interpretation and Construction in Laws and Politics with Remarks on Precedents and Authorities*. C.C. Little and J. Brown: New York, *passim*.

points will be elaborated upon in our discussion of 3 May Constitution in the 18th century, so only a general survey is needed here.

Table 2.1 Enumeration of Constitutional Archetypes in the 3 May Constitutional System, 1791[266]

Text	Phenomenon	Constitutional Archetype
[W]e do solemnly establish the present Constitution, which we declare wholly inviolable in every part […] shall be the standard of all laws and statues for the future Diets.[267]	Supremacy clause	Sources of Law
The law made by the present Diet, entitled, *Our royal free towns within the dominions of the Republic*, we mean to consider as part of the present constitution.[268]		
"All laws and statutes, old and new, contrary to the present constitution, or to any part thereof, are hereby abolished; and every paragraph in the foregoing articles, to be a competent part of the present constitution is acknowledged."[269]		
Whosoever should dare to oppose [this constitution], or to disturb the public tranquility, either by exciting mistrust, or by perverse interpretation of this constitution, and much more by forming insurrections and confederacies, either openly or secretly, such person or persons are declared to be *enemies and traitors to their country*, and shall be punished as such with utmost rigor by the Comitial Trybunał.	Rebellion and Confederate Seymy Declared Illegal	Consent and Legitimacy
		Legitimate Processes of Constitutional Change
The majority of votes shall decide every thing, and every where; therefore we abolish, and utterly annihilate, *liberum veto*, all sorts of confederacies and confederate Diets, as contrary to the spirit of the present constitution, as undermining the government,	Majoritarian Voting,	Decision-Making

[266] As has already been discussed earlier, the 3 May Constitution was never intended to be a document that was completely alone, but was together with the legal acts the "Declaration of the States Assembled", the "Law concerning Dietines, or primary Assemblies of Poland," and the "Laws Concerning Tows and Citizens within the Dominion of the Republic." In that sense, all of them are essentially co-constitutions for the sake of textual analysis. For more on the nuances of this topic, see: Wacław Uruszczak. 2013. "Ustawy okołokonstytucyjne Sejmu Wielkiego z 1791 i 1792 roku." *Krakowskie Studia z Historii Państwa i Prawa* 6(3): 247-258.

[267] 3 May Constitution, Preamble.

[268] 3 May Constitution, art. III: Towns and Citizens.

[269] Declaration of the States Assembled, ¶ I.

and as being ruinous to society.[270]		
[W]hatever liberties, grants, and conventions between the proprietors and villages, either individually or collectively, may be allowed in future, and entered authentically into; such agreements, according to their true meaning, shall import mutual and reciprocal obligations, binding not only the present contracting parties, but even their successors by inheritance or acquisition.[271]	Feudalism	Sources of Law
		Legal Interpretation
[E]specially laws, statutes, and privileges, granted to this order by Casimir the Great [Kazimierz Wielkie III], Lewis of Hungary [Ludwik Węgierski], Ladislaus Jagellon [Władysław II Jagiełło], and his brother Witoldus [Witold Kiejstutowicz], Grand Duke of Lithuania; also by Ladislaus [Władysław III Warneńczyk] and Casimirus [Kazimierz IV Andrzej Jagiellończyk], both Jagellons; by John Albertus [Jan I Olbracht], Alexander [Aleksander Jagiełłończyk], Sigismundus the First [Zygmunt I], and Sigismundus August[Zygmunt Augustus] (the last of the Jagellon race) are by the present act renewed, confirmed, and declared to be inviolable.[272]	Inviolability of Rights	Ennumerated, Individual Rights
	Constitutional Continuity with Proceeding Legal Systems	Sources of Law
[W]e determine the period of every twenty-five years for an *Extraordinary Constitutional Diet*, to be held purposely for the revision and such alterations of the constitution as may be found requisite; which Diet shall be circumscribed by a separate law hereafter.[273]	Legal Change	Legitimate Processes of Constitutional Change
The Holy Roman-Catholic Faith, with all its privileges and immunities, shall be the dominant natural religion. The changing of it for any other persuasion is forbidden under penalties of apostacy.[274]	Dominant religion	Hierarchical Organization of Institutions
Three distinct powers shall compose the government of the Polish nation, according to the present constitution; viz. 1st *Legislative* power in the States assembled. 2nd *Executive* power in the King and the Council of	Division of power	Horizontal Organization of Institutions

[270] 3 May Constitution, art. VI: The Diet, or the Legislative Power, § III, ¶ VII.
[271] 3 May Constitution, art. IV: Peasants and Villagers.
[272] 3 May Constitution, art. II: Nobility, or the Equestrian Order.
[273] 3 May Constitution, art. VI: The Diet, or the Legislative Power.
[274] 3 May Constitution, art. I: The Dominant National Religion.

<table>
<tr><td>Inspection. 3rd Judicial power in Jurisdictions existing, or to be established.[275]</td><td></td><td></td></tr>
<tr><td>The duty of such executive power shall be to watch over the laws, and to see them strictly executed according to their import, even by the means of public force, should it be necessary […] This executive power cannot assume the right of making laws, or of their interpretation.[276]</td><td>Separation of Executive Power</td><td rowspan="2">Horizontal Organization of Institutions</td></tr>
<tr><td>Executive commissions shall have judicial power in the matters relative to their administration.[277]</td><td>Limited Delegation of Judicial Power to the Executive</td></tr>
<tr><td rowspan="3">The Diet, or the Assembly of States, shall be divided into two Houses; viz., the House of Nuncios, or Deputies, and the House of the Senate, where the king is to Preside. The former being the representative and central point of supreme national authority, shall possess the pre-eminence in the Legislature; therefore, all bill are to be decided first in this House.[278]</td><td>Bicameral Legislature</td><td>Horizontal Organization of Institutions</td></tr>
<tr><td>Supremacy</td><td>Hierarchical Organization of Institutions</td></tr>
<tr><td colspan="2">Parliamentary Procedure</td></tr>
<tr><td>In regard to the House of Senate, it is to consist of Bishops, Palatines, Castellans, and Ministers, under the presidency of the King, who shall have but one vote, and the casting voice in case of parity, which he may give either personally, or by a message to the House.[279]</td><td colspan="2">Voting Procedure</td></tr>
<tr><td>As judicial power is incompatible with the legislative, nor can be administered by the King, therefore, tribunals and magistrates ought to be established and elected. It ought to have local existence, that every citizen should know where to seek justice, and every transgressor can discern the hand of national court. We establish […] Primary Courts of Justice for each palatinate and district, composed of Judges chosen at the Dietine […] From these Courts appeals are allowed to the</td><td>Separation of Judicial Power, Territorial Structure of Courts</td><td>Horizontal Organization of Institutions</td></tr>
</table>

[275] 3 May Constitution, art. V: Form of Government, or the Definition of Public Powers.
[276] 3 May Constitution, art. VII: The King, or Executive Power.
[277] 3 May Constitution, art. VIII: The Judicial Power.
[278] 3 May Constitution, art VI: The Diet, or Legislative Power.
[279] 3 May Constitution, art. VI: The Diet, or Legislative Power, §2, ¶2.

high tribunals, erected one from each of the three provinces, in which the kingdom is divided. Those Courts, both primary and final, shall be for the class of nobles, or the equestrian order, and all the proprietors of property.[280]		
[A]s the same holy religion [Roman Catholicism] commands us to love our neighbors, we therefore owe to all people of whatever persuasion, peace in matters of faith, and the protection of government; consequently we assure, to all persuasions and religions, freedom and liberty, according to the laws of the country, and in all dominions of the Republic.[281]	Religious toleration	Enumerated, Individual Rights
Revering the memory of our ancestors with gratitude, as the first founders of our liberties, it is but just to acknowledge, in a most solemn manner, that all the preeminence and prerogatives of liberty, both in public and private life, should be insured to this order [the *szlachta*][282]	*Szlachta*'s public and private rights, by the *szlachta*, for the *szlachta*	
We acknowledge the rank of the noble Equestrian order in Poland to be equal to all degrees of *szlachta*—all persons of that order to be equal among themselves, not only in the eligibility to all posts of honor, trust, or emolument, but in the enjoyment of all privileges and prerogatives appertaining to the said order[283]	Equality before the Law	
All nobles of the equestrian order are entitled to vote in their respective palatinates and districts[284]	Universal (noble voting)	
That cardinal law, *"Neminem captivabimus nisi jure victim,*" we extent to all persons as citizens established in towns.[285]	Extending the right of inviolability[286]	

[280] 3 May Constitution, art. VIII:: The Judicial Power.
[281] 3 May Constitution, art. I: The Dominant National Religion.
[282] 3 May Constitution, art. II: Nobility or the Equestrian Order.
[283] 3 May Constitution, art. II: Nobility or the Equestrian Order.
[284] 3 May Constitution, art. VIII: The King, or Executive Power.
[285] Laws Concerning Tows and Citizens within the Dominion of the Republic, § II: Rights and Prerogatives of Citizens.
[286] It should be noted that the 3 May Constitution extends the *Neminem captivabimus nisi jure victim* from the nobility to the towns, or alternatively refers to the rights of *citizens* in general. However, citizenry was only a subset of the people rather than to the populace writ large.

[W]e preserve and guarantee to every individual thereof personal liberty and security of territorial and moveable property, as they were formerly enjoyed; nor shall we even suffer the least encroachment on either by the supreme national power (on which the present form of government is established), under any pretext whatsoever, contrary to private rights, either in part, or in the whole.[287]	Guarantee of Enumerated Rights	Limitation of Political Power
Every King, on his accession to the Throne, shall take a solemn oath to God and the Nation, to support the present constitution, to fulfil the *pacta conventa*[288]	King's oath, *pacta conventa*	Source of law
The King's opinion, after that of every Member in the Council [of Inspection] has been heard, shall decisively prevail. Every resolution of this Council shall be issued under the King's signature, countersigned by one of the Ministers sitting therein; and thus signed, shall be obeyed by all executive departments, except in cases expressly exempted by the present constitution.[289]	King's power countersigned	Limitation of Political Power
If it should happen that two-thirds of secret votes in both Houses demand the changing of any person, either in the Council, or any executive department, the King is bound to nominate another […] when these Ministers are denounced and accused before the Diet (By the special Committee appointed for examining their proceedings) of any transgression of positive law, they are answerable with their persons and fortunes. Such impeachments being determined by a simple majority of votes, collected jointly by Houses.[290]	Impeachment	Limitation of Royal or Executive Power

[287] 3 May Constitution, art. II: Nobility, or the Equestrian Order.
[288] 3 May Constitution, art. VII: The King, or Executive Power, *New Constitution*, pg. 23. ¶XIII.
[289] 3 May Constitution, art. VII: The King, or Executive Power, ¶ XXVII-XVIII.
[290] 3 May Constitution, art. VII: The King, or Executive Power, ¶ XXXI-XXXII.

While this list is not exhaustive, it is comprehensive enough to give a general survey of the constitutional system. Furthermore, it is clear that several of these categories do not neatly line up with the constitutional archetypes presented in Table 2.1. This is something that shall be worked out in depth over the course of specific chapters explaining the content of law and how these particular legal principles developed, but it is sufficient to say for now that the divergence between theory and practice is both expected and necessary as part of the hermeneutics process, the laws leading to further laws. There is a clear hierarchy of legal sources, with specific legal acts mentioned. There are strong limitations given to the royal power from the legislative body, though within the executive itself the king more or less is unchallenged. Checks against the king come from unanimous disapproval by his ministers, which leads to the legislature stepping in.

As in the British parliamentary system, the lower house is more powerful and is regionally elected. There is something of the institution of king-in-parliament[291], but only for the upper house, which shall consist of both secular and religious authorities. There the king has one vote, and is used to break ties, but many of the senators would have already been quite close to the king, as he was the one who appointed them to their administrative positions throughout the nation, so the upper house was more likely to be an extension of the king's will, rather than as a check to it.[292] Finally, similar to the United States constitution, the judiciary system is somewhat underdeveloped conceptually. Given that the judicial power was the last to evolve as an independent institution,[293] this is not particularly surprising and

[291] According to Makiłła, Konstanty Grzybowski presented the idea that the office of the king had become a part of the Sejm during the election of Zygmunt I and after the death of Zygmunt Augustus in 1572-1573. However, Makiłła cautions that this was due to the very specific situations of interregna, and not a permanent part of the constitutional system. See: Makiłła, *Artykuły Henrykowskie*, pgs. 233-234; Konstanty Grybowski. 1985. "The Three Parliamentary Estates." In: Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pgs. 86-87; Konstanty Grzybowski. 1959. *Teoria reprezentacji w Polsce epoki Odrodzenia*. Warszawa: Państwowe Wydawnictwo Naukowe. See: Mark Brzeziński. 1998. *The Struggle for Constitutionalism in Poland*. St. Martin's Press: New York, pgs. 34-42.

[292] Grzybowski, *Parliament at the Summit of Its Development*, pgs. 93-95.

[293] Of the modern distinction of executive, legislative, and judicial powers, it was the judicial power that emerged last. Generally speaking, most ancient societies had some kind of division between a king and powerful members of the nobility, who sometimes acted individually or as a political bloc. In latter cases the nobility as a body politic served as a check against the power of the king, and as time went on this evolved from sporadic checks against excessive grievances to a more regular council of nobles who advised the king as well as some kind of parliamentary body that formally organized the nobility. In ancient Greece and Rome, the separation was not between the execution of the law and the creation of the law, but rather between making general rules vs. particular rules. The ability to decide between these two types of lawmaking and appointing someone or somebody to make this decision therefore presents an issue of judgment, if only implicitly. True distinction between the powers could only emerge after state diverged from society, and law and sovereignty developed. Legislative power only truly emerged in the Medieval period after it was recognized that men could create law, rather than merely uncover and declare the laws that already existed in nature or were given from divinity and then to execute them. Again, judgement was implicit throughout the executive and judicial functions. Judgement came to be considered a natural continuation of the execution of the law in addition to choosing when a law should be general vs when law should be particular, with this latter understanding very close to what we consider to be "constitutional" today. The former led to concepts such as the monarch as ultimate judge, with His/Her Majesty's justice the basis of common law system. Eventually, the king increasingly delegated responsibility to permanent advisers, who oversaw a justice system that eventually reached full

was generally observed throughout the emergence of modern democracy. The system is also hierarchical, with the Church and the *szlachta* given firm rights. There is a clear contradiction between principles of religious toleration and freedom for non-Catholics while Catholics who change their religion are severely punished, which would not be acceptable in modern democracy.

Perhaps most notably at all, however, is the extensive enumeration of privileges acknowledged from past kings, as well as the *pacta conventa*. However, the exact details of these specific laws and the privileges that they grant are not completely clear, and one would have to be a *szlachcic* well-versed in constitutional history to know their exact details. Contrastingly, the United States Constitutionally formally adopted a Bill of Rights with ten specific privileges outlined[294] and the French Revolution listed specific rights in the second section of the 3 September 1791 Constitution, directly following the Preamble.[295] The difference between the American and French Constitutions and the Polish-Lithuanian Constitution is quite clear: the American and French ones were interested in creating a body of rights for the whole citizenry, whereas for Poland-Lithuania the citizenry was synonymous with the *szlachta*, with one of said Constitution's goals being to expand these rights to the "*royal free towns within the dominions of the Republic*".[296] However, royal free towns were under the personal domain of the king, so in some way it could be argued that this was not the true individual liberty, but rather benefits granted on behalf of the king to his personal subjects. Similarly, the rights of the *szlachta* were not extended to the peasantry, though foreigners or Poles living abroad who returned to the Commonwealth would be granted freedom, rather than automatically enter serfdom.[297] To conclude this strain of thought, it seems reasonable to suggest that the writers of the 3 May Constitution did not need to—or did not see the need to explicitly do so—specifically enumerate rights and privileges, because it was largely a confirmation to the *szlachta* of the privileges that they are already enjoyed. As such, while it is clear that certain parts of the constitution *appear* to be underdeveloped (the judiciary) or vague (mentioning of the *pacta conventa*), it is necessary to begin to reconstruct the entirety of the Polish-Lithuanian Constitutional system in order to reveal if these first impressions really are true, or to uncover solutions to them that evolved in the nation over time.

The remainder of this study is to be an elaboration of these set of archetypes and phenomena, locating them whenever possible, then indicating which are preserved and the way in which they are preserved, and which ones are discarded. This is a positive task of using legal texts and contemporary sources to demonstrate continuity. A further step will be to develop constitutional hermeneutics along two dimensions: first, to examine each text within its context and second, to construct a dialogue of sorts between the 1791 Constitution and the 1573 Henrician articles through the medium of socio-history. Each chapter will roughly treat one century—the 16th, the 17th, and the 18th—though the historical periodization

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independence as a separate power. See: M.J.C. Vile. 1998. *Constitutionalism and the Separation of Powers*. Indianapolis: Liberty Fund, *passim*.

[294] U.S. Const., art. I-X.

[295] 3 September Constitution, Title I: Fundamental Provisions Guaranteed by the Constitution.

[296] 3 May Constitution, art. III: Towns and Citizens.

[297] 3 May Constitution, art. IV: Peasants and Villagers.

will try to follow the development of constitutional principles, rather than simply use political events (wars, deaths of kings, treaties, etc.) to determine when one period begins or ends. The end of the chapters concerning the 16th and 17th centuries will analyze the constitutional principles deduced from the 3 May Constitution, in order to look for their origins. Should any principle be found that no longer is present within the 1791 Constitution, it will be explicitly noted.

The conclusion shall then attempt to present one full turn of this constitutional hermeneutic circle, beginning with the first impressions of the 1791 Constitution—the text in as pure a form as possible—then presenting the results from both the 16th and 17th centuries. This will then be compared again with the principles and the 1791 Constitution to see if any of the dilemmas of ambiguity can be clarified, or new tensions discovered within the 1791 text itself as the analysis turns back onto its source. At long last it will then be possible to present this constitutional hermeneutic circle as an encapsulation of the evolution of the constitutional and political system of the Polish-Lithuanian Commonwealth, that is, as a history of constitutional change.

CHAPTER THREE

The Period of Constitutional Construction
The Henrician Articles and the Culmination of Centuries of Struggle (1374 – 1609)

"*Tu leżą zacne ciała rycerstwa polskiego,*
Pochowane w tym prochu do dnia ostatniego.
Gardła swe położyli dla drogich wolności,
Krew ich drogą rozlano w surowej srogości.
Ojczyznę miłowali jako cni synowie,
Samsiedzi ich pobili, brzydcy wyrodkowie.
Legliście, cni rycerze, moja szlachto droga,
Pożarła was złych ręka Kaimowa sroga;
Nieszczerze z wami poszli bracia nieżyczliwi,
Na waszą śmierć czyhali jak lwi popędliwi.
Mieliście z nie dość mocy, gdy się wam modlili
O zwłokę do ugody, zdradą was pobili.
Legliście dla wolności, garła położyli
Dla ojczyzny, samsiedzi was z świata zgładzili.[298]

I. Pre-Henrician Privileges: A Brief Background

Having established the 3 May Constitution as a reference point for our hermeneutic delving into the past of the Commonwealth, it naturally follows to look at the text itself. Given this, it is perhaps natural to ask "why stop at the Henrician Articles" or—more concretely—the Henrician Article as part of the process of constitutional construction? Why not use the Henrician Articles themselves as the starting point, and then iterate the process further back into the beginning of the Jagiellonian dynasty in the 14th century, or the reunification of the Kingdom of Poland under the Piasts, or the to the beginning of the Piast dynasty under Mieszko I?

From a purely theoretical view, there is no reason why such a method could not be applied to critically reexamine the literature on Polish-Lithuanian legal, constitutional, and political history. Such an exercise would likely lead to fruitful new research and add to a budding literature on the topic. On the other hand, there is a very real reason to be skeptical of whether such a deep analysis would make sense conceptually: that "historical deepness" unto itself is not a sufficient criteria for proper historiosophical reflection. Quite simply, the ideas of "Polishness" and "constitutionalism" may not be elastic enough to cover such a broad historical period, and our line of inquiry is simply not prepared to delve into such a question. Similarly, it may simply not be conceptually tenable to link historic mythology of "Polishness" with practical evaluations of concrete contributions of the Commonwealth for

[298] *Nagrobek pobitego o wolność rycerstwa polskiego pod Guzowem* [fragment] (*Tombstone of the Polish knighthood defeated for freedom at Guzów* [fragment]. "Bitwa pod Guzowem." Muzeum Historii Polski. https://muzhp.pl/pl/e/1920/bitwa-pod-guzowem. [Accessed 28 October 2021].

constitutionalism, just as ever scientific reflection on the nature of immorality, law, and justice does not begin with Cain murdering Abel. Though the territory of Poland today covers much of the same land that Mieszko I and the Piasts ruled in the 10th century, the Kingdom of Poland saw dramatic shifts in terms of geography, culture, and religion over the next 800 years, with many regions fighting to maintain their political autonomy and cultural distinctiveness. Throughout the personal union of Poland-Lithuania under the Jagiellonians as well as the Polish-Lithuanian union after 1569, many of these questions remained unsettled. The execution of law movement, one of the most significant movements within 16th century Kingdom of Poland listed a unification of all the provinces into one legal and economic system among their many goals,[299] but such efforts were met with mixed results, with some of the reasons why being examined more critically later in this chapter.

It is worth reminding ourselves that our level of analysis concerns itself with *constitutional* questions—that is questions regarding the architecture of the political and legal system—rather than political activity or specific enactments of law, concrete judicial decisions, policies, etc. This distinction is important because there was near-continuous friction—or at least possible friction—between the multiple political entities within both the personal union of Poland-Lithuania under the Jagiellonians as well as the Polish-Lithuanian union after 1569. Many of these regions nominally retained their own institutions and legal systems, though were often vulnerable to the whims of the Polish king, who often intervened in their domestic affairs.[300] In the constitutional and legal acts written during this period, the king's signature is always in some variation of: the king of Poland, Grand Duke of Lithuania, Ruthenia, as well as Prussia, then a laundry list of various provinces, depending on the specific historical situation, even through to the end of the Commonwealth in the 18th century.[301] Many of these provinces were extended the same rights as the Polish *szlachta* had, including the ability to participate in royal elections—as was certainly the case with Ducal Prussia.[302] This formed a unique kind of union all on its own that was neither quite a federation nor a confederation, in that there was a body of constitutional law created by the Seym and the king that variously extending rights and privileges, jurisdiction of the courts,

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[299] Daniel Stone. 2001. *The Polish-Lithuanian State, 1386-1795*. The University of Washington Press: Seattle and London, pgs. 41-43.

[300] Karin Friedrich. 2007. "Poland-Lithuania." In: Howell A. Lloyd, Glenn Burgess, and Simon Hodgson, eds, *European Political Thought, 1450-1700: Religion, Law and Philosophy*. Yale University Press: New Haven and London, pg.66.

[301] For example, King Zygmunt III Waza, who ruled over the Commonwealth at what was its largest geographical extent after a victory against Muscovy in 1609, used the full title: "Zgymunt III z łaski Bożej Krol Polski, Wielkie Książe Litewskie, Ruskie, Pruskie, Mazowieckie, Żmudzkie, Inflantckie etc. etc. a Szwedzki, Gotski, Wandalski dziedziczny Król," (Zgymunt III, by the grace of God, the King of Poland, Grand Dukes of Lithuania, Ruthenia, Prussia, Mazovia, Żmudzkie, Livonia, etc. etc. a Swedish, Gotski, Vandalic Hereditary King), *Volumina Constitutionum* Tom II, Volumen II, pg. 379. For a sample of how the king's various titles changed with time, see:
The Henrician Articles. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. http://polishfreedom.pl/en/document/the-henrician-articles. [Accessed 15 February 2021]; *New Constitution of the Government of Poland*; Stanisław Grodziski, Irena Dwornicka, and Wacław Uruszczak. 1996. *Volumina Constitutionun*, Volumen 1: 1493-1526. Wydawnictwo Sejmowe: Warszawa; Stanisław Grodziski and Wacław Uruszczak. 2008. *Volumina Constitutionum*. Volumen 2: 1587-1609. Wydawnictwo Sejmowe: Warszawa.

[302] Robert Frost. 2015. *The Oxford History of Poland-Lithuania: Volume I: the Making of the Polish-Lithuanian Union, 1385-1569*. Oxford University Press: Oxford, pg. 218.

the ability to participate in the election of the king, etc. to the provinces, acknowledged local law (Polish vs. Lithuanian, Masovian vs. Prussian, etc.), and superseded local law.

Complicating matters, there were also multiple sources of law: for example, there were *statutes* (statuty), where the king would attempt to create a legal code for the entire nation, *privileges*, which were granted by the king to a particular group at a particular place in time, usually the *szlachta*, and as *constitutions* (konstytucje) or statutory law, which were official laws passed by the Seym.[303] The division between these is often unclear, with the *szlachta* helping the king in cataloguing customary law into statutes, the king sometimes granting privileges at various Seymy due to pressure from the *szlachta*, while statute very often began as the king sending a draft of a law or a request to the Seym.[304] There were also significant differences in political—and later religious—culture across the regions, with the Polish ethnic group, generally in the geographic region of what is Poland today, there was strong identification with Roman Catholicism as well as a more or less egalitarian relationship among the knights whose descendants were the *szlachta*. However, even as far back as the Piast period there was a clear distinction of the mighty (możnych / *nobiles*) and the regular knights (zwykłe rycerstwo / *milites*),[305] who evolved into the *szlachta* who were nominally equal before the law, though in political and economic reality remained somewhat distinct. The more powerful families matured into what were eventually referred to as magnates (*magnaci*) and recognizing their power over the Jagiellonian dynasty, achieved some semblance of political consciousness before the *szlachta* did as a whole,[306] hence particular privileges gradually evolved into general privileges over centuries. Both the *szlachta* and their ancestors had a long history of governing themselves, suspicious of giving too much political power to individuals or families and electing their leaders.[307]

However, Lithuania and the Baltic were much more hierarchical, being governed by hereditary princes allied with the Church and powerful noble families called *magnaci*. Over time, Prussia and Lithuania were much more receptive to Protestantism, with Prussia's

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[303] Wacław Uruszczak. 2014. "Prawa celem polityki w Polsce Jagiellonów." *Krakowskie Studia z Historii Państwa i Prawa* 1, pg. 164; Wacław Uruszczak. 2009. "Statuty Kazimierza Wielkiego jako źródło prawa polskiego." *Studia z Dziejów Państwa i Prawa Polskiego* 3, pg. 100.

[304] Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pgs. 262-263.

[305] Katarzyna Pudłowska. 2020. *Historia ustroju i prawa polski: w pigułce*. Wydawnictwo C.H. Beck: Warszawa, pg. 29.

[306] Józef Siemieński. 1985. "Polish Political Culture in the 16th Century." In: Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pgs. 53-54.

[307] "The clan ethos lingered in the tradition of regarding landed property as the common inheritance of the extended kinship group. Partible inheritance shaped the *szlachta*'s development over the next four centuries, working over the longer term against the consolidation of powerful *magnat* dynasties and a narrow oligarchy. While individual *magnat* families used their positions to secure their status and wealth over several generations, the nobility's steadily increasing size and the recurrent need to divide family lands among all children ensured that the position even of the most powerful families was never secure: there were always ambitious and hungry challengers for office, honour, and status," Frost, *The Oxford History of Poland-Lithuania*, pg. 63. On the other hand, Uruszczak is not so optimistic about how the practice of local government by the *wiece*—a kind of a communal council of lords—was so democratic, and that in fact local rule was more often than not an oligarchic practice where the most powerful local family would dominate the others in dynastic over time. See: Uruszczak, *Historia państwa i prawa polskiego*, pg. 39.

mainly German town population becoming Lutheran and many Lithuanian *magnat* families becoming Calvinist.[308] The Calvinists were a particularly strong force in the 1550s-1570s, accounting for about 20% of the total *szlachta* as well as the "absolute majority among the lay members in the Senate".[309] The Duchy of Prussia remained a vassal of Poland-Lithuania, though it retained a strong sense of German identity and autonomy to govern its own affairs under the Hohenzollern dynasty. The third major division was Ruthenia. In short, there was too much diversity and too little external danger to create the need for a strong, central government ruled over by a powerful king for much of the relationship of Poland-Lithuania.

As Sucheni-Grabowska explains:

> Monarchs did not have a good start to autocratic rule in Poland. Society, compacted in an already developed sense of community beyond a district level and devoid of external threat, saw no justification to surrender to the dictates of the ruler and compromise the political prerogatives of the *szlachta* state. On the contrary: the strongest of the states - the chivalric knights, wished to expand the powers it had previously acquired and assert its primacy in the social power arrangements of the Kingdom.[310]

Revisionist historians have often argued that this was the fundamental flaw of Poland-Lithuania, leading to its collapse, but this is a historiographically unfair criticism. For over 350 years the Commonwealth was one of the largest states in Europe, relatively peaceful, and avoided much of the violent religious conflicts throughout 16th century Europe.[311] It was unique in that it expanded by a series of personal—and later constitutional—unions, rather than (only, or mainly though) conquest. As Uruszczak notes, this diversity and decentralization may be thought of as one of its strengths:

> Today, no serious historian can deny the greatness of the sixteenth- and seventeenth-century Commonwealth. Sufficient testimony to this is its political and military successes,

[308] Godlewski, "Spory szlachty", pg. 53; D.G. Hart. 2013. *Calvinism: A History*. Yale University Press: New Haven, pgs. 41-43; Philip Benedict. 2002. *Christ's Churches Purely Reformed: A Social History of Calvinism*. Yale University Press: New Haven, pgs. 260-270; Stone, *Polish-Lithuanian State*, pgs. 43, 52.

[309] Norman Davies. 2005. *God's Playground: A History of Poland. Volume I: The Origins to 1795*. Revised Edition. Oxford University Press: Oxford, pg. 143; Uruszczuk also discusses the role of Calvinism, though he declines to give any specific numerical estimations. Uruszczak. *Historia państwa i prawa polskiego*, pg. 142. Bardach, however, calculates that 163 of 552 total Sejm deputies were Protestant between 1548 to 1572, though he only states that the majority of them were Calvinist. See: Juliusz Bardach. 1985. "Elections of Sejm Deputies in Old Poland." In: Władysław Czapliński, ed. 1985. The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies. Ossolineum: Wrocław, pg. 133.

[310] Anna Sucheni-Grabowska. 2009. *Wolność i prawo w staropolskiej koncepcji państwa*. Muzeum Historii Polski: Warszawa, pg. 74.

[311] "The Republic became one of the largest European states not through conquests, but through unions and incorporation. In fact, there is no European state that has expanded its territory in such a way. Another unique feature of this society was this respect for the law and the basing of public life on the foundation of the law, which of course also has negative connotations, associated, for example, with a very legalistic, to the point of absurdity, treatment of the law. The last distinguishing feature of the Commonwealth - this will be discussed further - is the specific conglomeration of nations, ethnic groups, religions and faiths. I think that the questions of the Kraków school historians about where the systemic error was, because the Republic fell, is wrongly posed, because it was precisely this system that turned out to be a permanent system. If we assume, as Professor Wyczański wants in one of his older works titled: *Polska Rzecząpospolitą szlachecką*, count its existence from the mid-15th century, this is, after all, the experience of the state lasted three and a half centuries," Comments by Hanna Żerek-Kleszcz, in: Jakub Brodacki, ed. 2007. *Polska na tle Europy: XVI-XVII Wieku.* Muzeum Historii Polski: Warszawa, pg. 45.

> achievements in the field of spiritual and material culture, and considerable wealth, having its source in the fertility of the land and the labor of the farmer. However, the greatest success of this state should be considered the fact that for several centuries it was a common homeland for many peoples, differing from each other in language, culture, religion. In the Republic, Poles, Lithuanians, Belarusians, Ukrainians, Latvians, Germans, Armenians, Tatars, Jews, Scots, Dutch and many other nations and ethnic groups were able to live and work within common borders under the scepter of the same monarch. The development of this state occurred gradually, not through conquest and annexation, but peacefully, thanks to the attractiveness of the political and legal system created in Poland during the Jagiellonian era. Its assessment against the background of Europe at the time is perfectly reflected in the term "a state without stakes," which entered scholarly circulation thanks to Janusz Tazbir's now-classic work.[312]

The story of the Polish-Lithuanian union and the subsequent Polish-Lithuanian Commonwealth is also one of the *szlachta* and ethnic Poles rising to political, social, and cultural domination, with the historical assessment of how "Polish" each of these various provinces were variously greatly by historical time period as well as by historian. In short, the entity known as "Poland-Lithuania" is something of a ship of Theseus,[313] a "Jagiellonian myth",[314] and had "fundamental constitutional laws" that were "nicely contradictory"[315], whereas other European states such as France, England, Scotland, Wales, Spain and Switzerland have had arguably much more fixed cultural, linguistic, and geographical boundaries, at least since the end of the 16th century. As such, this probing back into the history of "Polishness" is too complicated a question to be merely assumed as a basis for deeper comparative work, even within the history of the country.[316]

Rather than a deep and speculative history, of what is or is not Polish as well as what is or is not law, we rely upon our exegetical approach, beginning with a text as fixed point in history. This exchanges explanative nuance and appreciation with narrative. Fortunately, a

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[312] Wacław Uruszczak. 2007. "In Polonia Lex Est Rex. Niektóre cechy ustroj rzeczyospolitej XVI-XVII w." In Jakub Brodacki. *Polska na tle Europy: XVI-XVII Wieku*. Muzeum Historii Polski: Warszawa, pg. 25.

[313] "There is no doubt that until the Union of Lublin in 1569, the Kingdom of Poland and the Grand Duchy of Lithuania were separate states. Royal Prussia, as well as the Duchies of Oświęcim and Zator also possessed separateness. The Union of 1569 was in fact the creation of one bicameral state, that is, a federation of the Kingdom of Poland (the Crown) and the Grand Duchy of Lithuania. Royal Prussia became part of the body of the Crown. Using the collective name "Poland" for this creation is not legitimate for the 16th and 17th centuries. A more accurate name would certainly be "Poland-Lithuania" On the other hand, in the 18th century, the name "Poland" was already used to describe the entire state, reserving the term "the Crown" for Poland proper along with the borderland (Ukrainian) provinces. Thus, the history of Poland after 1569 is in fact the history of the Polish-Lithuanian Commonwealth, or basically the Crown and the Grand Duchy of Lithuania. The latter was a common state of Lithuanians and Byelorussians, just as the Crown was a common state of Poles, Ukrainians, and Germans, if one does not count other nationalities and minorities, especially Jews," Uruszczak, "In Polonia", pg. 22.

[314] Dorota Pietrzyk-Reeves. 2017b. "The Revivals of the Jagiellonian Idea: Political and Normative Contexts." *Politeja - Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego*: 51(6): 79-94. See also Andrzej Sulima-Kamiński's comments in: Brodacki, *Polska na tle Europy*, pg. 27.

[315] Davies, *God's Playground*, pg. 247.

[316] For example, there are some Polish thinkers who want to link the current 1997 Polish Constitution and the Third Polish Republic with the 1791 Constitution and Commonwealth as the First Polish Republic. For an opposing viewpoint, see: Tomasz Kamusella. 2017. *The Un-Polish Poland, 1989 and the Illusion of Regained Historical Continuity*. Palgrave MacMillan: London.

list of such privileges/constitutional foundations are specifically listed in Article II and summarized in Table 3.1 below.[317]

While we shall return to both topics in their respective sections, it is worth noting that the following list of "constitutional" acts are "constitutional" in a literalist sense of the term. It is up to our subsequent investigation to clarify them more substantially, being cautious as to introduce other legal texts. The legal texts that will be introduced have not been chosen at random, but carefully selected in order to elucidate what the author feels are underlying currents or phases within Polish-Lithuanian Constitutional developments. However, we must remember that neither the list given below nor the legal acts cited throughout this work are intended as an exhaustive, "final word" on Polish-Lithuanian constitutionalism. Indeed, the canonicity of various texts as well as the nature of the constitutional canon itself are up for considerable thoughtful conversation and debate for many years to come. Indeed, by its vary nature, the selection and interpretation of any canon of texts is itself a process that can have no definite conclusion.

[317] 3 May Constitution, art. II.

Table 3.1: Laws, Statues, and Privileges Recognized by 3 May Constitution

Source (Common English Translations)	Date	Name	Summary
(Kazimierz III Wielki) (Casimir the Great)	1368[318]	The Statutes of Kazimierz III Wielki	• A step towards standardized laws throughout the Kingdom • Everyone punished according to their own actions • Establishment of rights typical in Roman cannon law[319]
Ludwik Węgierski (Lewis of Hungary) [320]	1374	Privilege of Koszyce	• *Szlachta* exempted from paying tribute except for a small, nominal amount • The king could only fill local offices from among the local *szlachta* • Payment of soldiers' wages to *szlachta* who cooperated during military campaigns
Władysław II Jagiełło (Witolda Ladisłaus)	1385[321]	Act of Krewo (Union of Krewo)	Act establishing the personal union of the Crown and the Grand Duchy; All pagan *szlachta* who accepted Christian baptism would receive the same privileges as Poles: • full property rights, • hereditary title, • freedom to marry daughters without the grand

[318] See: *The Statutes of Casimir III the Great (selection*). The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. They are taken from Zygmunt Helcel, ed. 1856. "Statut czwarty wiślicki powszechny z roku 1368." In: Helcel, *Starodawne prawa polskiego pomniki*. Vol. I: 199-206. [Accessed 22-Feb. 2021]. https://polishfreedom.pl/en/the-statutes-of-casimir-iii-the-great-selection/

[319] Uruszczak, *Historia państwa i prawa polskiego*, pg. 87.

[320] "The Polish Sources." In Zbigniew Rau, Przemysław Żurawski vel Grajewski, and Marek Tracz-Tryniecki, eds. 2016. *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*. Routledge: London and New York, pgs. 150-154; Frost, *Oxford History of Poland-Lithuania,* pgs.65-66; *Privilege of Koszyce*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 25 June 2022]. https://polishfreedom.pl/en/privilege-of-koszyce/

[321] Frost, *The Oxford History of Poland-Lithuania*, pg. 68; *The Union of Krewo (Act of Kreva).* [The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. Accessed 25 June 2022]. https://polishfreedom.pl/en/union-of-krewo-act-of-kreva/.

			duke's permission, • abolishing of most services to the duke
	1413[322]	Union of Horodło	• Improved upon Poland-Lithuania through a personal dynastic union • Joint conventions between the Crown and the Grand Duchy in making laws and policy • Established parity between Polish and Lithuanian *szlachta*
	1422[323]	Czerwińsk Privilege	• Forbade the seizure of property without a court sentence
	1430, 1433	Privilege of Jedlnia and Kraków	• *Neminem captivabimus nisi jure victim* (we shall not arrest anyone without a court verdict) privilege granted to the szlachta. • the ban on confiscating landed estates without a court verdict • monopoly bestowed on *szlachta* in ecclesiastical dignitaries • promise to extend rights and privileges to Orthodox *szlachta*/Ruthenians • The *szlachta* right to withdraw support from the king if he did not keep his promises (*de non praestanda oboedientia*).
Kazimierz IV Jagiellończyk (Casimirus Jagiellon)[324]	1454	Nieszawa Statutes	• *Szlachta* consent required to pass all laws as well as declaring of war, Crown royal lands to be used for the

[322] Frost, *The Oxford History of Poland-Lithuania*, pgs. 109-120; *Privilege of Jedlnia and Kraków*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 25 June 2022]. https://polishfreedom.pl/en/privilege-of-jedlnia-and-krakow.
[323] Krzystof Koehler. 2012. "The Heritage of Polish Republicanism." *The Sarmatian Review* 2, pg. 1660; Rau et al, *Magna Carta*, pgs. 154-155.
[324] "The Polish Sources," pgs. 155-157; Frost, *The Oxford History of Poland-Lithuania*, pgs. 231-241.

			benefit of the nation rather than the king
Jan I Olbracht (John Albertus)[325]	1496	Piotrków Statutes	• Consolidation of Nieszawa statutes into one coherent privilege
Aleksandr Jagiellończyk (Alexander)	1501[326]	Union of Mielnik	• Every king after Aleksander was to be elected by the Lithuanian and Polish *szlachta* together • The right to resist the king • Upon election, each new king was to reaffirm all the previous laws and privileges • Polish and Lithuanian *magnaci* would appoint a council to deliberate and manage state affairs
	1505[327]	Nihil Novi	• The king could not resolve anything new (*nihil novi*) without the "common consent of the senators and the landed envoys"
Zygmunt I (Sigismundus the First)[328]	1532[329]	Korrektura Prawa	• Consolidation of law courts and legal processes
Zygmunt II August (Sigismundus August)[330]	1573	Union of Lublin	• Strengthening the Union between Poland and Lithuania

[325] Frost, *The Oxford History of Poland-Lithuania*, pg. 290.

[326] *Union of Mielnik (the Privilege of Aleksander, Grand Duke of Lithuania*). The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 25 June 2022]. https://polishfreedom.pl/en/union-of-mielnik-the-privilege-of-aleksander-grand-duke-of-lithuania

[327] "The Polish Sources," pgs. 157-158; Frost, *ibid*., pgs. 344-353; *Nihil novi constitution.* The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. Translated by Tristan Korecki and Philip Earl Steele from Sławomir Godek and Magdalena Wilczek-Karczewska, eds. 2006. *Historia ustroju i prawa w Polsce do 1772/1795: wybór źródeł.* Wydawnictwo Naukowe PLN: Warszawa, pg. 65. [Accessed 25 June 2022]. https://www.polishfreedom.pl/en/nihil-novi-constitution/

[328] "The Polish Sources," pgs. 157-159.

[329] *Infra*, pgs. 160-161.

[330] Frost, *ibid.*, pgs. 446-455; "Excerpts from the constitutions regarding the end of the jurisdiction of ecclesiastical courts over the nobility." The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 25 June 2022.] https://polishfreedom.pl/en/excerpts-from-the-constitutions-regarding-the-end-of-the-jurisdiction-of-ecclesiastical-courts-over-the-nobility/

What is immediately clear is that the 3 May Constitution generally reconfirmed many of the same fundamental rights and privileges that were mentioned in the Henrician Articles.[331] What is not answered, however, is *why* these particular privileges were listed, and what these privileges *meant* for the determination of Polish-Lithuanian constitutionalism. We thus have the beginnings of the hermeneutic circle: the text and a set of interpretive principles that have emerged within it as guides with which to search into the past. What is necessary is thus to actually apply them to the past, that is, to put flesh on the bones of Polish-Lithuanian constitutionalism. To accomplish this task, it is worth briefly discussing the history of the political and legal structure of Poland-Lithuania as part of this background, allowing the principles of 15th and 16th century constitutionalism to develop organically.

There were two main political forces, the king and the *szlachta*, with the *szlachta* divided between lower and middle *szlachta*, and the more powerful and wealthier *szlachta*, the *magnaci*. A third division—the burghers—were located in the cities and did not easily fit into the political system, which was largely based on landownership and feudalism. Much of the 15th and 16th century actually witnessed a decline in the political position of the burghers, who had some degree of self-governance at the city level, but very little representation in the Seym, with one representative per city.[332] The clergy could theoretically come from any part of society, but the leadership of the church was disproportionately drawn from the more powerful and wealthy families.[333] While not a strict rule, generally the *magnaci* were close to the kings and the church, with the king selecting a somewhat permanent body of councilors from among them—which was known as the royal council (rada królewska).[334] Given that the Crown and the Grand Duchy were joined in a personal union under the Jagiellonian dynasty, who were Lithuanian, there was a natural closeness between the king and the Lithuanian *magnaci* who favored a more oligarchic style of rule around hereditary rights, whereas the lower and middle *szlachta* preferred more of an egalitarian political system that reflected their political and economic realities.

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[331] Makiłła discusses how the Henrician Articles essentially became the background of the Rzeczpospolita. In 1632 they were largely merged with the pacta conventa of Władysław IV, which stipulated that the king would respect all the rights and privileges of the *szlachta* and uphold the laws of the kingdom. From this point onward, the Henrician Articles were themselves cited less and less often, until they essentially faded into the background until 1768 when new cardinal laws were added to them. See: Makiłła, *Artykuły henrykowskie*, pgs. 491-493, 500-502.

[332] There was a 1496 statute that prevented peasantry and burghers from purchasing and owning land. While it was not really enforced at first, one of the demands of the mid-16th century execution of law movement was that these old statutes should be enforced seriously. This led to a significant process where the burghers were declining throughout the 16th century and continued throughout the lifespan of the Commonwealth. As such, while other European nations were broadening their tax base and fiscal structure through the growth of cities and centers of trade and finance, this did not happen o the same extent in Poland. The practical consequence was stretching the royal purse even further, but the political consequence was a strong nobility that was widely dispersed throughout the country. See: Stone, *Poland-Lithuania*, *passim* but especially pg. 28 especially; Sucheni-Grabowska, *Spory królów*, *passim*.

[333] Stone, *The Polish-Lithuanian State*, pgs. 99, 109.

[334] Andrzej Marzec. 2012. "Rada Królewska w monarchii Kazimierza Wielkiego." In W. Bukowski, T. Jurek, eds. *Narodziny Rzeczypospolitej. Studia z dziejów średniowiecza i czasów wczesnonowożytynych*. T. 2. Towarzystwo Naukowe "Societas Vistulana": Kraków.

The Poles were more numerous than the Lithuanians, though the Lithuanians governed greater territory due to their rule of Ruthenia. This placed the Lithuanians in a precarious position, as the borders in the north stretched close to an expanding Muscovy and Baltic states,[335] while their provinces to the south and east bordered Muscovy as well as Ottomans. Reconquest of the Polish northern coast that had been seized by the Teutonic Order in the 14th centuries, had been a dream for a century, and the aggression of the Teutonic knights into the Baltic had been a driving force that united the Crown and Lithuania, first into an alliance by necessity, then by personal union. Even though the Teutonic knights had been gradually weakening over the centuries and strategically lay between the Kingdom of Poland and Lithuania, the Lithuanians were not strong enough to subdue them on their own, and the more numerous and democratically minded *szlachta* knew this. When king Kazimierz IV Jagiellończyk asked for help, they demanded concession of political rights such as the right for their voices to be heard whenever a new law was being considered by the king, and that they would have a say in the raising of troops, declaration of war, and collection of taxes. This became known as the Nieszawa statute (1454),[336] in which the acknowledgement of the necessity of *szlachta* consent paved the way for both the Seymy and the seymiki as well as began the process of standardizing parliamentarianism as well as demonstrated the success of the *szlachta*'s universal egalitarianism before the law.[337] Władysław II Jagiełło and the Jagiellonians would call upon the Seymy and seymiki on an *ad hoc* basis, depending on the needs of the nation at the time.[338]

Though the *szlachta* had been practicing political self-organization and self-governance for centuries,[339] the Nieszawa statute was a watershed in establishing constitutional principles. However, its role should not be overstated in that it was not a particularly new invention as much as a codification of what was already in practice, with the Polish *szlachta* electing to organize themselves into local councils or *wiece* since the late Middle Ages at the very least.[340] While the Piasts had seen themselves as personal owners of

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[335] See: R. Nisbet Bain. 2006. *Scandinavia: a political history of Denmark, Norway and Sweden from 1513 to 1960*. Elibron Classics: Boston; Robert I. Frost. 2000. *The Northern Wars: War, State and Society in Northeastern Europe, 1558-1721*. Routledge: New York and London.

[336] Frost, *Oxford History of Poland-Lithuania*, pgs. 231-241; Makiłła, *Artykuły henrykowskie*; Anna Sucheni-Grabowska. 2007. *Odbudowa domeny królewskiej w Polsce 1504-1548*. Second Edition. Muzeum Historii Polski: Warszawa, pg. 46; Davies, *God's Playground*, pg. 164; Stone, *The Polish-Lithuanian State*, pg. 28.; Anna Sucheni-Grabowska. 1988. *Spory królów ze szlachtą w złotym wieku: wokół egzekucji praw*. Kraków: Krajowa Agencja Wydawnicza, pg.9.

[337] Sucheni-Grabowska, *Wolność i prawo*, pg. 75.

[338] Marek Borucki. 1972. *Seymy i seymiki szlacheckie*. Książka i Wiedza: Warszawa, pgs. 23-24.

[339] The institution of wiec (plural wiece) was common throughout the Slavic lands—the Czechs, Rus', Poles, and Ruthenians all had some form of it—in the late Middle Ages. Like much of legal history, its origins are not entirely clear and are disputed, both in terms of content as well as when exactly it appeared and how it matured. Though some
posit its origins into the 6th and 7th centuries, it is generally agreed upon to have solidified within the 10th century and played an important role throughout the Piast dynasty into the 14th century. Though these *wiece*—sometimes referred to as rallies or rally courts—served multiple purposes. As Stanisław Russocki observes: "[In] Polish, the term "wiec" [rally] is used to describe all kinds of assemblies, both tribal and princely conventions, placita meetings or extended curia, and even land and city court years held by them together with the feudal lords," Stanisław Russocki. 1968. "Wiece w miastach Słowiańszczyzy Wschodniej i Zachodniej: nowa próba wyjaśnienia ich genezy funkcji." *Przegląd Historyczny* 59(4), pg. 750. However, they were mostly

the state, connected with their embrace of Christianity and the defenders of Christendom in the region, after they collapsed the *szlachta* had returned to local rule by *wiece* and only gave up that local sovereignty in exchange for privileges.[341] The king remained the source of the legislative power. The point of the privilege was that the king had to get the consent of the *szlachta* in imposing law and policy, not that the *szlachta* were the source of the law.[342] Polish-Lithuanian constitutionalism was thus not directly comparable to the modern conception of the state, which emphasizes some combination of the separation of powers, centralization and hierarchization of political power, monopoly of legitimate physical force, and distinguishing the personhood of the executive from a permanent, neutral set of ministers and staff, *inter alia*,[343] though it did contain some elements such as rule of law (*lex est rex*)

political accords or legal certifications. "The institution of the wiec [rally] was usually associated with two different diplomatic formulas appearing in the content of some chancellery documents: mentions of a legal act or certification of ducal approvals during the rally and the so-called formulas of consent of the powerful," Krzystof Bracha. 1986. "Wiece Bolesława Wstydliwego 1234-1279." *Kwartalnik Historyczny* 93(3), pg. 664. For more on the ancient roots of the wiec, see: Pudłowska, *Historia ustroju i prawa polski*, pg. 16; Marek Kornat and Wacław Uruszczak. 2018. *550 lat parlamentaryzmu rzeczypospolitej*. Wydawnictwo Sejmowe: Warszawa, pg. 7; Marek Wrede and Maria Wrede. 1999. *Sejm i sejmiki Pierwszej Rzeczypospolitej*. Wydawnictwo Sejmowe: Warszawa, pg. 17; Anna Sucheni-Grabowska. 1997. "The Origin and Development of the Polish Parliamentary System through the End of the Seventeenth Century." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pgs. 13-14. For more on the history of the Polish *szlachta*'s self-governance, see: Frost, *Oxford History of Poland-Lithuania*, pg.63; Kutrzeba, Stanisław. 2001. *Historia ustroju Polski: Korona.* Wydawnictwo Poznańskiego Towarzystwo Przyjaciół Nauk: Poznań, pg. 27. For a fuller discussion, see: Błazej Popławski. 2019. "550-lecie Parlamentaryzmu Rzeczypospolitej" w Zamku Królewskim w Warszawie." *Przegląd Sejmowy* 1: 317-328; Maciej Mikła. 2014. "Prawodawstwo dla miast z wczesnego okresu polskiego parlamentaryzmu (do 1468 roku)." *Krakowskie Studia z Historii Państwa i Prawa* 1: 133-145; Piotr Węcowski. 1998. "Krakowskie Wiece Sądowe i Ich Rola w Życiu Politycznym w Czasach Panowania Władysława Jagiełły." *Kwartalnik Historyczny* 3: 19-48; Krzystof Bracha. 1986. "Wiece Bolesława Wstydliwego 1234-1279." *Kwartalnik Historyczny* 93(3): 663-677; Jerzy Mularczyk. 1984. *Władza książęca na Śląska w XIII wieku*. Wydawnictwo Uniwersytetu Wrocławskiego: Wrocław; Russocki, "Wiece w miastach Słowiańszczyzy Wschodniej i Zachodniej."

[341] Borucki, *seymy i seymiki szlacheckie*, pgs. 13-16

[342] Marek Wrede. 2005. *Sejm i dawna Rzeczpospolita: Momenty Dziejowe*. Wydawnictwo Sejmowe: Warszawa, pg. 17.

[343] Although there is no universally agreed upon definition of the modern state, there *is* near-universal agreement upon a series of attributes that it has, such as separation of powers, centralization and hierarchization of political power, monopoly of legitimate physical force, and distinguishing the personhood of the executive from a permanent, neutral set of ministers and staff, adoption of a constitution (modern constitutionalism), rule of law (*lex regia*), a professional bureaucracy and secularism, a social contract between the people and the rulers, democratic institutions, rationalization of political power and state institutions, *inter alia*. While the monopoly of legitimate force is most commonly associated with Weber (Weber 2020; Anter 2014; Nelson 2006; Gill 2003; Morris 1998; Held 1989), it is part of a larger tradition connected at least as far back as Machiavelli and Hobbes (Ardito 2015; Pierson 2005), though Weber also strongly associated the modern state with rationalization and modern bureaucracy, which Foucault has famously elaborated upon (Foucault 2011; 1977). Perhaps the theoretician of the modern state most commonly contrasted with Weber is Marx, whom Weber partially reacted to, and his association with the modern state with capitalism, with the state the proxy of the bourgeoisie as management of the capitalist economy (Hopkins 2020; ten Brin 2014; Nelson 2006; Pierson 2005; Morris 1998; Held 1989), and idea that remains strong in political philosophy today. Others abstract the modern state further back and associate it with the form of governance that broadly emerged in Europe after the Reformation or post-Westphalia (Pierson 2005; Tilly and Blockmans 1994; Avineri 1974; Strayer 1970). The broad, over-arching themes across shared across theories of the state appear to be centralization and

and secularism, *inter alia*.[344] Over the 15th and 16th centuries the *szlachta* evolved into a truly legislative power as would be conceptualized today, which was the result of hard-won political battles, as we shall see. However, it is sufficient to say that to some degree the Nieszawa statute was the beginning of the Crown of Poland's own version of modern republicanism.[345]

This long process is summarized by Wacław Uruszczak.[346] In general, the *szlachta* had been meeting in local assemblies since the Jagiellonian period. Sometimes these were a council for the local ruler or even the king to give him advice or support, while at other times it was a gathering of *szlachta* to petition changes or voice opposition to the king's policies. Sometimes the whole of the *szlachta* would gather in an assembly before the king, which was essentially an extension of extension of royal councils with powerful *magnaci*, where the general *szlachta*, local landowners, and local officials were assistants toward the meeting. The king and his council of powerful *szlachta* or clergy had all of the legislative power, with the remainder of the *szlachta* having a parliamentary role of bringing petitions or suggestions. These meetings were held irregularly, its membership was irregular, and its competencies were unclear. As time went, these local institutions became seymiki whereas the ones involving the king became Seymy.[347] The first bicameral Seym appeared around the year

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hierarchy of institutions, monopoly of legitimate force, internal organization of state power according to law and bureaucracy, and supposed neutrality, though the latter is questioned by Marxism and its descendants in feminist, post-colonial, and post-modern studies more generally. For an extensive—though incomplete—treatment of a wide range of theories about the modern state as well as the juxtaposition thereof, see: Benjamin D. Hopkins. 2020. *Ruling the Savage Periphery: Frontier Governance and the Making of the Modern State*. Harvard University Press: Cambridge and London; Max Weber. Edited and translated by Keith Tribe. 2020. *Economy and Society: A New Translation*. Harvard University Press: Cambridge; Alissa M. Ardito. 2015. *Machiavelli and the Modern State:* The Prince, *the* Discourses on Livy, *and the Extended Territorial Republic*. Cambridge University Press: New York; Andreas Anter. 2014. *Max Weber's Theory of the Modern State: Origins, Structure and Significance.* Palgrave MacMillan: New York; Lucian M. Ashworth. 2014. *A History of International Thought: From the origins of the modern state to academic international relations.* Routledge: London and New York; Antonio Negri. Translation by Maurizia Boscagli. 1999. *Insurgencies: Constituent Power and the Modern State*. University of Minnesota Press: Minneapolis and London; Christopher W. Morris. 1998. *An Essay on the Modern State*. Cambridge University Press: Cambridge; David Held. 1995. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford University Press: Stanford; Charles Tilly and Willem Pieter Blockmans. 1994. *Cities and the rise of states in Europe, A.D. 1000 to 1800*. Westview Press: Boulder; David Held. 1989. *Political Theory and the Modern State*: *Essays on State, Power, and Democracy.* Polity Press: Cambridge; Michel Foucault. 1977. *Discipline and punish: the birth of the prison*. Vintage Books: New York; Gianfranco Poggi. 1978. *The Development of the Modern State: A Sociological Introduction*. Stanford University Press: Stanford; Shlomo Avineri.1974. *Hegel's Theory of the Modern State.* Cambridge University Press: Cambridge; Joseph R. Strayer. 1970. *On the Medieval Origin of the Modern State.* Princeton University Press: Princeton.

[344] Adam Jankiewicz. 2011. *Lex est Rex in Polonia et in Lithuania: tradycje prawnoustrojowe Rzeczypospolitej: doświadczenie i dziedzictwo*. Wydawnictwo DiG: Warszawa; Kriegseisen, "Reformacja", pg. 193-194; Godlewski, "*Szlachta*", pgs. 45, 57-58; Godlewski, "Spory szlachty", passim; Uruszczak, "Species", pg. 29; Sucheni-Grabowska, "Spory szlachtej", *passim.*

[345] Bardach, Juliusz, Bogusław Leśnodorski, and Michał Pietrzak. 1987. *Historia państwa i prawa polskiego.* Państwowe Wydawnictwo Naukowe: Warszawa, pg. 117.

[346] Uruszczak, *Historia państwa i prawa polskiego*, pgs. 147-151.

[347] As Frost points out, the very idea of "Seymy" and "seymiki" is somewhat problematic, given that there were not set rules organizing political assemblies of nobles, either for their purpose or for their organization, until

1500[348] and the king promised to do "nothing new" without the consent of his advisors that was country to the common good of the nation. Eventually, local seymiki would vote to send a delegation of representatives that would meet a general Seym for the whole Commonwealth, where each delegation would vote with one voice. As time went on, the delegations from the local seymiki would consolidate into the Izba Poselska while the King's council would evolve into the Senat.[349]

By the beginning of the 16th century, the division between the *szlachta* and the *magnaci* as well as the division between the kings and the *szlachta* had solidified into more or less set political institutions. However, due to the *ad hoc* nature of these assemblies, the parliamentary procedure remained unclear, and it was extremely vulnerable to manipulation by the king or by his allies or by a powerful noble. For example, the order of speakers and the process of debate, the exact topics that the parliamentary bodies could address, who should write the law down, who should record and then publish it, etc. were all poorly defined. This left multiple opportunities for manipulation throughout the parliamentary process.[350] As we shall see, organizing of parliamentary procedure was one of the main questions over the next centuries.

The king was also the head of the legal system,[351] with Poland-Lithuania broadly following the principle *rex iudex supremus* [king as the supreme judge].[352] He also retained significant legislative powers as the main source of law: it was by his signature that a law became officially binding.[353] The Polish legal system developed similarly to other European nations: for centuries, the king moved from place to place to pass judgment and keep the peace. However, as time went on and the kingdom grew in terms of population, political responsibilities for the king, and other social and political complexities, the king delegated more and more powers to local administrators, particularly *starosta* (plural *starostowie*), *wojewoda* (plural *wojewodowie*), and *kasztelan* (plural *kasztelani*). *Starosty* served as provincial governors with extensive military and judicial powers, executed church decrees, and managed royal estates, sometimes even royal castles and fortifications; the best equivalent within the Anglo-Saxon experience is probably something close to how *sheriffs*

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the 16th century. Even the theory of a kind of natural evolution from regional sejmiki to regional and then general Sejmy is disputed. As such, "Seym" is generally used as a simplification of this complex process and means any kind of general assembly by the nobility or as a kind of (proto-)parliament. See: Frost, *Oxford History of Poland-Lithuania*, pgs. 286-290.

[348] There is some debate as to when it emerged specifically. For example, one possible date is given as 1493 by Katarzyna Pudłowska, whereas the more standard view places it with the *Nihil Novi* [1505], e.g., supported by Tomasz Kucharski and Włacław Uruszczak. For a fuller debate, see: Pudłowska. *Historia ustroju i prawa polski*, pg. 73; Tomasz Kucharski. 2014. *Instytucja egzorbitancji w systemie prawnoustrojowym Rzeczypospolitej Obojga Narodów*. Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń, pg. 16f; Uruszczak, *Historia państwa i prawa polskiego*, pgs. 150-151.

[349] Konstanty Grzybowski. 1985. "The Three Parliamentary Estates." In: Władysław Czapliński, ed., *Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pg. 89.

[350] Uruszczak, *ibid.*, pgs. 151-153.

[351] *Ibid.*, pg. 145.

[352] Waldemar Bednaruk,. 2008. *Trybunał Koronny: szlachecki sąd najwyższy w latach 1578-1794*. Towarzystwo Naukowe KUL: Lublin, pg. 25.

[353] Borucki, *Seymy i seymiki szlacheckie*, pgs. 41-42.

originally acted in England. *Starosta*, on the other hand, were seen as proxies of the king, especially in the territories where the king would rarely attend.[354]

Finally, it is also important to more closely examine the financial realities and the political tensions between the Crown and the Grand Duchy, particularly the Lithuanian Jagiellonian dynasty's tendency to favor hierarchy and a strong king, while the Polish *szlachta* favored more egalitarian measures and a king who was strong, but severely limited in his power. As we shall later see, few of even the staunchest supporters of republicanism explicitly opposed the idea of the king, because there was the widespread belief that he played a role as "the father of the nation" and as the only one who could overcome disputes between citizens, who were nominally equal before the law.[355] Here we must be careful to note that the idea of a neutral king who rules the nation in a symbolic way as a "first among equals" feels reminiscent of modern conceptions of the monarch as head of state but not head of government within constitutional monarchy. Firstly, there was no separation between the person of the monarch, the office of the Crown, and the state,[356] though these were in fact developing. Secondly, the king had significant political power lasting up through the 17th century. The balance between these two ideas—the necessity of the king as an institution to unify the nation and the reality of the king's actual political power—created something of a compromise in that the king's powers were unlimited in his respective sphere and that the main political question of Polish republicanism was how to clearly define and limit that sphere itself.[357]

This was the main objective of the first constitutional act of the 16th century, the Mielnik articles[358]:

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[354] Borucki, *Seymy i seymiki szlacheckie*, pgs. 161-163; Sucheni-Grabowska, *Wolność i prawo*, *passim*; Sucheni-Grabowska, *Odbudowa*, *passim*; Sucheni-Grabowska, *Spory królów*, pgs. 8-9.

[355] Edward Opaliński. 1983. "Postawa Szlachty Polskiej wobec osoby królewskiej jako instytucji w latach 1587-1648. Próba Postawienia Problematyki." *Kwartalnik Historyczny* 90(4), pg. 795.

[356] The distinction between the use of the king's lands and public monies for his personal gain versus for the good of the Commonwealth was one of the major points in the Nieszawa statutes, which banned such personal usage, especially for the Crown estates. However, Zygmunt I Stary and Zygmunt II August often ignored the Nieszawa statutes, which led to one of the major reform concerns of the executionist movement. However, despite this there was little anti-monarchism in Polish republicanism, due to the faith that the king was not the supreme source of political power, but rather the Republic itself and the rule of law. Diminishing faith and personal dislike of the last two Jagiellonian kings gradually translated into frustration with the institution of the Crown itself. As mentioned earlier, the distinction between the personhood of the executive/the ruler who rules according to whim and state institutions that rule according to law is a key part of modern statehood. See: Makiłła, *Artykuły henrykowskie,* pgs. 474-475; Uruszczak, "Species privilegium", pgs. 29-30; Anna Grześkowiak-Krwawicz. 2002. "Anti-monarchism in Polish Republicanism in the Seventeenth and Eighteenth Centuries." In Martin van Gelderen and Quentin Skinner (eds.) *Republicanism: A Shared European Heritage*. Volume 1. Republicanism and Constitutionalism in Early Modern Europe. Cambridge: Cambridge University Press, pg.47; Sucheni-Gabowska, *Spóry królow*, *passim*.

[357] Almut Bues. 2001. "The Formation of the Polish-Lithuanian Monarchy in the Sixteenth Century." In Richard Butterwick, ed. *The Polish-Lithuanian Monarchy in European Context c.1500-1795*. New York: Palgrave MacMillan, pg. 71.

[358] "In return, the king-elect was obliged to accept the document known as the Mielnik privilege of 1501. The basic idea of this document was to emphasize the king's duty to respect the law and rule in accordance with the common good (*bonum commune*). If a king ruled arbitrarily, disregarding the law and the common good, he was a tyrant and consequently society was relieved of its obligation to obey him. This act fully expresses the

> But because nothing can happen more excellently among human interests than to live under a good and just ruler, subject to and obedient to their counsel and laws, and not to their will or whim, for as long as the Senat decides by its gravity, so long as the republic stands by its own forces, it has often been found that is, princes want to act according to their discretion and will, and while their efforts are resisted by the leaders of the council, then attacks and characters turn against the state, their person and their fortunes, not respecting them moderately.[359]

As we shall explore later, the Mielnik articles were never really adopted simply because the king did not want to adopt them, and that there was no good mechanism to make the king take a specific action or to refrain from doing so. This built into the inherent logic of the Polish-Lithuanian constitutional system: if the *szlachta* were all equals under the law then the role of the king was necessary as the only person above the *szlachta* to judge them or to lead them. However, by virtue of being in a first-among-equals situation, no one person or group could overthrow the king. This lack of an active system of checks and balances, and instead relying on an assumption of consensus and passive distribution of power is a problem inherent within classical republican models,[360] which were a strong theoretical and practical inspiration for the Poles.

While a specific group of people could not challenge the king or make the king perform certain decisions, it was possible for a group of people—ideally the whole *szlachta* or the majority of the *szlachta* itself—to rise up against the king should it be demonstrated that the king had violated the only power higher than himself: the collective will of the republic as present through the rule of law. The Mielnik articles created an important step in recognizing *ius resistendi.* [361] Some historians have even drawn a parallel between the increasing popularity of the *ius resistendi* with the Reformation as a way of separating the state from the Church, a trend that Poland-Lithuania similarly followed in the 16th century.[362]

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ecclesiastical doctrine of royal power, the foundation of which was to bind the king by both divine and human law, and the right to resist his subjects, not only in relation to the tyrant *absque titulo* [without title], but also *quo ad exercituum* [to the hosts]," Uruszczak. 2008. "Species privilegium", pg. 28.

[359] *Volumina Constitutionum*, Vol I., pg. 110.

[360] Vile, *Constitutionalism and the Separation of Powers., passim.*

[361] The concept of legal resistance against arbitrary authority has a long history in Polish political thought, as it does elsewhere. See: Edward Opaliński. 2016. "Confederations and rokosz." In: Tomasz Gromelski, Christian Preusse, Alan Ross, and Damien Tricoire, eds., *Frühneuzeitliche Reiche in Europa: Das Heilige Römische Reich und Polen-Litaen im Vergleich. Empires in Early Modern Europe: The Holy Roman Empire and Poland-Lithuania in Comparison*. Harrassowitz: Wiesbaden, pgs. 105-118; Sebastian P. Bartos. 2013. "Post-Gregorian Episcopal Authority and the Struggle for Ducal Kraków, 1177-1210." *The Polish Review* 58(3): 3-33; Jerzy Wyrozumski. 2009. "Od ius resistendi do ius de non praestanda oboedientia w Polsce." In Marian Małecki and Bielsko-Biała, eds. *Świat, Europa, mała ojczyzna. Studia ofiarowane profesorowi Stanisławowi Grodziskiemu w 80-lecie urodzin*. Wyższa Szkoła Administracji: Bielsko-Biała, pgs. 155–64; Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pg. 59.

[362] "It should also be remembered that the Polish doctrine of the right of resistance by a state representative state representation against possible abuses and tyranny of the royal power began to take shape already in the late Middle Ages and it was a process that only accelerated during the period of the Reformation in the Kingdom of Poland, and finally ended only in the first decade. 17th century. It can be assumed that it was the reception of political ideas of Protestantism, and in the middle of the 16th century Calvinism in particular, that contributed to an increased interest in the idea of the right to resist states against royal claims," Wojciech Kriegseisen. 2018. "Reformacja a geneza demokracji szlacheckiej w Polsce." *Rocznik Teologiczny* 3, pg. 195. For more on

As Kriegseisen explains:

> One of the most characteristic elements common to both the Reformation political doctrines and the emerging ideology of *szlachta* democracy in the second half of the 16th century was the theory of the right to resist power that breaks its obligations towards its subjects, that is, falls into tyranny. This does not mean, of course, that the *szlachta* reform ideology and the program of the execution of rights were republican in nature. On the contrary – all the political reform projects formulated in Poland in the 16th century assumed that the decisive role in this process should be played by the monarch with *the ius reformandi* [the right of the ruler to regulate]. Therefore, he was to have the initiative and leadership of changes in religious and church relations. Also, supporters of the execution of rights hoped for an agreement with Zygmunt August, in an alliance with whom they wanted to change the practice of the political system, i.e. to break with the domination of the *magnateria* and instead introduce *szlachta* democracy, in which the parliament, or rather the chamber, was to play a decisive role in the Chamber of Deputies cooperating with the king.[363]

As such, there was no strong solution to check the ever-present temptation of political power within regular parliamentary and political order, but there was always the possibility of extraparliamentary and extrapolitical action through a *rokosz*, though these were quite difficult to coordinate among the *szlachta* and thus comparatively rare. Thus, on balance this same temptation led to many of the entanglements that befell the Republic over the next two hundred years, such as the closeness of the Jagiellonians to the Habsburgs[364], the struggles between Zygmunt II August and his mother Bona Sforza,[365] and later Zygmunt III Waza's attempt to hold absolutism in his disastrous attempts to keep his Crowns in Sweden, Poland, and Lithuania.[366] According to the *szlachta*, the "Commonwealth" was their personal creation, their sense of community,[367] and in this sense the kings often did not have the interest of the Commonwealth at heart. Part of the impetus for the execution of law movement—perhaps the most important political movement within 16th century Poland-Lithuania—was resisting Zygmunt I Stary and Zygmunt II Augustus' attempts to use Crown estates as a fund to support their military campaigns throughout the Baltic.[368]

Part of this tension can perhaps be explained by the nature of the Jagiellonian dynasty that ruled Poland-Lithuania (1386-1572), and how their interests often clashed with the

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the connection betewen Calvinism and Polish-Lithuanian Republicanism, see: Juliusz Bardach, Bogusław Leśnodorski, and Michał Pietrzak, *Bardach, Leśnodorski, and Pietrzak, Historia państwa i prawa polskiego*., pg. 189.

[363] Kriegseisen, "Reformacja a geneza demokracji szlacheckiej w Polsce," pgs. 194-195.

[364] Adrianna Czekalska. 2016. "Drugi etap rokoszu Zebrzydowskiego (X 1606-VI 1608) w świetle wybranych druków ulotnych." *Acta Universitatis Lodziensis Foloia Historica* 96: 19-41; Greśkowiak-Krawicz, "Anti-monarchism"; Kate Wilson. 2002. "The Jewel of Liberty Stolen? The Rokosz of Sandomierz and Polish Dissent." Presented at "The Contours of Legitimac yin Central Europe: New Approaches in Graduate Studies." European Studies Center, St. Anthony's College, Oxford, 24-26 May 2002. http://users.ox.ac.uk/~oaces/conference/papers/Kate_Wilson.pdf. (Accessed 5 January 2021); Janusz Tazbir. 1957. "Ze studiów nad ksenofobią w Polsce w dobie późnego renesansu." *Przegląd Historyczny* 48(4): 655-682.

[365] Sucheni-Grabowska,*Odbudowa domeny królewskiej*, pgs. 141-149, 152-155.

[366] Opaliński, "Postawa Szlachty," pg. 800.

[367] Anna Grześkowiak-Krwawicz. 2011. "Noble Republicanism in the Polish-Lithuanian Commonwealth (An Attempt at Discussion)." *Acta Poloniae Historica* 103, pgs.38-39.

[368] Sucheni-Grabowska, *Spóry królow*, pg. 12.

Polish *szlachta* and carried on into the debates between the Senat and House of Deputies respectively. The last "king" of Poland was Jadwiga the daughter of Ludwik Węgierskiej, last of house Angevin [l][369] albeit after significant concessions given to the *szlachta* in order to crown and support her despite being ten years old. However, the young age of Jadwiga and the mutual interests of the Crown of Poland and the Grand Duchy of Lithuania brought up the idea of a marriage to unite the two nations together. Despite being initially betrothed to William of Austria, the *szlachta* broke off her engagement in favor of the Grand Duke of Lithuania Jogaila, over twenty years her senior. In exchange, Jogaila converted to Christianity and took the name Władysław. After the marriage and his baptism, he was crowned Władysław II Jagiełło on February 18th, 1386.[370]

This united Poland-Lithuania for the first time, but it was a personal union, with the two remaining politically separate. After a young Jadwiga and their daughter died from complications due to childbirth, Władysław II Jagiełło found himself in a difficult position in that he did not own any right to the Polish Crown himself and that under inheritance law it should pass to Jadwiga's closest relative. Hence, he presented the *szlachta* with a new series of privileges that would have transformed him from king in name to actual king and that the Crown would stay within his bloodline.[371] The *szlachta* would always have the right to have the final say in deciding who would be the next king, which they referred to as an "election", but one that was markedly different from how we would consider an election today. This new theory was put to the test after Władysław's death in 1434, when the *szlachta* gathered together to hold an election Seym to choose the new king, but in reality that one of Władysław's sons would be elected was not really questioned: instead, the process of electing was more to confirm the privileges of the *szlachta* and to grant legitimacy to the king's reign, rather than an open selection of candidates.[372] Thus began the Jagiellonian dynasty, with

[369] "As is well known, in October 1384 Jadwiga Andegaweńska was crowned king of Poland ("*in regen Polonie coronata*"). Such a record was found in almost all sources of the time. From the point of view of this contribution, it is not important what power Jadwiga had before Jagiełło's coronation or what her legal position was after the ceremony. What is important for us is the conviction about Jadwiga's authority stated a century later. The designation of Jadwiga as queen (*regina*) in the treaty of 1496 should not come as a surprise. She titled herself as such, and was also referred to as such in many sources, such as in university sermons. In the case of the memorandum under review, however, the title reflected the author's broader view of the essence of Jadwiga Andegaweńska's power. In his view, she was not "the king of Poland" and her authority was not equivalent to that of a king," Piotr Węcowski. 2014. "Jadwiga Andegaweńska w opinii prawniczej z końca XV w. Przyczynek do późnośredniowiecznych wyobrażeń na temat władzy monarszej." *Ecclesia-regnum-fontes. Studia z dziejów średniowiecza*, Warszawa, pg. 255.

[370] Wacław Uruszczak. 1999. *Państwo pierwszych Jagiellonów*. Krajowa Agencja Wydawnicza: Warszawa, pgs. 1-2.

[371] Uruszczak, *Państwo pierwszych Jagiellonów*, pgs. 31-32; See also: Pudłowska, *Historia ustroju i prawa polski*, pg. 45. For a more in-depth look at Jadwiga's election, her marriage to Jagiełło and then to Jagiełło's "election" after her death, see: Marek Kornat and Wacław Uruszczak. 2018. 550 *lat parlamentaryzmu rzeczypospolitej*. Wydawnictwo Sejmowe: Warszawa, pgs. 12-13.

[372] "The Kraków Diet of 1434 was not, in the strict sense of the word, an electoral Diet. This is contradicted by the purpose of its convening. Dlugosz writes that at this sejm 'the coronation of the future Polish king was to be either accomplished or rejected.' Also, the very course of the debates indicates that it was not so much about the election of a king in the strict sense of the word, but about determining which of the two royal sons would receive the royal sacraments. In essence, the Kraków Sejm of 1434 was a continuation of the mechanism of succession found earlier in the Piast and Angevin periods, although at the same time it contained significant

each king technically elected by the *szlachta*, a key feature of post-Piast Poland that set it apart from other nations throughout Europe at the time,[373] though was not necessarily unique for Central Europe.[374]

Over centuries of battling together against the Teutonic Order, the Mongolians, the Ottomans, Muscovy, *inter alia*, the Crown and the Grand Duchy were the two strongest states in Central-Eastern Europe and realized they could achieve more together than in competition. Władysław II married two more Polish noblewomen, neither of which produced a male heir. Finally, his fourth marriage to a Lithuanian princess produced his heirs, the brothers Władysław III (1424-1444) and Kazimierz IV Jagiellończyk (1427-1592). This created a pattern of sorts wherein the Jagiellonian kings either had trouble producing an heir or died young, passing the crown to their younger siblings, and wherever a union was successful it was always to a foreigner.[375] As such, though the personal union was between Poland-Lithuania, no Jagiellon ever had a drop of Polish blood in their veins.[376]

It is important to acknowledge the differences in political culture between the Lithuanian boyars and the Polish *szlachta*, somewhat reflected by the different mechanisms for the selection of the office of Grand Duke of Lithuania versus King of Poland. The title of

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novelties. Jagiełło's sons, by virtue of the legitimacy and longevity of their father's reign, were the 'heirs' of their father's rights to the crown. Their rights to the Polish throne were confirmed by pledges given by the nobility in 1425, 1430-33. For their effectiveness, however, these rights - as in Piast times - required official, preceding the coronation itself, recognition by the states - in practice, the lords of the council - and thus an election. It is hard to think that Queen Sophia was wrong when, during the Krakow deliberations, she asked the crown states not to deprive her sons of their 'inheritance'," Kornat and Uruszczak, 550 *lat parlamentaryzmu rzeczypospolitej*, pgs. 43-44.

[373] "The electivity of the Polish throne constituted the foundation of the post-Piast regime. It was the source of contract between the future ruler and his subjects who expressed consent (*consensus*) to the taking of power by pretender to the throne, who in turn bonded himself to obey the conditions of the social agreement reached in this way," Krzysztof Koehler. 2012. "The Heritage of Polish Republicanism." *The Sarmatian Review* 2, pg. 1659.

[374] "By East Central European standards, this limitation of monarchical sovereignty was not exceptional. The Poland, Hungary and Bohemia of 1500 shared what Gottfried Schramm has called a 'pure culture of a state of estates [*Ständestaa*t]'. Their governments were conducted on the basis of the estates' recognition of fundamental laws and capitulations, which limited royal powers (such as the Bohemian *Landesordnung* of 1500), and of decentralised decision-making bodies (such as the *sejmik* in Poland, the *Landtag* in Bohemia and Silesia, and the *Komitat* in Hungary), which prevented the exercise of *absolutum dominium*. In the course of seventh century Habsburg rulers considerably curbed the power of the estates in Bohemia and Hungary. But Poland remained a classic *Ständestaat*," Karin Friedrich," Karin Friedrich. 2007. "Poland-Lithuania", pg. 223; See also: Zbigniew Rau, Przemysław Żurawski vel Grajewski and Marek Tracz-Tryniecki. eds. 2016. *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*. Routledge: London and New York, *passim*; Sucheni-Grabowska, *Spory królów*, pg. 2.

[375] Kazimierz IV married a Habsburg and had multiple sons, three of whom would become kings of Poland: Jan I Olbracht (1459-1501) had no children, and his younger brother Kazimierz joined the clergy, later becoming Saint Kazimierz (1458-1484) though he predeceased his father; the throne thus passed to the third son, Aleksander I (1461-1506), who also did not have any heirs. The throne thus passed to the fourth brother, Zygmunt I (1467-1548), who married the Italian Bona Sforza, Sforza, whose family ruled Milan and who was herself a duchess in her own right, herself a controversial figure in the history of Poland-Lithuania. Their only son, Zygmunt II August (1520-1572) himself died without any heirs, bringing the Jagiellonian dynasty to its end. Frost, *Oxford History*, passim; Stanisław Włodzimierz. 1858. *Zbiór Pamiętnikow do Dziejów Polskich.* Tom 1. Drukarnia Gazety Codziennéj: Warszawa, *passim.*

[376] Sucheni-Grabowska, *Wolność i prawo w staropolskiej koncepcji państwa*, pg. 78.

Grand Duke was automatic and hereditary whereas the Polish Crown was elective.[377] This was often the source of frustration for the Jagiellonians in that while half of the lands they ruled passed automatically, the other half had to be essentially bargained for every generation, though how successful the *szlachta* were in acquiring concessions varied depending on the geopolitical and financial situation of the union at the time. Similarly, the Lithuanian system was much more hierarchical with a council of *magnaci* who were naturally quite close to the king, whereas the relationship between the *szlachta* was much more complicated. As discussed earlier, in the period of tribal rule and the formation of the Piast dynasty, the local council and *wiece* were quite powerful and the relationship among the *szlachta* was much more horizontal and based on equality before the law. However, during the Jagiellonian period the king and his close allies the *magnaci* had most of the political power in a more hierarchical distribution of power, with many offices such as *starosta*, chancellor, treasurer, hetman, etc. being local offices that were essentially nationalized by the royal court.[378] As we shall see, the 16th century was a period wherein the *szlachta* were regaining their political voice and organization.

Due to geography, the Lithuanians were more concerned with Muscovy, which was competing with them in the east and along the northern Baltic coast, whereas the Poles were more concerned with the Ottomans, the Holy Roman Empire, and the Habsburgs, which competed with them over Moldova. The desire of the Jagiellonians to build alliances with the strongly pro-Catholic, pro-imperial Habsburgs was one of the many concerns of the Polish *szlachta*, particularly the executionists.[379] Finally, the Jagiellonian dynasty was quite spread through Central and Eastern Europe, with branches in Hungary and Bohemia. In fact, at the turn of the 16th century, Władysław II Jagiełło was king of Bohemia, Hungary, and Croatia, Jan I Olbracht was elected by the *szlachta* to be king of Poland, and Aleksander ruled Lithuania. These far-reaching dynastic ties also created a complex foreign policy, engaged in various conflicts throughout Central and Eastern Europe that sometimes went against the wishes and interests of the *szlachta*.[380]

These complex overlapping dynamics created a cycle of sorts, wherein the Jagiellonians created a foreign policy commitment—often an entanglement—that was not necessarily popular with the *szlachta* or aligned with their interests but that the Lithuanians did not have the manpower or resources to manage or conclude said commitments on their own. This was often the case for wars or expansionist policies, wherein the king and his allies in the Seym would craft a set of privileges to obtain political and military support from the *szlachta*.[381] After the resolution of the problem, the king and his allies would look for

[377] Jadwiga was the last hereditary ruler of the Polish Crown. In 1430 Władysław II Jagiełło had to bargain with the Polish *szlachta* to secure the throne for his heirs in what became known as the Jedlnia privilege. See: Frost, *Oxford History of Poland-Lithuania*, pg. 150; Sucheni-Grabowska, *Wolność i prawo*, pgs. 77-78.
[378] Uruszczak, *Historia państwa i prawa polskiego*, pgs. 159-160.
[379] Stone, *Poland-Lithuania*, pgs. 53-54.
[380] Stone, *Poland-Lithuania*, *passim*.
[381] This same pattern was repeated with the Nieszawa statutes (1454) for the *szlachta*'s support in the Thirteen Years' War against the Teutonic Order, the Statute of Piotrków (1496) for the *szlachta*'s support in an expedition against Moldavia as part of the Polish-Turkish War (1485-1503), and Mielnik (1501) and Nihil novi (1505) were granted for the *szlachta*'s participation as part of the ongoing wars between Lithuania and

ambiguities within the law or simply choose not to enforce it in order to regain some of the power lost in the compromise. The Jagiellonians were also close allies with the Church, and though religious (clerical) courts and criminal courts were supposed to be separate jurisdictions according to Polish law, throughout the Jagiellonian period the *starosty* began to increasingly execute the decisions and summons of the Church.[382] As we shall see, this became a major point of contention, especially as this period was when the Reformation came to Poland-Lithuania, and was a key point in the execution of law reform movement.[383] Secondly, though the Jagiellonians were supposed to keep Polish Crown lands for the maintenance of the state—particularly to finance the defense of the nation—they had given away substantial tracts of their lands to their supporters for very little fees, essentially in perpetuity. This practice had bankrupted the nation by the time of the last two Jagiellonian kings, Zygmunt I Stary and Zygmunt II August.[384] In addition, the Jagiellonians were often accused of *absolute dominium*,[385] and that the political discourse at the time had elements of what Pietrzyk-Reeves refers to as "preabsolutism".[386] The last two in particular had a tendency to surround themselves with foreigners or *magnat* advisers, and had a personal dislike of working with the Seym and the *szlachta*, avoiding them as often as possible. Whenever there was a conflict with the Seym that could not be resolved, the last two Jagiellonians sometimes refused to call them altogether and chose to retreat to their ancestral lands in Lithuania, sometimes for years.[387] For significant periods during his reign, Zygmunt August tried to rule without calling the Seym at all. [388] All of these set the stage for the constitutional and political reforms that would take place over the 16th century.

II. Constitutional Antecedents to the Henrician Articles

Of the previously mentioned acts, the seven that served as the most immediate antecedents to the Henrician articles were the Privilege of Koszyce (1374), Czerwińsk privilege (1422) that prevented the king from seizing property without a court order, the Jedlnia privilege (1430)—later confirmed at Kraków (1433)— the Nieszawa Statute (1454/1496), the Union of Mielnik (1501), the Mielnik Privileges (1501), and *Nihil Novi*

Muscovy. See: Oxford, *History*; Davies, *God's Playground*; "Władcy zwierzchni". http://www.poczet.com/przywileje.htm. [Accessed 26 April 2021].

[382] Uruszczak, *Historia państwa i prawa polskiego*, pgs. 161-163.

[383] Łukasz Godlewski. 2014. "*Szlachta* a duchowieństwo podczas panowania Zygmunta Starego." *Białostockie Teki Historyczne* 12: 37-59; Łukasz Godlewski. 2013. "Spory szlachty o dziesięciny i jurysdykcję duchownych na sejmach egzekucyjnych 1562-1565." *Białostockie Teki Historyczne* 11: 51-70; Edyta Nowak-Jamróz. 2006. "O polski język statutów – charakter egzekucyjnego postulatu." *Studia z Dziejów Państwa i Prawa Polskiego* 9(1): 217-225. Stone, *The Polish-Lithuanian State*, pg. 54; Sucheni-Grabowska, *Spory królów*, pg. 26.

[384] Sucheni-Grabowska, *Odbudowa domeny królewskiej*, *passim.*

[385] Sucheni-Grabowska, *Wolność i prawo*, pg.42; Uruszczak, "Species," pg. 28.

[386] Dorota Pietrzyk-Reeves. 2017a. "Patterns of Political Thinking and Arguments in Poland–Lithuania: Virtues, Res Publica and Education." In Leszek Korporowicz, Sylwia Jaskuła, Małgorzata Stefanowicz, Paweł Plichta, Biblioteka Jagiellońska, Jakub Błaszczak, Marzena McNamara, eds. *Jagiellonian Ideas Toward the Challenges of Modern Times*. Jagiellonian Library: Kraków, pg. 335.

[387] Frost, *Oxford History of Poland-Lithuania*, pages 441-445; Makiłła, *Artykuły henrykowskie*, pgs. 237-239; Sucheni-Grabowska, *Spory królów*, pg. 19.

[388] Władysław Konopczyński. 1985. "The Principle of Unanimity during the Renaissance." In: Władysław Czapliński, ed. 1985, *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pg. 37.

(1505). They were constitutional in that they fulfilled a broad purpose of establishing the political and legal framework that governed social relations and institutions within the Crown and the Grand Duchy. Understanding the nature of these various acts can be somewhat difficult, but a simple way to categorize them would be into: privileges (*przywileje*) and constitutions (*konstytucja* or *constitutio*). Privileges were the official granting or recognition of new rights held by the *szlachta* within certain geographical areas, which over time extended to the whole *szlachta* class, before being slowly extended to other classes later, such as the 3 May Constitution extending *szlachta* privileges.[389] To complicate matters, these categories may not be mutually exclusive, with some legal provisions overlapping into multiple areas or multiple instruments performing the same action, e.g. there may have been granting of a privileges as well as acknowledgement of those privileges within a constitution. Furthermore, many of these privileges were *constitutional* in the architectonic sense we employ throughout this study, in that by guaranteeing certain freedoms of the *szlachta* they limited the power of the king and shaped the entire political and legal system, such as privileges of religious freedom simultaneously taking powers away from the king and the (church) courts. The effective end of the "traditional" understanding of the king as the personification of the state ended with the death of Kazimierz Wielki and the personal union of the Polish Crown and the Kingdom of Hungary under Ludwik Węgierskiej (Louis I or Louis the Great), in that the king had to acknowledge the Polish Crown as a legal entity unto its own.[390] Ludwik Węgierskiej granted the granted the Privilege of Koszyce in 1374 in order to secure the throne of Poland for one of his daughters, himself having no male heirs. It was successful, with his daughter Jadwiga eventually succeeding him. The constitutional archetypes produced by the Privilege of Koszyce are presented below in Table 3.2.

[389] 3 May Constitution, art. III: Towns and Citizens.
[390] Wacław Uruszczak. 1999. *Państwo pierwszych Jagiellonów*. Krajowa Agencja Wydawnicza: Warszawa, pg. 3.

Table 3.2 Enumeration of Constitutional Archetypes of the Privilege of Koszyce, 17 September, 1374[391]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
We also pledge and swear that such honorable offices and ranks as voivode, castellan, judge, chamberlain, and to them similar, which according to common practice were held for life, we shall not entrust to any strangers, foreign to our land, unless they should reside within the lands of our Kingdome where such noble offices and ranks exist [sic]. These we wish to keep entirely without any alteration, observing their rights as they used to be observed in the times of the most dignified rulers, Władysław, grandfather, and Kazimierz, uncle, our Polish kings.	Offices cannot be granted to foreigners or to foreigners who are full time residents in the Crown	Representation, Participation, and Citizenship	Ontology
	Acknowledges laws of previous kings	Sources of Law	
		Consent and Legitimacy	
We also swear that no baron, knight, lord, or any other alien or stranger, regardless of their assets, will be made a governor, commonly known as a *starosta*, should their blood not be Polish, unless they should belong to the land to a Polish family.	Offices cannot be granted to foreigners or to foreigners who are full time residents in Crown	Representation, Participation, and Citizenship	
Should we or our face the need to travel through the Kingdom we promise not to call at barons, knights, lords and their peoples, peasants, and villagers against their will and we shall not allow for anything to be demanded from them on the occasion of our visit; however, should we not be able to find a suitable place to lay our heads for rest then we shall order for food and all other necessities to be provided at our own expense.	The king shall respect the private property and rights of his subjects when he travels and shall not overly burden them financially or in any other way.	Enumerated, Individual Rights	

[391] "The Polish Sources," pgs. 152-153. Translated by Weronika and Dean Edmunds from the original Polish text: Sławomir Godek and Magdalena Wilczek-Karczewska. *Historia ustroju i prawa w Polsce do 1772/1795: wybór źródeł*. Wydawnictwo Naukowe PLN: Warszawa, pgs. 32-35.

At the time, the Kingdom Poland was in a personal union with the Kingdom of Hungary. As such, the Polish *szlachta* greatly—and reasonably—feared that their lands might be threatened by a foreign ruler with a court of foreign advisers. As such, Ludwik was very careful to explicitly declare that offices could not be given to foreigners unless they were foreigners who lived in the Crown, and that local offices were granted to those who actually lived in the region. Similarly, he also acknowledged that Poles would follow Polish laws. Finally, he respected the rights of his citizens whenever he travelled: neither the king nor his servants—members of the Court, the armed forces, etc.—could seize private property, nor demand food or other services without fair pay to their hosts.

In the early 15th century, the Kingdom of Poland and the Grand Duchy had been united in a personal union under Władysław II Jagiełło, and both shared a common enemy in the Teutonic Order. Władysław II engaged in a series of wars against the Order in order to regain lost land, but at the time the king had no personal army, but instead relied on the support of the *szlachta* to wage his campaigns. The Czerwińsk Privilege was granted in 1422 in order to convince reluctant *szlachta* to fight in the conflicts. The constitutional archetypes of the Czerwiński Privilege are laid out in Table 3.3 below.

Table 3.3 Enumeration of Constitutional Archetypes of the Czerwińsk Privilege 1422[392]

<table>
<tr><th>Text</th><th>Outcome</th><th>Constitutional Archetype(s)</th><th>Constitutional Archetype-as-Such</th></tr>
<tr><td>[W]e shall not take from any of our subjects, regardless of their titles, offices, Estate and rank, their hereditary estates, neither to the Treasury nor into our or our clerk’s disposal, nor shall we employ anyone or execute such actions as a punishment for perpetration of a misdeed or harm caused—unless previously decided by our courts and judges, who shall be called to such service by ourselves and our prelates and lords, and it is them who will carefully consider each case prior to their verdict.</td><td>Inviolability of Private Property</td><td>Enumerated, Individual Rights</td><td rowspan="2">Ontology</td></tr>
<tr><td>[W]e proclaim that all the peoples of our Kingdom, regardless of their status, honours, and rank, who at present and in the future wish to present their cases in one of our landed courts, be tried under one law, customs, and traditions in all lands of our Kingdom.</td><td colspan="2">Unification of Law</td><td rowspan="3">Epistemology</td></tr>
<tr><td rowspan="2">[O]ur judges, therefore, whilst arbitrating in the courts over which they are presiding, shall not dare to introduce any customs, traditions, and rules other than those listed in the Statute of the Polish Kings and manifested in the traditions of the aforesaid Kingdom, to which they should for ever adhere. And should they rule anything that stands in contradiction to the aforesaid, their sentence shall be void of binding power and shamefully ignored.</td><td>Narrow Interpretation of the Law</td><td rowspan="2">Attributes or Criteria of Legal Interpretation</td></tr>
<tr><td>Possibility of Judicial Review</td></tr>
</table>

[392] “The Polish Sources,” pgs. 154-155. Translated by Weronika and Dean Edmunds from the original Polish text: Weronika and Dean Edmunds from the Polish text, Lech Grochowski and Andrzej Misiuk, eds. 2003. *Historia państwa i prawa Polski: wybór źródeł X-XX wiek*. Wydawnictwo Warmińsko-Mazurskiego: Olsztyn, pgs. 31-33.

Władysław II Jagiełło confirmed the right of the inviolability of personal property but also went further in tying it to formal courts. He proclaimed equal access to the courts, that there would be one law throughout the Kingdom, and that judges should interpret the law narrowly. He also laid a foundation for reviewing and overturning judges' decisions. The Czerwińsk Privilege did not simply protect the rights of the *szlachta*, but also laid the foundations for a unified legal order throughout the Kingdom.

Just as Ludwik I was uncertain about whether one of his daughters could succeed him to the throne, so too was Władysław II worried whether his son would succeed him and granted the Jedlna Privilege in exchange for securing his son's crown. It largely synthesized and reconfirmed the privileged that came before it and is summarized in Table 3.4.

Table 3.4 Enumeration of Constitutional Archetypes of the Privilege of Jedlnia in 1430, re-confirmed at Kraków in 1433[393]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
[N]one of the goods or possessions of anyone shall be confiscated: unless he be presented to Us by duly authorized Judges, or our Barons, as a man condemned by the court.	*Szlachta* cannot have their property confiscated nor put in prison without going through a proper judicial process and a sentencing before a Court.	Enumerated, Individual Rights	Ontology
We moreover promise and swear that no landowner possessing a landed property be imprisoned for misdemeanors or faults, and We shall not issue an arrest order against him; and We shall not at all punish him, unless the court in a judicious manner has proved his guilt and if the Judges of the land wherein the landowner resides have delivered him into our hands, or those of our *starosty*.		Rule of Law	
		Justice and Court Procedures	Teleology
All their rights and privileges, which earlier at our coronation and later, in different circumstances and times, were bestowed upon them, or which were bestowed upon them since ancient times by the other kings and dukes, our predecessors, the rightful heirs of the Kingdom of Poland: by virtue of this present privilege We do ratify, approve, renew, and confirm by the rule of the articles herein written below, owing to which regulation, even if the tenor of the aforesaid privileges has comprised certain incomprehensible items, they shall henceforth acquire a clearer meaning, and all the ambiguities or dubious aspects, resulting wherefrom there usually arises a confounded comprehension of matters, and errors are begotten, shall be rendered absent.	Affirmation of previously granted *szlachta* privileges	Sources of Law	Ontology
	The above-mentioned Laws and regulations shall be interpreted in a way to improve their clarity	Requirements of Legal Interpretation	Epistemology

[393] *Privilege of Jedlnia and Kraków*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 25 June 2022] https://polishfreedom.pl/en/privilege-of-jedlnia-and-krakow/; Dorota Malec. 2016. "The nobility's privileges and the formation of civil liberties in old Poland." In Zbigniew Rau, Marek Tracz-Tryniecki, and Przemysław Żurawski vel Grajewski, eds., Magna Carta: A Central European perspective of our common heritage of freedom. Routledge: London and New York, pg. 135; "The Polish Sources," pg. 155.

Firstly, it is our will that the Divine dwellings in their entirety, namely, churches, with all of their powers, immunities, and liberties, as well as the boundaries and distinctions of which they have taken advantage in the time of the two or our predecessors, the kings and dukes of Poland, be preserved, in every single kind thereof; whereas, *We allow the ecclesiastical and secular dignities of the Kingdom of Poland to persist and permanently endure, upon the strength of the same rights, customs, and liberties* that they possessed at the times of the Most Serene Rulers, Lords Kazimierz III Wielki, Ludwik Węgierski, and other kings as well as dukes, heirs to the Kingdom of Poland (emphasis added).	Privileges of the Church as well as Secular Authorities Upheld	Partial Separation of Church and State	
Should it occur that any of these dignities [offices] be vacant, We shall not entrust or in any other manner offer the same to anyone born in a foreign land, but only to a deserving nobleman preserved in good repute in those lands wherein a dignity of this kind or another public office be vacant; so in the land of Cracow, to an individual native to the land of Cracow; in the land of Sandomierz, to an individual native to the land of Sandomierz; and in Greater Poland, to an individual native to Greater Poland; and, at length, We do grant or confer in like manner for each individual land of the Kingdom of Poland [clarification added].	Local Government Officers Cannot be Held By Foreigners; Local Government Offices Held by Locals	Representation, Participation, and Citizenship	Ontology

A person's private property could not be confiscated without a decision by a judge. A member of the *szlachta* could not be imprisoned or punished without a court first finding him guilty. All the previously granted *szlachta* privileges were reconfirmed. Laws were to be interpreted in a way that would improve their clarity and judicial errors shall be overturned. Local government offices could not be held by foreigners, and local offices had to be administered by local officials. Here, the principle barring foreigners from office was stronger than in other legal acts, in that it was not offered to any foreigner, even to one who was a full-time resident of the land. It also notably added that the rights and privileges of churches would be upheld and preserved and acknowledged both secular and ecclesiastical offices. Overall, the Jedlnia Privileges were consistent with efforts to stabilize the political and legal system, more so than adding anything new to it.

By the middle of the 15th century, Władysław II's grandson Kazimierz IV Jagiellończyk was again engaged in a conflict against the Teutonic Order. He granted the Nieszawa Privileges in 1454 to gain the military support of the *szlachta*, which are summarized in Table 3.5 below. They were reconfirmed by his son Jan Olbracht at Piotrków in 1496 with some additions, which are summarized in Table 3.6 below.

Table 3.5 Enumeration of Constitutional Archetypes in Nieszawa Privileges, 1454[394]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
[H]igh positions and offices in all lands of our Kingdom will be entrusted absolutely to local people of merit, appropriate age, education, and life experience, high positions, thus, shall be awarded to people native of the land where a given position exists and whose hereditary estates are located within the boundaries of the land in question so that there will be no room for muttering and dissatisfaction.[395]	Local Offices to be held by local residents,	Representation, Participation, and Citizenship	Ontology
As the estates and properties of our royal office were initially awarded not only to ourselves but also to grant protection and safety of the entire Kingdom, we solemnly swear that we shall not put any of the lands or castles, including those inhabited by starosts, in pledge, and should they be unjustly pawned by our nobles then the creditor shall loose whatever they paid for them.[396]	The property given to the king is for the protection of the kingdom, not his personal gain	Distinction of the ruler from the state	
We also solemnly swear that we shall not issue letters suspending the judiciary or any documents that could prevent or delay the course of justice bringing harm to one of the parties—the defendant or the petitioner; should it, nevertheless, happen that a letter of such nature leaves our office, whether due to one person's insolent obtrusiveness or for any other reason, it shall be deemed as void and the judges should not feel intimidated on its	King promises to not prejudge and interfere with a trial	Horizontal Organization of Political Institutions Boundaries of State Power	Ontology

[394] "The Polish Sources," pgs. 156-157. Translated by Weronika and Dean Edmunds from the original Polish text: Weronika and Dean Edmunds from the Polish text, Lech Grochowski and Andrzej Misiuk, eds. 2003. *Historia państwa i prawa Polski: wybór źródeł X-XX wiek*. Wydawnictwo Warmińsko-Mazurskiego: Olsztyn, pgs. 34-39.
[395] "The Polish Sources," pg. 156.
[396] *Loc. Cit.*

account when passing judgement.[397]			
We also declare that our *starosty* should not pass judgement on every matter, but only in four cases, namely: disruptions at the royal tract, when merchants are being harmed; arson; violent assault on a household, and rape committed against women.[398]	*Starosty* jurisdiction defined	Horizontal Organization of Institutions	
		Purpose of the State	Teleology
Should anyone facing the majesty of the court be unable to duly give account of their case, or should struggle to speak and be left without a friend who could speak for them, then the court where the hearing takes place is obliged to provide them at their request with a suitable defense counsel.[399]	Everyone guaranteed a defense in court	Enumerated, Individual Rights	Ontology

[397] The Polish Sources," pg. 156.
[398] *Loc. Cit.*
[399] *Ibid*., pg. 157.

Table 3.6 Enumeration of Constitutional Archetypes in Piotrków Statutes, 1496[400]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
Considering that some of the *konstytucje* of our predecessors had been brought into oblivion, and that others needed reformation, innovation, and others additions, at the instance of all our *szlachta*, by the advice of our barons and councilors appointed before us, the *konstytucje* of the lands of our aforesaid Kingdom, we decided to renew, amend, and reform for the better by the present ones. We have decided to add that the judges of the world of our Kingdom, based on themselves and learned from them in judging, should preserve the old equity of the sovereign state.[401]	A Council of *Szlachta* Help the King Make Legal Changes	Legitimacy	Ontology
[E]veryone who comes to the market should be free to sell and buy his property as he pleases.[402]	Free markets	Boundaries of State Power	Ontology
Again, we promise that we will not make any new *konstyyucje*, nor will we command the nations to go to war without the approval of general gatherings that are to take place in every land.[403].	*Szlachta*' consent needed to declare war	Horizontal Organization of Political Institutions	
		Representation, Participation, and Citizenship Boundaries of Sate Power	

[400] The full Latin version of the Nieszawa privilege, reconfirmed in 1496, is presented in *Volumina Constitutionum*, Tom I, Vol. I, pgs. 60-85.
[401] "Privilegium Nyeschoviense," in *Volumina Legum*, Tom I, pg. 114; in: *Volumina Constitutionum*, Tom I, Vol. I, pgs. 61-62.
[402] "In foro publico non sint prohibitions," in *Volumina Legum*, Tom I, pg.115; in *Volumina Constitutionum*, Tom I, Vol. I, pg. 65.
[403] "De bello et constitutionibus decernendis," in: *Volumina Legum*, Tom I, pg. 115; in: *Volumina Constitutionum*, Tom I, Vol. I, pg. 66

Like the acts that preceded it, they confirmed that local offices are to be held by local residents, though they did not specify that they could not be foreigners. They also elaborated upon the rights of the *szlachta* to a fair trial in that the king was not allowed to prejudge or interfere in the trial in any way. The jurisdiction of the *starosta* were also explicitly defined. Finally, everyone was granted the right to a defense in court, and that they would be provided one if they did not have one for themselves. The narrowing of the king's own ability to interact with the legal system, the specifying of the role of a *starosta*, and the granting of a right to defense were all incredibly important in that the king—and those whom he appointed—was overseer of both the judication of law as well as its execution. In modern terms, he was head of both the executive as well as the legislative branch. Thus, there was extensive potential for the king to administer justice unfairly or to at least be seen as having administered justice unfairly. The Nieszawa Privileges and Piotrków Statutes put constraints on the king, his representatives, as well as judges, but also served a vital function in increasingly separating his function as an executive and his function as the highest judge in the land.

The turn of the 15th century saw a weakening of the Polish-Lithuanian union, with king Kazimierz IV Jagiellończyk's two sons Jan I Olbracht and Aleksander Jagiellończyk inheriting lordship over the Crown and the Grand Duchy, respectively. Ivan III of Muscovy hoped to take advantage of this weakness and was preparing for war against Lithuania, with many Polish *szlachta* having been reluctant to fight against Muscovy in the past. When Lithuania asked for Polish aide, the *szlachta* demanded that the Polish-Lithuanian union be strengthened and centralized. Essentially, the Poles wanted to incorporate Lithuania as a constituent part of the Crown, whereas the Lithuanians wanted eternal friendship and brotherhood of separate realms. The Lithuanians only wanted a royal election if the Jagiellonian dynasty died out, which was in line with the views of the Grand Duchy that the position of Grand Duke was hereditary, not elective. On the other hand, the Poles wanted to preserve the right to elect every king.[404] Eventually the need for the Poles to have support against the Ottomans and the Lithuanians' need for support against Muscovy produced a compromise of sorts:

> The Poles might in practice favour the natural rights that the Jagiellons claimed to possess, and they might always vote for a candidate who would preserve the union, but they would not surrender the right to choose.[405]

This created a situation where there was *de jure* election of a new king by the *szlachta*, but *de facto* would continue in the Jagiellonian hereditary line. This agreement was worked out by Jan I Olbracht and Aleksander I, establishing a confederation of sorts between the two nations.[406] By 1501 it was clear that Muscovy was making significant gains in the war and Jan I Olbracht died unexpectedly. Aleksander I took the opportunity to reunify the two lands together. Recognizing the weakness of Lithuania's bargaining position, the Poles revived the stronger version of a union and a series of privileges that Aleksander I would grant after being elected king. The Union of Mielnik was approved by two bodies of Polish and

[404] Frost, *Oxford History of Poland-Lithuania,* pgs. 327-328.
[405] *Ibid*., pg. 333.
[406] *Ibid*., pgs. 330-334.

Lithuanian lords in October 1501 and the Mielnik privileges were created a few days later. Aleksander I was crowned in December of that year but ultimately never ratified the Mielnik privileges. The Poles did not supply enough military aid and Lithuania had to sue for peace largely on her own, at greatly disadvantageous terms. With the Lithuanian good will for a greater union depleted, one set of universal privileges shared by the Lithuanian and Polish *szlachta* were ultimately rejected. Aleksander I remained king of two separate realms, though the royal council in the Crown and the Grand Duchy cooperated together, with state institutions, hierarchies, and legislative bodies remaining separate.[407] The Union of Mielnik and the Privilege of Mielnik are summarized in tables 3.6 and 3.7 respectively.

The early 16th century witnessed a series of increasingly expensive entanglements between the Grand Duchy of Lithuania and Muscovy. The Union of Mielnik and Privilege of Mielnik were created to secure *szlachta* support for wars in foreign lands by blood or treasure. It is important to acknowledge that the Union of Mielnik and the Privileges of Mielnik are not the same. The Union of Mielnik was the *political* union that renewed the relationship of the Kingdom of Poland and the Grand Duchy, whereby Aleksander I acknowledged and acceded to the demands of the Polish *szlachta* for closer union with Lithuania, whereas the Privilege of Mielnik was a *constitutional* arrangement that specifically refined institutions, though both had elements that were key to the development of Polish-Lithuanian Constitutionalism. The two text are presented for comparison below, in Tables 3.7 and 3.8.

[407] Frost, *Oxford History of Poland-Lithuania*, pgs. 338-340.

Table 3.7 Enumeration of Constitutional Archetypes in Union of Mielnik, Proposed 3 October 1501, Confirmed 23 October 1501[408]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
Thus, since every body conserves itself, wherever, with salutary remedies, whilst it destroys itself with the contrary things, hence, everything that concerns the whole of the body and everything therein contained shall be ordained through a common council on both parts and, similarly, exercised by common support in things both adverse and prosperous.	Decision-making Process of the Union Established	Political Decision-making,	Epistemology
		Consent and Legitimacy	Ontology
Thus, all of the alliances whatsoever, also those confirmed by oath and formerly entered into with whomever, shall be observed by both of the two parties *for as long as there be naught therein that infringes on the laws and amenities of the Kingdom and the Grand Duchy of Lithuania* (emphasis added).	Supremacy of local interests	Hierarchical Organization of Institutions	
		Sources of Law	
[L]et each of the parts be of counsel and aide to the other, so that the royal majesty may preserve the laws, liberties, dignitaries, and offices of both of the dominions inviolate; whilst the generality of the laws, judgements, habituations, prerogatives, and singular liberties and judiciary constitutions of both dominions, of the old time and kept hitherto, be unharmed and preserved as such.	Role of the Executive, Preservation of Laws	Horizontal Organization of Institutions	
		Legal Sources	
		Legitimate Methods of Constitutional Change	Epistemology

[408] All of the citations are to be found at *Union of Mielnik (the Privilege of Aleksander, Grand Duke of Lithuania*), The Polish History Museum, Warszawa: *The Legal Path of Polish Freedom*. [Accessed 28 June 2022]. https://polishfreedom.pl/en/union-of-mielnik-the-privilege-of-aleksander-grand-duke-of-lithuania/

Table 3.8 Enumeration of Constitutional Archetypes in the Mielnik Privileges, Submitted 25 October, 1501 Never Approved[409]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
But what can turn out to be nothing more excellent among human interests, than to live life under a good and just prince, who is subject to the advice of upright men, to the laws rather than not to their will or to their lust? that is, that princes are willing to act according to their own will and desires, and while their endeavors are resisted by the leading counsel, then their impulses and dispositions can only turn against their state, person, and fortune with moderate success.	Creation of an Advisory Body for the King	Horizontal Organization of Institutions	Ontology
Our Royal Majesty and Our Successors will be bound and will be obliged to report the same action in which it will be appealed to the discussion of the lords councilors, and will be obliged to abide by their decision, just as in individual public and private actions,			

[409] Full Latin text found in Grodzinski, Irena Dwornicka, and Uruszczak, *Volumina Constitutionum*, pgs. 111-113.

The Union of Mielnik established the concept of a common council that was to be composed of delegates from both the Crown and the Grand Duchy in what was effectively an administrative union of the two nations. However, it was also recognized that neither the Crown nor the Grand Duchy were allowed to produce any laws or enter into any alliances that would harm either party's interest. In this sense, the rights of the Crown and the rights of the Grand Duchy were superior to those of the union between them. The legal systems of both parts were preserved separately, with both ultimately managed by the king. The Mielnik Privileges went much farther than the Union of Mielnik, proposing the creation of a body of advisors whom the king would need to consult on his actions. This council would consist of members from both the Crown and from Lithuanian and would—at least in theory—provide some kind of counterbalance to the king's absolute power and authority. It also reconfirmed the process of the election of the king, but that the Crown and Lithuania would vote together to reach unanimity and consensus on a candidate, rather than each vote separately, as was done throughout the Jagiellonian period. An even stronger form of this idea—that of introducing the right to disobey—was proposed, but eventually removed from the articles.[410]

It is important to acknowledge that the Union of Mielnik and the Privileges of Mielnik are not the same, given that both played a slightly different role in the Commonwealth's constitutional development. The Union of Mielnik was largely a *political* union that renewed the relationship of the Kingdom of Poland and the Grand Duchy but did attempt to limit the power of the king. It also created a clear hierarchy between a law held in common between both nations and the laws of each individual nation, in that the interests of the Crown and Lithuania both outweighed the interest of their union. However, the interests of the Crown and Lithuania did provide some kind of check on each other, in that neither was allowed to perform any action that might threaten the interests of the other. The Union of Mielnik also confirmed the role of the king as the supreme judge. The Mielnik privileges—on the other hand—had a much stronger constitutional dimension to them, in that it discussed the limitations of the king's power through an official political institution that drew its membership from both the Crown and the Grand Duchy, it discussed the matter of royal election, and it also discussed the duties of the king and suggested that it was possible that he could violate that role.

The unfortunate lack of distinguishing between the Union of Mielnik and the Mielnik Privileges within scholarly literature—particularly in the English-speaking world[411]—has reinforced the notion that Poland-Lithuania should be reserved for "Polish", "Eastern European", or "Slavic" studies, rather than as something that is of more universal importance and recognition. Fortunately, recent Polish scholarship has made more sophisticated examinations into this field of research.[412] Neither the Union of Mielnik nor the Mielnik privileges were successful. Neither the Polish Seym nor the Lithuanian Seym voted for the

[410] Uruszczak, *Historia państwo i prawa*, pgs. 156-157.

[411] For example, neither Davies nor Stone distinguish them, whereas Frost discusses them as separate acts at great length. See: Stone, *The Polish Lithuanian State*, pg. 34; Frost, *Oxford History of Poland-Lithuania*, pg. 347f, 349; Davies, *God's Playground*, pgs. 111, 164.

[412] Stanisław Grodzinski, Irena Dwornicka, and Wacław Uruszczak, eds. 2000. *Volumina Constitutionum*. T.1: 1493-1549. Warszawa: Wydawnictwo Sejmowe, pgs. 100-101. In fact, the editors describe the history of these acts, along with a bibliography of publications that have treated them, spanning well over 450 years.

Union of Mielnik: for the Polish *szlachta* wary of the oligarchic rule of the Jagiellonians and their *magnat* supporters it did not go enough to preserve their freedom and limit the power of the king. For the Lithuanian Jagiellonians and their supporters, it gave up too many rights and forced too many restrictions on the power of the king and the Church. Ultimately, due to the war situation with Muscovy and its financial and political strain on the Grand Duchy, the *szlachta* had the upper hand and made some minor gains, such as nominally restricting the king's decisions by *szlachta* consensus as well as empowering the Senat as the overseer of the legal system as well as legislation.[413] Further, though the Mielnik articles were passed by the Seym, upon his coronation King Aleksander did not confirm them, thus they never became fully binding.[414] In legal systems, it is often dissenting voices or those that lose the immediate political debate that often have the longer impact on shaping political and legal culture, and—as we shall see later—the introduction of ideas limiting the power of the king and the potential right of the *szlachta* to disobey him if said duties were not upheld or if their rights were violated would become critically important for 16th century Polish-Lithuanian constitutional development.

The next major constitutional watershed, the *Nihil novi*, was an elaboration upon these themes. By 1505 the Jagiellonian dynasty's fortunes had continued to diminish, as it was clear that Aleksander I Jagiellończyk was dying without an heir. He thus endeavored to secure the Polish crown for his younger brother, Zygmunt I. However, he had generally continued favoritism toward Lithuanians over Poles, and his refusal to implement Mielnik did not make him popular with the *szlachta*. However, Aleksander's politically savvy lieutenant, Jan Łaski convinced Aleksander that the best way to outmaneuver the *szlachta* was to present them with favorable terms that would diminish the power of the oligarchs, but that he should move first to set the terms of the agreement. Following his advice, Aleksander called the 30 March 1505 Seym and produced the *Nihil Novi*, which would secure the throne for Zygmunt I in exchange for strengthening the power of the Seym. It read:

> Since the common law and public statutes affect not individuals, but the whole people, therefore in this assembly at Radom, with all the prelates, councilors, barons, and envoys of the land, we consider it to be right and reasonable, and have therefore established, that henceforth and in perpetuity, nothing new [*nihil novi*] should be decreed by us or our successors that is to the prejudice and inconvenience of the *Res Publica*, or to the injury or detriment of whatsoever private interest, or that alters the common law or public liberties, without the common agreement of our councilors and envoys of the lands.[415]

Nihil Novi's "nothing new" was not itself a new idea, and was somewhat misleading, in that in reality it meant "nothing *completely* new",[416] which was vague and gave the king much room in practice. This reflected the current practices that had already existed in the Crown and Lithuania over the 15th century. However, it was important in that it crystallized

[413] Jacek Brzozowski. 2011. "Zygmunt I a senat koronny w latach 1506-1535." *Białostockie Teki Historyczne* 9: 11-39.
[414] Uruszczak, "Species privilegium", pg. 28.
[415] Translation by Frost, *Oxford History of Poland-Lithuania*, pg. 349; See also: "The Polish Sources," pg. 157.
[416] "A significant moment in its history was the adoption of the constitution known as *Nihil novi*. The title used in general circulation is actually the exact opposite of its content. It was not "nothing new", but "completely new." Lewandowska-Malec, "Demokracja deliberacyjna", pg. 59.

the Seym from a gathering of local *szlachta* with an ambiguous and underdefined role in the political system to an actually governing parliament as would be understood today,[417] what has been referred to as a "parliamentary monarchy".[418] In other words, it was the beginning of the Seym's legal sovereignty.[419] *Nihil Novi* was vital in the transition from the rule of the king in the early Jagiellonian period toward the rise of the Senat, the Izba Poselska, and the king as three parliamentary estates, each bound by their own specific role in the Seym.

> The monarch, having the right of legislative initiative, as well as the free (not necessarily following the vote of the majority) conclusions of the views of his senate council, convening and proposing the issues of the Sejm sessions, retained the superior status over both chambers of the Sejm, as well as the right to sanction its resolutions. The presence of the king was not necessary for the proceedings of the Seym (in the years 1506-1540 as many as seven Seymy were held without the participation of Sigismund I). The monarch was the head of the congregation and was not originally part of it. It was not yet a parliamentary state. The evolution of the king's position in this direction was a consequence of the Nihil novi constitution - formally equating the king, the senate and the chamber of deputies as factors in legislative decisions. [420]

The exact differentiation between the Izba Poselska and the Senat was not clear: the text the "common agreement of our councilors and envoys of the lands" does not give precise instructions as to what "common agreement" meant, nor whether "our councilors and envoys of the lands" should be one collective body or two differentiated bodies. *Nihil Novi* was also specifically limited to common law and public statutes.[421] This meant that the king had to obey a hierarchy of laws that was already established, and that he could not alter that hierarchy himself.[422] However, it said nothing of the king's ability to write and implement laws that could be demonstrated as "neutral" in terms of the perceived impact on the

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[417] Frost, *Oxford History of Poland-Lithuania,* pgs. 349-353.

[418] "The Republic of Poland was a parliamentary monarchy. This means that the king was permanently associated with the representation of the political people in governing the state. The Polish Seym is seen as a state assembly and is compared with other state assemblies in Europe. This is correct, but not entirely. The standard state assemblies were basically just consultative assemblies that were convened in emergency situations. The Polish Seym was transformed from a regular assembly into a parliament, and thus a permanent body of the legislative power in which representatives of the political nation sat. This process took place during the fifteenth century and found a specific culmination in the *Nihil novi* constitution. The very adoption of this constitution was related to the main goal of the Radom Sejm of 1505, which was the implementation of the Polish-Lithuanian union of Mielnik. This union was supposed to be a parliamentary union. In a joint Polish-Lithuanian state, a change of common law or its violation could take place with the joint consent of senators and deputies," Uruszczak, "In Polonia Lex Est Rex," pgs. 19-20.

[419] Wrede, *Sejm i dawna Rzeczpospolita,* pg. 39.

[420] *Loc cit.*

[421] This point is directly addressed by Makiłła, *Artykuły henrykowskie*, pg. 268.

[422] "In the 16th century, respecting and proper application of Polish common law, which was shaped in the 15th century, became the main goal of the politics pursued by the nobility through the state parliamentary institutions, i.e., in sejmiki and Seymy, as well as at illegal assemblies held, in particular, on the occasion of mass mobilization. An example of this was the Lviv rebellion of 1537. The king and officials were forbidden to use the law as a tool in politics and were persuaded to strictly respect common law. The politics practiced in the state was to serve the law. Let us note that this idea is essentially close to today's constitutionalism. The modern legal system of the state is based on the basic law, i.e., the constitution, which should be respected by every act of the authority that establishes or applies the law. It was similar in the Jagiellonian times. The king could issue legal acts, but only those that did not violate common law and freedoms. This principle clearly arises from the constitution of the *Nihil novi* Sejm of Radom of 1505," Uruszczak, "Prawa celem", pg. 165.

Republic. Or perhaps, to say it in a more nuanced way, unless there was a clear consensus among the *szlachta* against the king's actions, he could effectively do as he pleased. Secondly, as previously noted, there was nothing to force the king to actually fairly implement the laws that were already in place and in practice the king was quite powerful,[423] able to selectively implement laws and privileges to the advantage of his followers. Thirdly, there were significant areas of law that were not public, but rather "private" law, such as what the king could do on his own estates.

> Traditional powers of the king in legislative: legislative initiative of parliamentary resolutions, moderating them through the final editing and publication, and interpreting the statues. Kings remained independent from the legislature in royal cities, Jews, peasants on royal lands, etc. He also exclusively appoint clerks and appoint to senatorial offices, though he did not have the right to remove them without a criminal proceeding. The king was commander in chief though his power was practically limited by the power of the hetmans.[424]

From this it was quite clear that the king's own political power was not so much reduced in a quantitative sense, but rather in a qualitative, categorical sense: in other words, in areas under the king's purview he more or less remained absolute, just that he was no longer absolute across all of the political and legal system.

Finally, there was significant disagreement about what "without the common agreement" meant precisely. Did it mean that there was to be some general consensus formed by the *szlachta*, what we would variously consider to be passive, tacit, or implicit consent in today's political science terminology?[425] How is this common agreement to be expressed? Is there a special parliamentary mechanism to air grievances or make petitions to the king or is this part of the general business of the Seym, though it meets infrequently. Is it determined by majority vote, unanimous vote, consensus, etc. among the *szlachta*? Do each of the two chambers of the Seym demonstrate their consent together or separately, or does "common agreement" mean that a total threshold of the entire *szlachta* needs to be reached, i.e., 50%+1 of the Izba Poselska and 50%+1 in the Senat? Such practical questions were left unanswered and would have to be worked out in political practice and thought over the course of the next two centuries. In the end, the successful *Nihil novi* as well as the unsuccessful Union of Mielnik and Mielnik privileges would both become substantive sources of precedent for the Henrician Articles.[426] Ironically, even though the rejection of the Mielnik articles was done out of the Jagiellonian kings' interest to preserve their own power, in reality this weakened

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[423] Ewa Dubas-Urwanowicz. 2002. "Królestwo bez króla? Kompetencje monarsze w dwóch pierwszych bezkrólewiach po śmierci Zygmunta Augusta." *Przegląd Historyczny* 93(2), pg. 146.

[424] Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego,* pg. 195.

[425] For the sake of simplicity, these terms are used synonymously and interchangeably, though different fields use the terms in slightly different ways. For example, active vs passive consent is most often referred to in the context of sexual or interpersonal relations, whereas tactic consent is more prevalent in the political science literature. See: Judith N. Shklar. 2019. *On Political Obligation*. Yale University Press: Hartford; Michael Davis. 2012. "Locke on Consent: The *Two Treatises* as Practical Ethics." *The Philosophical Quarterly* 62(248): 464-485; Edward A. Harris. 1992. "From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law." *Columbia Law Review* 92(3): 651-683; Craig L. Carr. 1990. "Tacit Consent." *Public Affairs Quarterly* 4(4): 335-345; A. John Simmons. 1976. "Tacit Consent and Political Obligation." *Philosophy & Public Affairs* 5(3): 274-291.

[426] Frost, *Oxford History of Poland-Lithuania*, pg.343; Makiłła, *Artykuły henrykowskie,* pgs. 57-58.

the oligarchical model of governance. The *wiec* is often claimed to have evolved into the seymik, a localized, small-scale Seym where only geographically local *szlachta* could participate.[427] Sometimes they governed themselves, but they also could elect candidates to certain local offices that would later require the king's confirmation or as deputies to the Izba Poselska itself.[428] As such, the Seym and the seymiki were intimately connected together.[429] They were thus places where the *szlachta* received their political education and was the cauldron for the *szlachta*'s political self-awakening as a class.[430]

As Almut Bues explains:

> Though the Polish monarchy resembled those of Europe at the time in many ways, it also had a "semi-perfected noble self-administration" fully developed in the 15th century and an "equally inadequate state of the royal administration". As the 15th century transitioned to the 16th, there were clear distinctions between the higher and the lower nobility. The Privilege of Mielnik gave the magnates a temporary victory, with the king obeying the full will of the senate and the senate in turn pledging obedience to him (*de non praestanda oboedientia*). This oligarchy was never fully accepted and was swept away by the Sejm at Radom (1505) which stabilized the role of the whole nobility with the *nihil novi* constitution, which declared that the king had no right to make laws, only the Sejm. This was part of a political shift from the Sejmiki to the Sejm.[431]

To admittedly oversimplify the problem somewhat, the entire 16th century can be thought of as the struggle to clarify these tensions, with the most important political reform movement of the era—the execution of law movement—consisting in the *szlachta* trying to rebalance political power away from the King and his *magnat* allies in the Senat to the Izba Poselska. However, these changes were not simply reconfiguring of institutions to reflect changes in the realities of the political structure, but went to a deeper, constitutional level by attempting to reform the principles that governed the political and legal spheres themselves.

III. Fighting for Parity: the Execution of Law Movement and the True Separation of Powers

The sixteenth century began with a Jagiellonian dynasty weakened externally by continuous wars—or threat of war—especially against Muscovy, the Ottomans, and Moldavia as well as internally by tensions between the Crown and the Grand Duchy as well as the king and the Senat granting political rights to the *szlachta* and the Izba Poselska. Though the Polish Crown had been known for a long history of religious toleration in

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[427] Wojciech Kriegseisen. 1995. *Sejm Rzeczypospolitej szlacheckiej (do 1763 roku): geneza i kryzys władzy ustawodawczej*. Wydawnictwo Seymowe: Kancelaria Sejmu: Warszawa, *passim*.

[428] How the deputies were elected varied widely by region, with some regions adopting unanimity, others by consensus. See: Bardach, "Elections of Sejm Deputies in Old Poland", pgs. 135-136.

[429] "The right to attend pre-Sejm and electoral sejmiks was enjoyed by the entire nobility of a given voivodeship or land, but parliamentary debates could be attended only by representatives of the nobility. In other words, the parliamentary system functioning in Poland and, subsequently, the Commonwealth of Two Nations was composed of two linked elements of direct (sejmiks) and indirect democracy (Sejm). Such a construction of the political system survived to the end of the Polish-Lithuanian state although its particular components evolved," Edward Opaliński. 2021. "Sejm of the Commonwealth of Two Nations 1572-1668." *Przegląd Sejmowy* 6, pg. 90; See also: Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pgs. 96-98.

[430] Wrede, *Sejm i dawna Rzeczpospolita*, pg. 17.

[431] Bues "The Formation of the Polish-Lithuanian Monarchy," pg. 60.

practice, in 1424 Władysław II Jagiełło responded to the Hussite uprising by passing the Edict of Wieluń, which declared that deviation from the faith could be seen as *lese majesty*, though it was never truly implemented.[432]

Another series of problems was due to poor management of the Crown lands, the royal treasury, and local offices. At the same time, there was growing political self-awareness of the *szlachta* including in the provinces such as Red Ruthenia and Royal Prussia, the revival of classical Republic ideas,[433] the Jagiellonians' surrounding themselves with foreigners and appointing foreigners to positions of political administrative power, and, finally, the reluctance of the Jagiellonians to engage with the Seym and follow previous laws all came to a head by the middle of the 16th century. King Zygmunt II August particularly believed that he could suspend privileges or implement the law according to his own wishes rather than following the constitutions or statutes.[434] To some extent, the execution of law movement engaged with all of these ideas.

The execution of law movement (*ruch egzekucji prawa*) or executionist movement (*ruch egzekucjny*) has occupied a strange place in histories of the Polish-Lithuanian Commonwealth. Until the 20th century the movement was largely overlooked or simply thought of as part of the overall process of the *szlachta* rising to become the most dominant political force in the Rzeczpospolita rather than as a driver of it. Sucheni-Grabowska argued that this narrow—and often negative—historical interpretation of the executionists was part of the long shadow of the Kraków historical school, which often was critical of democracy in the Commonwealth as weakening the state in an age where modern states were ruled by powerful kings,[435] though she favorably cites Stanisław Kutrzeba as an exception to this trend.[436] This criticism of the executionists as somehow anticipating the "anarchy" of *szlachta* self-rule is notably ironic, given that it many ways the executionists were attempting to strengthen the state by reviving attempts to create a full union between Poland and Lithuania, pushing to consolidate Royal Prussia, Red Ruthenia, and other provinces into the Crown, and create a central legal system and tax policy, all of which were stronger political visions of the state than held by the Jagiellonian kings.[437] In this sense, the executionists did not associate centralized and organized political power of the state as *malum in se*, given that they argued for strong limitations on the power of the king, the rule of law, and that the Seym should be the dominant political institution. In her own work, Sucheni-Grabowski grounded the executionist movement in the political and financial realities of its time, as well as within the development of parliamentarianism and politics in the Commonwealth.[438] Following this

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[432] Uruszczak, *Państwo pierwszych Jagiellonów*, pgs. 26-29.

[433] Dorota Pietrzyk-Reeves. 2010. "O pojęciu 'Rzeczpospolita' (res publica) w polskiej myśli politycznej XVI wieku." *Czasopismo Prawno-Historyczne* LXII: 37-63.

[434] "The Zygmunt's Monarchy invariably treated privileges as acts equivalent to statutes or other acts of common law. Moreover, it was believed that the king, by virtue of his authority, could always deviate from the generally applicable norm in the event of necessity or for the public benefit. In the late Jagiellonian times, despite the growing role of parliamentary legislation, the importance of royal privileges in the legal system of the state did not diminish," Uruszczak, "Prawa celem…", pg. 165.

[435] Sucheni-Grabowska, *Wolność i prawo*, *passim*.

[436] Stanisław Kutrzeba. 1921. *Sejm walny dawnej Rzeczypospolitej Polskiej*. Warszawa.

[437] Sucheni-Grabowska, *Spory królów*, pg. 4; Stone, *The Polish-Lithuanian State*, pg.41,

[438] Sucheni-Grabowska, *Odbudowa domeny*, *passim*; Sucheni-Grabowska, *Spory królów*, *passim*.

more sophisticated appreciation of the executionists, Szulc points out that what the literature has generally lacked is a deeper understanding of the role that it played in transforming the legal system:

> The slogan "execution of goods" is included in the literature as one of the postulates put forward in the 16th century by the political movement of the nobility aimed at implementing the program of the execution of rights. However, there is no comprehensive study devoted to the legal issues of the enforcement of goods. Most of the works highlighted some of the effects of the execution. Among them, the problems related to the revision of the estate, the quart. The issue of the enforcement of royal goods in the light of the constitution of the Sejmy of 1562-1569 was omitted.[439]

We will follow the lead of Kutrzeba, Sucheni-Grabowska, and Szulc, specifically focusing on the role that the executionist movement played in shaping the constitutionalism of the Commonwealth, in that though it was a political movement,[440] it advocated more sophisticated principles of how to reform and change Poland-Lithuania systematically.[441] What is interesting to note about the executionist movement is that, generally speaking, they did not see themselves—or at least did not *portray* themselves—as constitutional radicals and reformers, but rather that in their opinion the law was not being carried out correctly. Thus, they were constitutional conservatives—albeit pragmatic ones—improving the execution of the law by holding the king and his administration accountable to it, not radically altering the law itself, and commonly used the slogan "old before the new"[442] as their rallying cry along with "public freedom" and "rule of law" / "law is king" (*lex est rex*).[443]

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[439] Tadeusz Szulc. 2000. *Z Badań nad egzekucją praw: podstawy ustawodawcze egzekucji dóbr, ich interpretacja i nowelizacja na sejmach za panowania Zygmunta II Augusta.* Wydawnictwo Uniwersytetu Łódzkiego: Łódź, pg. 15.

[440] "The executionist activities were also of a political nature: the overwhelming majority of the executionist postulates were aimed at extending and consolidating the domination of the *szlachta* in the state, which is why they do not lack demagogy and populism," Nowak-Jamróz, "O polski język statutów", pg. 223.

[441] "The political emancipation of the nobility, which began in the 1620s, was carried out under the slogans of the execution of rights. The stance of the nobility in defense of the legal principles that make up noble democracy was at the same time directed against the tendencies of the monarch and the *magnaci* remaining in alliance with him. The place of the clash was the Seym, which the king was forced to convene to meet his financial needs. The nobility who stepped down in these matters also used the Seym to express their aspirations to give the Kingdom a new constitutional shape. In turn, the king, from the 1620s, was more and more often forced to give up his independent position and seek a compromise with the nobility at the cost of supporting the royal expectations," Makiłła, *Artykuły henrykowskie*, pg. 180.

[442] "In accordance with the formal assumptions of "execution" and negating the thought of transforming the laws and system of the Republic, rooted in the mentality of the *szlachta*, they translated and executionists-programmatically "old" before "new" and denied the fact that they undertook, in fact, in addition to execution, also a huge work of reform," Sucheni-Grabowska, *Spory królów*, pg. 4.

[443] "Adopting the overriding principle of this system of preserving the "public freedom" of the *szlachta* nation was accompanied by the slogan of "the rule of law" (*Lex est rex in Polonia et in Lituania*), constantly recurring in political rhetoric, as the basic distinguishing feature of the republic (*rzeczpospolita*) against the background of absolutist states, rhetorically identified by the general public noble with the tyranny of the ruler and the captivity of his subjects. Already in the aforementioned *Nihil novi* constitution, in its key fragment, the two most important designators of democratic values for the nobility are listed: *ius commune* (i.e., 'common law', i.e. common, binding on all) and *publica libertas* (i.e. 'public freedom', vested in citizens, so the *szlachta*). The designated terms are listed here as follows: the law comes first, but its relationship with 'public' freedom has

> As noble politicians and virtually the entire nobility understood, however, rights not only acted as a direct protection of individual freedoms but also, and perhaps foremost, had to protect the structure that guaranteed freedom – the Commonwealth. They not only protected the Commonwealth, but created it, imbued it with life, and acted as its soul. It was for this reason, among others, that the nobility dreaded the breaching of 'the good old laws' – as the entire edifice of the Commonwealth was based on them, every breaching or violation as well as act of disobedience with regard to them by both the ruler as well the citizens could shake its foundations. This was not an exclusively Polish peculiarity. Citizens of 'free states' were skeptical in general toward changes in the laws 'of old', as it was they that guaranteed their freedom.[444]

> It should be emphasized in discussions about sixteenth and seventeenth-century Polish parliamentarianism that new laws were rarely written. Generally, older laws were reinterpreted or their scope broadened. Changed political conditions gave these legal acts some variation., but their actual form was shaped by a broad program advanced during the years of the last two Jagiellon kings, which […] defined its goal as the 'execution of the laws'.
>
> The reaffirmation or updating of old laws was most often undertaken as a result of their violation by the rulers. This was, therefore, law-making as a form of retaliation, and this must be taken into account. It sometimes happened that a new legal act limited the power of the king or the Senate.[445]

There is some truth to this idea that the *szlachta* were holding the king to the letter of the law, in that at the 1459 Piotrków Seym King Kazimierz IV Jagiellończyk acknowledged that if the royal lands were correctly managed this would be enough to deal with all the needs and costs of the country's defense, the mismanagement of which was one of the foundations for the execution movement nearly a century later.[446] Similarly, by the middle of the 16th century there was widespread dissatisfaction with the desecularization of laws, such that the executionist movement was supported by Protestants,[447] Catholics, and Orthodox, as well as by both *magnaci* and *szlachta*.[448] In actuality, there were changes within Polish-Lithuanian

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not yet been precisely defined. In the further development of the *szlachta* movement of 'executing the laws' this relationship was clarified, creating a constantly returning *topos* of the law in political rhetoric that upholds freedom (of the *szlachta*) - a law to which the nation and the ruler are equally subject," Irena Szczepankowska. 2008. "Prawo i Wolność Dyskursie Politycznym Rzeczypospolitej Przedrozbiorowej (podstawowe problemy badawcze)." *Poradnik Językowy* 8, pg. 77; see also, Uruszczak, *Historia państwa i prawa polskiego*, pgs. 156, 232-233; Borucki, *Seymy i seymiki szlacheckie*, pg. 48.

[444] Grześkowiak-Krwawicz, "Noble Republicanism", pg. 55. See also: Sucheni-Grabowska, *Wolność i prawo*, pg. 80.

[445] Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pgs. 28-29.

[446] Sucheni-Grabowski, *Odbudowa domeny*, pg. 51.

[447] "A significant proportion of supporters of the execution of rights was strongly influenced by the Reformation, especially Calvinism, and anti-trinitarianism, especially Arianism. All the preeminent Polish political writers of that era, such as Jakub Przyłuski, Andrzej Wolan, and Andrzej Frycz Modrzewski, were in close contact with the execution movement. Thanks to them, the Reformist movement of the *szlachta* gained theoretical foundations," Uruszczak, "Prawa celem", pg. 168.

[448] Stone suggests that it was actually antimagnat feelings that were able to unite many of the divisions within the executionist camp: Catholics and Protestants, poorer and richer nobles, reformers and conservatives, the pro-Habsburg faction, the pro-Hohenzollern faction, and the pro-Muscovite faction. See: Stone, *Polish-Lithuanian State*, pg. 54. However, it should also be noted that much of the driving force of the Reformation in Poland-Lithuania was actually Protestant *magnaci* and that, ironically the powerful Radziwiłł family of Lithuania embraced Calvinism as well as had a complex political relationship with the Jagiellonians. Further, though Zygmunt I Stary and Zygmunt II August were Catholic, in actual practice they were quite tolerant, even

constitutionalism as the balance of power between institutions shifted. There was also evolving conceptions of the role and nature of law, as well as its interpretation.[449] Though the seeds of the movement had developed in the 15th century—such as separating clerical courts from town and local courts, and reforming state administration and the judiciary[450]—it was only the events at the beginning of the 16th century that allowed for the movement to take off. As we shall see, much of their reform project was explicitly restating the privileges discussed above, such as: preventing or limiting the role of foreigners holding office, narrow interpretation of laws, limiting the role of the king and his representatives in both the interpretation and execution of laws, the importance of unified institutions and legal codes, *inter alia*.

In the literature there is some debate as to *when* the executionist movement truly began. One camp suggests that it began during the reign of Zygmunt I Stary[451] following the passage of the 1501 Mielnik articles and Mielnik privilege as well as the 1505 *Nihil Novi* passed during the reign his brother Aleksander I Jagiellończyk which allowed the *szlachta* the ability to meaningfully coordinate legislation against the king. Indeed, even though Mielnik was not entirely successful, it seems plausible to suggest that it was effectively a watershed in Polish-Lithuanian constitutional history in that it facilitated the transformation of the state from a "monarchic-aristocratic" one to a "monarchical-parliamentary" one.[452] This shift toward parliamentarianism and representative government aligns with the executionists' view that the personal inviolability granted by Jedlnia and Kraków and the right to participate in the legislature granted by *Nihil Novi* were the foundations of the entire civil society.[453] The *szlachta* were very much concerned with the equal applicability of law across the *szlachta* and throughout the Crown and the executionists supported the idea of *ius*

dabbling with Protestantism and reformism themselves from time to time. See: Frost, *Oxford History*; Łukasz Godlewski. 2013. "Spory szlachty," pg. 53; Stone, *Polish-Lithuanian State*; Sucheni-Grabowski, *Spory królów*, pg. 4.

[449] Godlewski. 2013. "Spory szlachty", pgs. 59-60; Szum, "Uniwersalizm"; Stone, *Polish-Lithuanian State*, pg. 40; Grześkowiak-Krwawicz, "Noble Republicanism in the Polish-Lithuanian Commonwealth," *passim*; Stanisław Salmonowicz and Stanisław Grodziski. 1999. "Uwagi o Królewskim Ustawodawstwie." In Jerzy Malec i Wacław Uruszczak, eds. *Parlamentaryzm i prawodawstwo przez wieki: prace dedykowane prof. Stanisławowi Płazie w siedemdziesiątą rocznicę urodzin*. Wydawnictwo Uniwersytetu Jegiellońskiego: Kraków, pg. 158; Sucheni-Grabowski, *Odbudowa domeny passim*.

[450] Godlewski, "*Szlachta* a duchowieństwo", pg. 37-39.

[451] Makiłła, *Artykuły henrykowskie*; Szczepankowska,"Prawo i Wolność"; Bues. "The Formation of the Polish-Lithuanian Monarchy," pgs. 62-63; Stone, *The Polish-Lithuanian State*; Norman Davies, *God's Playground*, pg. 111.

[452] Uruszczak, *Historia Państwa i Prawo*, pgs. 147-149.

[453] "Jagiełło's privilege of *Neminem captivabimus* not only guarded the personal safety of a *szlachcic* and protected him against possible arbitrariness of the local apparatus of the royal authority. A deputy of the regional (particular) sejmik came to the Crown Sejm and stood boldly with his - even if critical - conclusions before the royal majesty and powerful senators, because he knew that he was not threatened with imprisonment. He was restrained by his political culture - respect for the king, not fear. Executionists fully appreciated the values of the rights securing full inviolability in the absence of a court sentence. In their opinion, it was these privileges and the co-establishment of law (Nihil novi, 1505) that supported the entire edifice of *szlachta* civil liberties," Sucheni-Grabowska, *Spory królów*, pg. 2.

commune (common law),[454] which would be a uniform code throughout the nation, even followed by the king. The *ius commune* was highly complicated and nuanced, with Uruszczak contrasting *ius commune* with *ius particulare*, though its conceptual origins are not particularly clear.[455] For example, attempts to centralize the country and improve state administration by reforming legal codes was also common throughout the Kingdom of Hungary in the 15th and 16th centuries,[456] which—due to the recent union between the Crown of Poland and the Kingdom of Hungary barely a century earlier—would have been something that the *szlachta* were aware of and even studied. It established a kind of public law that was applicable throughout the nation, though in its application to private law was only for the *szlachta*. It established a kind of public law that was applicable throughout the nation, though in its application to private law was only for the *szlachta*. Other classes, e.g. townspeople, clergy, and peasants were subject to local laws and customs as well as to canon law. Critically for the executionists, the *ius commune* was a reflection of the growing sense of community shared by the *szlachta* as they gradually became politically self-aware and more active in public political discourse as well as participation in offices, seymiki, and Seymy. To put it simply, the *ius commune* was a kind of "Commonwealth of law" that was held by and existed for citizens.[457]

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[454] It should be briefly noted that *ius commune*, which literally translates to "common law" (Lesaffer, 2009, pg. 265), "universal common law" (Cairns and du Plessis 2010, pg.1) or "authoritative common law" according to the *Oxford Handbook of Legal History*, is different from the common law system that developed in England and spread to its colonies. *Ius commune* is in the sense of a law to which all in the land are subject to, i.e. some kind of basic law or law of the land, whereas common law is law developed through the judicial process (precedents, judicial opinions, etc.) rather than by the legislature. Though the English sense of common law originally applied to a set of common laws that standardized the English court system during the Norman period, it has since evolved to have a more complex meaning. There are some who argue that the *ius commune* had very little effect on the common law (Donahue 1991-1992) while others contend it has been significant (Helmholtz 2001, 1999). For a richer, fuller debate, see: Markus D. Dubber and Christopher Tomlins, eds. 2018. *The Oxford Handbook of Legal History*. Oxford University Press: Oxford; John W. Cairns and Paul J. du Plessis. 2010. "Introduction." In: John W. Cairns and Paul J. du Plessis, eds. *The Creation of the Ius Commne: From Causus to Regula*. Edinburgh University Press: Edinburgh; Randall Lesaffer. 2009. *European Legal History: A Cultural and Political Perspective.* Cambridge University Press: Cambridge; Bryan A. Garner. 2001. *A Dictionary of Modern Legal Usage*. 2nd Revised Edition. Oxford University Pres: New York, pgs. 177-178; R.H. Helmholz. 2001. *The ius commune in England: Four Studies*. Oxford University Press: New York; R.H. Helmholz. 1999. "Magna Carta and the *ius commune*." *The University of Chicago Law Review* 66(2): 297-371; Charles Donahue Jr. 1991-1992. "Ius Commune, Cannon Law, and Common Law in England *Symposium: Relationships Among Roman Law, Common Law, and Civil Law*." *Tulane Law Review* 66: 1745-1780.

[455] Uruszczak, "In Polonia", pg. 16-17.

[456] Attila K. Molnar and Levente Völgyesi. 2016. "The Hungarian Experience of freedom: the tradition of the Golden Bull," In: Zbigniew Rau, Przemysław Żurawski vel Grajewski, and Marek Tracz-Tryniecki, eds. *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*. Routledge: London and *Magna Carta*, pgs. 47-50.

[457] "Przywileje generalne, obok królewskich XIV- i XV-wiecznych statutów i konstytucji sejmowych, stanowiły podstawowe źródła polskiego prawa pospolitego (*ius commune*), czyli prawa wspólnego i jednolitego dla całego państwa. W części obejmującej prawo publiczne obowiązywało ono w zasadzie wszystkie stany. W części zawierającej prawo prywatne odnosiło się tylko do szlachty. Inne stany, to jest duchowieństwo, mieszczanie i chłopi, podlegały w tym zakresie własnym prawom kanonicznym. Rozwinęła się zapewne w XV wieku, w miarę postępującej centralizacji państwa. Wyrażała narastające poczucie wspólnoty całej szlachty królestwa. *Ius commune* w dziedzinie prawa korespondowało z ideą „wspólnoty" (*communitas*) oraz „rzeczypospolitej" (*respublica*) w znaczeniu wspólnego państwa dla wszystkich, która zdobyła sobie prawo obywatelstwa w drugiej połowie XV wieku i zdecydowanie zwyciężyła w XVI wieku, kiedy nazwę tę stosowano na oznaczenie państwa," Uruszczak, *Historia Państwa i Prawa Polskiego*, pg. 173.

It thus established law as the true ruler and the idea of public freedom.[458] This understanding of *ius commune*[459] can be thought of as a natural consequence and complement to the 1505 legal acts,[460] and stressed that if all were equal under the law, all had to have similar treasury burdens and the king had to manage his properties according to the betterment of the Commonwealth.[461] The Nieszawa and Piotrków statutes also gave the king the right to appoint a commissioner to hear disputes between royal goods (goods produced on the king's lands) and *szlachta* goods—that is to say, commerce between the king's lands and the *szlachta* lands—but the limitation of these courts' jurisdiction was not entirely clear.[462] This limited the power of the king, but also kept the judicial power within a well-defined sphere.[463] Appropriately, some posit the beginning of the execution of law movement in 1504 or 1505, as a negative reaction to the moment that Aleksander I Jagiellończyk did not fully implement the legal reforms of 1504.[464]

Uruszczak puts the starting date of the executionist movement in the 1520s when the *szlachta* were able to force Zygmunt I to make the promise of a special Seym—the Seym of Justice (Seym sprawiedliwości or *conventus iusititae*). One of the first opportunities for the

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[458] Szulc, "Historiograficzny bilans", pg. 77; Uruszczak, "In Polonia", pg. 16.

[459] "For the king, privileges were a means to achieve his goals. Through the monarch's privilege he rewarded merits, raised funds, paid off liabilities, concluded favorable agreements. For the beneficiary, a privilege was an act of establishing subjective rights, the type, scope and role of which depended on specific circumstances. The above-mentioned general privileges for the *szlachta* granted them a wide range of personal freedoms and political rights. Thanks to them, it gained the position of the first state of the Kingdom. Among personal freedoms, tax freedoms and personal inviolability, known as the law of *neminem captivabimus nisi iure victum*, became particularly important. The general privileges of the *szlachta* played a decisive role in building the political institutions of modern Poland, especially such as the *szlachta* parliament, sejmiki, and *konfederacje*. For the *szlachta*, the general privileges achieved by it, and in fact the freedoms resulting from them, became the main goal of politics from the middle of the 15th century. It was about maintaining and increasing them. They were considered a fundamental part of the so-called common law (*ius commune*), i.e. common and uniform for the entire state. The idea of *ius commune* appeared in Poland along with universal canon law. It developed in the 15th century along with the progressive centralization of the state. It expressed the growing sense of community among all the nobility of the Kingdom," Uruszczak, "Prawa celem polityki w Polsce Jagiellonów," pg. 165.

[460] *Loc cit.*

[461] "From the very beginning of its existence, the execution of law movement questioned the validity of the privileges issued by the monarch, in particular those that violated the norms of common law. The leading leaders of this movement openly proclaimed that under common law (*ius commune*) all (ie, all *szlachta*) should be equal and subject to one law. Thus, no privilege may contradict the rules established by the common law. One of the main points of the movement's political program was the equality of fiscal burdens, in line with the maxim *communia onera communiter ferenda* [common burdens are to be shared in common]. Obviously, such a postulate could not be well received by secular and religious *magnaci* who exercised their tax and customs freedoms by virtue of their privileges. Another point of this program was the "execution of royal property". It was about the restitution of goods leased by private persons, mainly under long-term and perpetual liens. Demands were made to revise the deeds of ownership of the royal lands in order to recover those properties that had been unlawfully appropriated, or to increase the rents and other fees paid from them to the treasury," Uruszczak, "Species privilegium," pg.29.

[462] The best authority on the complex situation of the king's management—or in the case of the last two Jagiellonians, mismanagement—of Crown lands is probably Sucheni-Grabowska. See: Sucheni-Grabowska, *Spory królów*, *passim*.

[463] Oswald Balzer. 1886. *Geneza trybunału koronnego: Studium z dziejów sądownictwa polskiego XV wieku.* Nakład Redakcyi Biblioteki Umiejętności Prawnych: Warszawa, pgs. 21-24.

[464] Szulc, *Z Badań nad egzekucją praw*, pg. 61.

deputies to flex their political will was the 1520 Seym in Bydgoszcz. The *szlachta* demanded that all their privileges would be verified and those contrary to the *ius commune* would be annulled.[465] Zygmunt I never held such a Seym during his lifetime, and instead tried to go around the problem by creating the *Formula Processus* in 1523, which was the basis for the 1532 Correction of the Law (*Korektura praw* or *Correctura iurium*), the first attempt at a formal legal code. However, though there was some support for it among both the *magnaci* and the middle and lower *szlachta*, it was ultimately rejected for political reasons: it was more the consolidation of the king's power through law than for the correction of the law that the *szlachta* wanted.[466]

Others posit the beginnings of the executionist movement in the 1530s toward the end of Zygmunt I's long reign. Sucheni-Grabowska places the starting date in 1537 when many of the *szlachta* gathered at Lwów and called for their own Seym to protest the rule of Zygmunt I, breaking out into the Chicken War (Wojna kokosza), one of the first *rokosze*—or quasi-legal rebellions by the *szlachta* against an unjust king—in Polish history.[467] Sucheni-Grabowska further notes, however, that movements to "execute" the law more faithfully were not uniquely Polish, but popular throughout Europe in the 15th and 16th centuries.[468] In other words, we must be careful not to confuse the usage of a common slogan or idea at the time with a particular movement, i.e. distinguishing "movements in favor of execution" with *the* executionist movement. Szulc gives evidence that the starting point of the execution movement was sometime in the reign of Zygmunt II August, noting that the key 15th century legal acts that attempted to limit the power of the king and his agency over his estates—such as Nieszawa—were not even mentioned in parliamentary legislation during Zygmunt I's time.[469] Similarly, there is convincing evidence by Uruszczak and others that Zygmunt I was savvier at using the Seym to his advantage than his son was, which prevented any significant reform during his lifetime.[470]

The unique situation of Zygmunt II August's 1530 *vivente rege* election—that he was elected as king while his father Zygmunt I was still alive—was also pivotal for the executionist movement. The election of a new king was only supposed to be after the preceding king's death, even if it was more or less known that the eldest son or successor of the preceding king would inherit the throne, so a *vivente rege* election was technically illegal. In fact, though appointing a successor while one was still alive may have been closer to the dynastic models practiced by the Lithuanians, it was something that directly challenged

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[465] Stone, *The Polish-Lithuanian State*, pg. 40.
[466] Uruszczak, "Prawa celem", pg.30; Bues, "The Formation of the Polish-Lithuanian Monarchy," pgs. 62-63.
[467] Sucheni-Grabowska, *Spory królów*, pg.3.
[468] *Loc. Cit.*
[469] "Sejm legislation during the reign of Sigismund I the Old did not refer to the statutes of 1440, 1454 and 1504. We generally do not find such references in the postulates contained in the sejmik instructions, written for deputies going to the Seymy at that time. The exception was a vague reference to the statutes, without mentioning them, included in the postulates of the deputies, submitted at the last Sejm during the reign of Sigismund I the Old. During the old king's lifetime, there was no problem with the execution of goods. Slogans of execution of rights were put forward, which had not yet given birth to a social movement, but constituted only the margins of the affairs of politicians of *szlachta* conventions," Szulc, *Z Badań nad egzekucją praw*, pgs. 31-32.
[470] Makiłła, *Artykuły henrykowskie*, pgs. 180-182; Sucheni-Grabowska, *Spory królów*, *passim*.

szlachta sensibility and would have certainly contributed to fears of the last Jagiellonians being absolutist.[471] It also would have been something that would have been strongly opposed by such a movement as the executionists, given that it was against what they stood for in both theory and practice, though perhaps it was a contributor to it as part of the growing consciousness of the lower and middle *szlachta* against the king and his allies. Zygmunt I was able to get the backing of enough *szlachta* to elect his son while he was still alive, but it was not without political compromise: he had to give the *szlachta* several concessions, among them securing the principle of election after the death of a king rather than dynastic succession or *vivente rege*, which was clearly a victory for the *szlachta*.[472]

As Bues describes it:

> The year 1529/1530 marks a turning point in the relations between the king and the *szlachta* In 1529 Zygmunt I's son Zygmunt August was elected and crowned grand duke by the Lithuanians at the age of 9 without the consent of the Polish nobles. At the 1529 Sejm the nobles were forced to accept him as an heir, but were angered because it was to be a general Sejm rather than an election sejm and forced Zygmunt I to give them privileges, namely that all elections going forward would be free elections.[473]

Connected to the theme of Zygmunt II August having a more difficult time dealing with the *szlachta* than his father did, Uruszczak puts the apex of the movement during his reign, after 1548.[474] None of Zygmunt II August's marriages were popular with the *szlachta* and none of them had been approved by the *szlachta*. The first was to Elizabeth of Austria, eldest child of Holy Roman Emperor Ferdinand I Habsburg, which barely lasted two years before her death; the second was to his mistress Barbara Radziwiłłówna, whom he met while married to Elizabeth, and whom he married in 1547. After Barbara's death he married Catherina of Austria, Elizabeth's younger sister. The first and third marriages were disliked due to the *szlachta*'s suspicion of deepening the alliance between the Jagiellonians and the absolutist Habsburgs, and the second because the Radziwiłł family was a powerful Lithuanian *magnat* family, which only distanced the Poles from the throne within the

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[471] Ewa Dubas-Urwanowicz. 2016. "Konsekwencje polityczne elekcji *vivente rege* podczas panowania dwóch ostatnich Jagiellonów." In: Mariusz Markiewicz and Dariusz Rolnik, *Wokół wolnych elekcji w państwie polsko-litewskim XVI-XVIII wieku. O znaczeniu idei wyboru – między prawami a obowiązkami*. Wydawnictwo Uniwersytetu Śląskiego: Katowice, pgs. 26-45.

[472] "It was only after the incident of the *vivente rege* election of King Sigismund Augustus on December 18, 1529, who, being the son of a universally respected father, would have been elected king anyway - despite the people's eventual acceptance of that choice - that the need for statutory security for the institution of election was raised. The statute *Caveat autem idem Rex* [Let the same king beware], issued by King Zygmunt I in 1530, spelled out the principles by which the king recognized the permanence of the right to an election, to be held after the death of any ruler, to be conducted at a convention established by the royal council and made known to the public, creating the possibility for anyone who would consider himself eligible to come to the election. With this, King Zygmunt confirmed the election as a juridical institution and at the same time ensured that King Zygmunt August would be sworn to the rights of the Kingdom upon reaching the appropriate age," Makiłła, *Artykuły henrykowskie*, pg. 129.

[473] Bues, "The Formation of the Polish-Lithuanian Monarchy," pgs. 61-62.

[474] "In 1548, Zygmunt I and Queen Bona's only son, Zygmunt August, took the throne. He was elected king during his father's lifetime, in 1529, and crowned in 1530. During his reign, the execution of law movement became a major political force in the state. The vast majority of middle and petty *szlachta* was concentrated in its ranks," Uruszczak, "Species privilegium," pg. 31. This difficulty of Zygmunt II August in dealing with the *szlachta* and the Sejm is also highlighted by Sucheni-Grabowska. See: Sucheni-Grabowska, *Odbudowa domeny*, *passim*.

Commonwealth.[475] Thus, although Zygmunt II August was already disliked by the executionists due to his *vivente rege* coronation, his personal choices only worsened matters. Finally, others contend that the "execution Seymy" were a series of specific parliamentary gatherings that only began in the mid-1560s.[476]

Given our emphasis on constitutionalism and the importance of grounding constitutional principles with specific legal texts, our understanding of the executionist movement will be one of the later varieties when there were specific references to the specific constitutional texts that have been addressed throughout the chapter, though we are not wedded to any particular year or event. Indeed, perhaps it is best to think of the executionist movement as emerging sometime in the late 1530s as Zygmunt I's reign came to an end, but only matured in the 1550s and 1560s. As we shall see later, the executionist movement majorly contributed to the political culture and constitutional background that informed and shaped the constitutional crisis of the 1570s.

As Sucheni-Grabowska notes, the executionists were largely motivated by two, cooperating factors: the strong personal inviolability right of the *szlachta* and strengthening and stabilizing the position of the Seym,[477] which had strong constitutional, political, and institutional dimensions. The executionist movement in the 1550s-1560s was very much "the right thing at the right time", in that Zygmunt II August's position and personality were significantly different than his father's. His *vivente rege* election and ambitions for a stronger monarchy made the *szlachta* wary of him. At the same time, he was very much concerned that the Lithuanian *magnaci* such as the Radziwiłł family were becoming too powerful and actively tried to rebalance the power within both nations but was not strong enough to break up powerful families unlike what happened in England and France.[478] He was also more ambitious than his father was in wanting a stronger influence on European politics; because of this, he could not risk domestic problems, which in turn made him vulnerable to financial and political demands by the *magnaci* and the *szlachta*. Finally, he was much more religiously open-minded than his father was and actively corresponded with Calvin and other reformers. He entertained ideas of reforming the Catholic Church in the Crown. Officially, he supported the Church, but he did not persecute or take any actions against Protestants.[479] As we shall see, this also opened up unique avenues to work with the executionists' reforms.

These elements aligned in four broad reform projects carried out by the executionists: financial and administrative reforms, limitations on the political and judicial role of the Church, strengthening the position of the Izba Poselska against the king as well as the Senat, and changing understandings of the nature of law as well as its interpretation. The first two are more clearly associated with statutory changes and were linked together by decisions

[475] Makiłła, *Artykuły henrykowskie*, pg. 182.
[476] Łukasz Godlewski. 2013. "Spory szlachty o dziesięciny i jurydykcję duchownych na sejmach egzekucyjnych 1562-1565." *Białostockie Teki Historyczne* 11: 51-70.
[477] "The development of a strong movement of the *szlachta* in Poland for the revindication of rights is due to the existence and interaction of two factors: subjective laws securing the personal and property inviolability of the *szlachta*; the stability and high position of the Sejm," Sucheni-Grabowska, *Spory królów*, pg. 2.
[478] Sucheni-Grabowska, *Wolność i prawo*, pgs. 120-129, 180-183.
[479] Stone, *The Polish-Lithuanian State*, pgs. 55-57.

made at various Seymy; they can be thought of as institutional and legalistic and thus the "less constitutional" of the four. The following two projects were more ephemeral than the others in that they are not the specific result of any particular Seymy or particular laws but are rather consequences of the aforementioned struggles. Additionally, some of their elements may have emerged in the process of working out these tensions. For example, strengthening and stabilizing the role of the Izba Poselska as at least equal to the Senat was both part of the political solution as well as the consequence of the *szlachta* flexing their political muscle in opposition to the *magnaci* and the Church. As such, the strengthening and stabilizing of the Izba Poselska as well as changing the legal and political culture are both purely "more constitutional" than the others.

Financial and Administrative Reform

The 1550s are important because they presented a very real economic problem, as the practice of giving away Crown lands for very little financial return, decades of debts and warfare, and Zygmunt I refusing to make reforms or concessions had exhausted the royal treasury to critical levels.[480] The executionists had a relatively easy time in organizing themselves around the principle of "executing" the laws that the Jagiellonians had so blatantly violated, and one of their most pressing reforms was for the loaned properties to be restored back to the Crown lands and to be put under management of the *szlachta* for the good of the nation. As noted earlier, there was a strong basis for this in the Nieszawa articles, which had been again confirmed at Sandomierz (1478) and Piotrków (1496).[481] King Kazimierz Jagiellończyk admitted that if the Crown lands were properly managed then it would not be necessary to rely on other financial sources to support the defense of the nation.[482]

A separate, though related issue was the question of managing local courts and administration. As noted earlier, these offices varied from being representatives of the king as part of the police and legal system, to local administrators of trade, coinage, and taxation, to managers of the king's own estates. In theory, some of these local officials were to help the local land courts and seymiki by easing the administrative load, but often these posts were treated as rewards from the king and as sources of income or prestige, rather than as in service to the country. This problem was exacerbated by the fact that many of these posts had life tenure, and that they had loose requirements for residency (osiadłość): rather than having to actually live in the community, it was often sufficient to simply buy or hold property in the region.[483]

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[480] Sucheni-Grabowska, *Spory królów*, pgs. 14-16.
[481] Sucheni-Grabowska, *Spory królów*, pg. 13.
[482] Sucheni-Grabowska, *Odbudowa domeny*, pgs. 51-52.
[483] "The principle of residence has been interpreted and postulated more or less rigorously. Sometimes the acts mentioned only in general terms about the necessity to demonstrate land ownership in the territory of the *starosta*. Most likely, the replies were defended many times with documents. Often times, they did not have much to do with living in a *starosta* center or in the capital of the województwa. The prudence of the wording of the Cerekwicki statutes (1454), which emphasize the necessity of "residence" and permanent presence of an official in the seat of the office, is puzzling," Sucheni-Grabowska, *Spory królów*, pg. 10.

Much of these residential requirements or the obligation to perform one's duties on pain of removal from office were actually part of statutory law since the mid-15th century, and unlimited giving out the Crown's lands was illegal under a 1504 statue. Giving out such property as gifts or favors was explicitly prohibited, though the last two Jagiellonians ignored this part of the law.[484] At the 1520 Seym in Bydgoszcz, King Zygmunt I had agreed to redistribute the Crown lands according to the *szlachta*'s demands in order to receive their support for a war against Prussia, only to never follow through on his promises and then provoked the *szlachta* ten years later by coronating his son *vivente rege*.[485] With the *szlachta*'s patience already wearing thin, improving local governance and courts as well as holding the king accountable to the law were easy rallying cries for a movement that actually wanted the laws to be "executed" properly.[486] Of particular importance to the executionists were the Czerwiński and Nieszawa privileges, which supported demands for proper organization of the courts, limiting the king's discretionary power to interpret law, protection of *szlachta* property rights, that local offices should be held by local residents, *inter alia*.

The issue was actually deeper than whether or not the Jagiellonians and their administration had been following the law but was a fundamental philosophical difference in understanding what "the execution of goods" meant. That the 1440, 1454, and 1504 statutes were the criteria for the execution of the land only became clear after multiple years of deliberation by the executionists at various Seymy: in the beginning it was more general dissatisfaction with the system. Eventually, it matured into the concept that the management of Crown lands should be subject to the *szlachta*'s approval at the Seym. [487] As noted earlier, the two main sources of income for the royal treasury were the revenues from the royal estates and taxes. As more and more lands were given to the *magnaci* at very low fees or for free as well as the Church being exempt from fees, the middle and lower *szlachta* were concerned that the king would tax them, the burghers, or the peasantry in order to make up for lost revenues, which would devastate the economy and not do much to actually improve the system. This fear was indeed justified when at the 1563 Seym the *magnat*-leaning Senat suggested to increase higher taxes on the peasantry, which was completely rejected.[488] Others were deeply concerned with the moral problems of the super-rich *magnaci* and the Church not having to pay any taxes while making the poorer and middle *szlachta*, the peasants, and the townspeople pay more—those in society with the least resources and who often had to pay dues as part of the feudal system anyway. One of the most radical visions was given by Andrzej Frycz Modrzewski, a leading humanist, dissenter, as well as executionist, who

[484] Szulc, *Z Badań nad egzekucją praw,* pg. 61; Sucheni-Grabowska, *Spory królów*, pg. 13.
[485] Uruszczak, "Prawa celem", pg. 30; Stone, *The Polish-Lithuanian State*, pg. 40.
[486] "It is significant that the universally binding text of the Nieszawa privileges, coinciding in time with the Cerekwicki privileges and confirmed nationwide by Olbracht (1496), did not include the requirements specified as "residency", but only the requirement to make landed estates hereditary, which proves the controversy of the matter and the strength of the party's resistance supporters of executioners of law, on the other hand, pushed through the laws announcing the application of the highest sanction to unlawful officials, i.e. deprivation of office (1510, 1519, 1524). However, there were still discrepancies between the letter of the law and life, and the *szlachta* camp constantly demanded the ability to practice with legislation," Sucheni-Grabowska, *Spory królów*, pg. 10.
[487] Szulc, *Z Badań nad egzekucją praw*, pgs. 55-58.
[488] Sucheni-Grabowska, *Spory królów*, pgs. 29-30.

argued that the health of the non-*szlachta* was just as important for the republic as the rights of the *szlachta* themselves:

> Truly a republic with *szlachta* alone cannot flourish, for who will add food to us and cattle if there are no ploughmen? Who can give us clothing and clothing, if we are not craftsmen? Who will bring the necessary things, if there is no merchant? Who will be a *szlachcic* in the end, if there are no peasants? What then is the evil cruelty that without which we cannot do, we so lightly disregard these throats![489]

However, the Jagiellonians interpreted the 1504 statutes as meaning that they had the ability to manage the Crown lands however they saw fit, so long as it was to the benefit of the Commonwealth. However, Zygmunt II August thought that the goods would be returned to him and then he could redistribute them as he wanted.[490] Here it is worth reminding ourselves that the executionist program was one of reformist—rather than of revolutionary—ambition.[491] The *szlachta* did not want to remove local administrators who were the king's allies and supporters: they merely wanted them to do their jobs.[492] Similarly, they had no interest in taking the king's lands for themselves, but only to make sure that they were managed properly and paying their dues to support the common good and defense of the nation, which was the intention of royal lands in the first place.[493] They were interested in better governance and economic trade not only within provinces, but between provinces as well, and pushed for greater economic integration as well as consistency of law across the nation.[494] Some wanted to push for a closer relationship between the Crown and Lithuania,[495] and though forming a single nation was ultimately rejected, the two nations were brought on a path closer to unification. Ironically, the *szlachta* have been blamed by historians for creating anarchism and disorder for refusing to cooperate with a central government and a strong king, but in the 16th century it was actually the executionists who were calling for closer union, while it was Zygmunt II August and his *magnat* allies who wanted to keep the Kingdom and the Grand Duchy as only a personal union, with separate legal, economic, and

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[489] Andrzej Frycz Modrzewski. 2012. *O poprawie Rzeczypospolitej.* Fundacja Nowoczesna Polska: Warszawa, pg. 105.
[490] Szulc, *Z Badań nad egzekucją praw*, pgs. 91-92.
[491] "The power of Zygmunt I was primarily based on the Royal Council (Crown Senat). Referring to the full respect for parliamentary institutions, the king objected against increasing the prerogatives of the Seym and against the aspirations of the middle and small *szlachta* to co-decide on the matters of the Kingdom. It turned out, however, that this type of policy had no chance of success in the long run. The times of Zygmunt I's reign became the scene of the first appearances of the middle and minor *szlachta* under the slogans of "execution of the praw", which over time turned into a great reformist political movement of this social group. The purpose of this movement was to reform the state by strengthening democratic institutions. Of course, it was only about *szlachta* democracy. The program of the execution of law movement was built progressively, modest at first and directed only against abuses of power, and with time it became a program of genuine state reform," Uruszczak, "Species privilegium," pg. 29. See also: Sucheni-Grabowska, *Odbudowa domeny*, *passim*; Sucheni-Grabowska, *Spory królów*, *passim.*
[492] Sucheni-Grabowska, *Spory królów*, pg. 9.
[493] Szulc, *Z Badań nad egzekucją praw*, pg. 53.
[494] Sucheni-Grabowska, *Spory królów*, pgs. 21-22.
[495] *Ibid*, pg. 57.

political systems, because extending the *szlachta*'s golden freedom would actually democratize the nation.[496]

Eventually, by the mid-1560s the executionists were beginning to make ground on administrative and financial reforms. Though the king and his *magnat* allies resisted returning the Crown properties, the numerical superiority and combined economic power of the *szlachta* forced their hands. The costs and complexities of the ongoing wars against Muscovy and Sweden over control of the Baltic, particularly Livonia (1558-1570),[497] essentially forced Zygmunt II August to concede to their demands. Zygmunt II August came around to the executionist movement when he realized that their demands for fairness could be turned into expanding taxes to include both the *magnaci* and the Church, and that reclaiming his lands had the opportunity to give him more wealth, which could be translated into his political goals and military ambitions. According to the executionists' own republican ideals, the king was the defender of the nation, and their objection was how the public finances were handled as well as how the Crown lands were managed more so than preventing Zygmunt II August's political and military ambitions. Thus, he reached out to Mikołaj Sienicki—a highly respected Calvinist member of the Seym[498], recognized as the "brains" of the executionist movement[499] and frequent critic of the king—to compromise, circumventing the *magnaci* to bring the king and the *szlachta* together.

> The subject of discussions and arrangements of the parliamentary states were primarily the issues of the "obrona potoczna" (common defense). The king must have realized that the executionists' demands had become more severe in this respect in recent years. However, while he was previously categorically opposed to the proposals to cover the costs of the "common defense", he has now changed his mind. He was aware of the senators' game who were trying to discount the protection of their own profits from the royal lands by the project of taxing the plebeian population. They were buried by the flourishing farm economy. Handing over the leased goods to the tax administration would mean giving up these often enormous revenues. Sieniecki, well aware of the rhythm of economic life, showed in his speech the necessity of adjusting the administration of royal lands to the current development possibilities of the land domain. Thus, the king perceived the profitability of the execution of goods even when taking over the common defense at his own expense. This concession was, moreover, a consequence of taking over the burden of the struggle for royal lands by the Chamber of Deputies. Executionists, on the other hand, gained a stronger motivation to push through the domain issue, also citing military needs. The monarch, in turn, by accepting the parliamentary initiatives, could also use this argument.[500]

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[496] "Hence the strange paradox of history that it was the same executionists who saw unification ideas more narrowly and one-sidedly than King Zygmunt August, who stood as a federation of the nations he ruled [...], gave the most valuable guarantees to the citizens of unified areas, as they offered them their own universal freedoms and equal to their own active participation in the ranks through the sejmiki and Seym," Sucheni-Grabowska, *Spory królów*, pg. 58.

[497] Edward Opaliński. 2002. "Civic Humanism and Republican Citizenship in the Polish Renaissance." In Martin van Gelderen and Quentin Skinner (eds.) *Republicanism: A Shared European Heritage.* Volume 1. *Republicanism and Constitutionalism in Early Modern Europe.* Cambridge: Cambridge University Press, pg. 150; Frost, *The Northern Wars*, *passim*.

[498] Uruszczak, *Historia państwa i prawa polskiego*, pg. 142.

[499] Sucheni-Grabowska, *ibid.*, pg. 4.

[500] *Ibid.*, pg. 30.

At the 1563 Seym the king surprised everyone by eschewing his royal garb made in the Italian high fashion of the day, dressing instead in traditional *szlachta* clothing.[501] The king largely yielded to the demands of the *szlachta* against the wishes of the Senat and his erstwhile *magnat* allies, such as tightening the obligations of local administrators and creating the office of inspectors *(instygatorów),* who directly challenged the Jagiellonians' total control over their finances.[502] Some lands were returned to the king, and the institution of the *kwarta* was adopted, which was a 25% rent on all the incomes made by public lands (lands owned by the king) as well as lands that were being leased the Church in order to provide for a permanent, professional army.[503] This was a significant increase, since most of these lands had been given to the kings allies essentially for free. Given that the two main sources of royal revenue were gains made from Crown properties and taxes, any decrease in royal rents had to be made up for in taxes and other fees. Accepting the *kwarta* led to a significant rebalancing of the financial power between the *magnaci* and the lower and middle *szlachta*. The institution of the *kwarta* would remain a continuous point of contention throughout the 16th century and into the 17th century, with questions of inspection of royal lands, management of the funds, and potential exemptions to the funds proving ongoing sources of contention under the Waza kings as well.[504] Indeed, fiscal reforms and the *kwarta* remained two of the most important political disputes at the time, and the *kwarta* often served as proxy in the conflict between the lesser and middle *szlachta* vs the king and the elites.[505]

What is most important from the perspective of constitutional continuity is that the institution of the *kwarta* remained. While on the surface this may appear largely practical, its constitutional import should not be understated: challenges to the independent finances of the king as well as separating the management of the king's lands from the king's ownership of those same lands was part of a broader process of moving toward modern, neutral state institutions that persist beyond whatever person or group is ruling the nation at a particular moment in time. It is furthermore reminiscent of modern battles about the "power of the purse" as held by the legislature with a spendthrift executive,[506] with the "legislature's power

[501] Izabela Lewandowska-Malec, ed. 2013. *Demokracje polskie: tradycje—współczesność—oczekiwania*. Kraków: Księgarnia Akademicka, pgs. 56-57.
[502] Sucheni-Grabowska, *Spory królów*, pgs. 33-34.
[503] Frost, *Oxford History of Poland-Lithuania*, pg. 455; Wilson, "The Jewel of Liberty Stolen?"; Stone, *The Polish-Lithuanian State*, pgs. 58, 80; Sucheni-Grabowska, *ibid*, pg. 36.
[504] Sucheni-Grabowska, *Wolność i prawo*, pgs. 224, 227-230.
[505] *Ibid.*, pgs. 219-220.
[506] The ability of the legislature to financially constrain the monarch as a hallmark of modernity has long been part of the Anglo-American constitutional tradition, though struggles between the legislative and the executive or monarch over state finances has been recognized in a variety of historical contexts, such as ancient Rome or the Dutch Republic. 20th century lawyers, political theorists, and economists introduced new wrinkles to the discussion by developing theories such as fiscal federalism or interpreting the power of the purse through public choice theory. For a survey of the Anglo-American approach to understanding the "power of the purse," see: Alexander Bolton and Sharece Thrower. 2019. "The Constraining Power of the Purse: Executive Discretion and Legislative Appropriations." *The Journal of Politics* 81(4): 1266-1281; Edward Andrew. 2015. "Locke on Consent, Taxation and Representation." *Theoria: A Journal of Social and Political Theory* 62(143): 15-32; Ethan Alexander-Davey. 2014. "Constitutional Self-Government and Nationalism: Hobbes, Locke and George Lawson." *History of Political Thought* 35(3), pg. 479; Gary W. Cox. 2012. "Was the Glorious Revolution a Constitutional Watershed?" *The Journal of Economic History* 72(3): 567-60; Wayne A. Rebhorn. 1990. "The

over the purse [having been] viewed as *the* key constraint on the executive since the Enlightenment."[507] Thus, the executionists' struggles over finances and state administration had a practical, immediate, and material dimension as well as reflected deeper tensions within Polish-Lithuanian constitutionalism. It presented one of the first real opportunities to check the power of the king by forcing him to use his property for the public good (the defense of the nation) and not how he personally saw fit and was the culmination of the long process that began in 1504. [508] In this sense, it was also part of the larger conversation about the distinction between the Crown as an institution and the personage of the king. This was a subtle shift in the constitutional system as well as political thinking. Before, the demands for the *szlachta* for equality before the law for themselves had elevated the king as the father of the nation as the only person who stood above the *szlachta*.

Though legislation was supposed to be passed with the consent of the *szlachta*, it was the king who often sent envoys and proposals to both the seymiki as well as the Seym. It was the king who executed the law and who selected local administrators. In sum, it was the king who alone could represent the entire nation and interpret its collective will. However, by conceding to the demands of the *szlachta* and elevating the Izba Poselska, it was essentially

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Crisis of the Aristocracy in Julius Caesar." *Renaissance Quarterly* 43(1), pg. 107; Phillip H. Stump. 1989. "The Reform of Papal Taxation at the Council of Constance (1414-1418)." *Speculum* 64(1), pgs. 75, 77; Charles D. Tarlton. 1985. "'The Rulers Now on Earth': Locke's Two Treatises and the Revolution of 1688." *The Historical Journal* 28(2), pg. 292; John Miller. 1982. "Charles II and Hist Parliaments." *Transactions of the Royal Historical Society* 32, pgs. 1, 15; Clayton Roberts. 1977. "The Constitutional Significance of the Financial Settlement of 1690." *The Historical Journal* 20(1), pgs. 60, 75-76; Clifford B. Anderson. 1962. "Ministerial Responsibility in the 1620's." *The Journal of Modern History* 34(4), pg. 381; R. F. Alfred Hoernlé. 1919. Bernard Bosanquet's Philosophy of the State." *Political Science Quarterly* 34(4), pg. 619; H. H. Asquith. 1915. "The Power of the Purse: How 'Silver Bullets' Are Made in Britain." *The New York Times Current History of the European War* 2(5): 954-957. For analysis of the power of the purse outside Anglo-American constitutionalism, see: Richard Jankowski. 2021. "The Demise of the Roman Republic: a faulty constitution?" *Constitutional Political Economy* 32, pgs. 220-221, 228-231; James C. Kennedy. 2010. "Dutch Political Developments and Religious Reform." In Keith Robbins, ed. *Political and Legal Perspectives: The Dynamics of Religious Reform in Northern Europe, 1780-1920*. Leuven University Press: Leuven, pgs. 118, 136; James B. Collins. 2001. "Noble Political Ideology and the Estates General of Orléans and Pontoise: French Republicanism." *Historical Reflections / Réflexions Historiques* 27(2), pg. 223; William W. Hagen. 1991. "Descent of the Sonderweg: Hans Rosenberg's History of Old-Regime Prussia." *Central European History* 24(1), pg. 32; Victor Crowther. 1990. "A Case-Study in the Power of the Purse: The Management of the Ducal Cappella in Modena in the Reign of Francesco II d'Este." *Journal of the Royal Musical Association* 115(2): 207-219; John A. Yunck. 1961. "Dan Denarius: The Almighty Penny and the Fifteenth Century Poets." *The American Journal of Economics and Sociology* 20(2): 207-222. For more on the power of the purse in modern political, economic, and constitutional theory, see: Mark Dincecco. 2009. "Political regimes and sovereign credit risk in Europe, 1750-1913." *European Review of Economic History* 13(1): 31-63; Michael M. Ting. 2001. "The 'Power of the Purse' and Its Implications for Bureaucratic Policy-Making." *Public Choice* 106(3/4): 243-274; Jean-Laurent Rosenthal. 1998. "The Political Economy of Absolutism Reconsidered." In: Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal and Barry R. Weingast, eds. *Analytic Narratives*. Princeton University Press: Princeton, pgs. 64-108; Randall L. Calvert, Matthew D. McCubbins and Barry R. Weingast. 1989. "A Theory of Political Control and Agency Discretion." *American Journal of Political Science* 33(3), pgs. 600-602; William Earle Klay. 1987. "Management through Budgetary Incentives." *Public Productivity Review* 10(3): 59-71; Klaus Von Beyme. 1985. "The Role of the State and the Growth of Government." *International Political Science Review / Revue international de science politique* 6(1), pg. 15.

[507] Garry W. Cox and Barry R. Weingast. 2017. "Executive Constraint, Political Stability, and Economic Growth." *Comparative Political Studies* 51(3), pg.288.

[508] Bues, "The Formation of the Polish-Lithuanian Monarchy," pg. 32.

a shift to a collective mode of the *szlachta* governing themselves by electing their own representatives.[509] Today, debate remains as to whether Zygmunt II August was friend or foe of the executionists, in that he may have simply conceded that dividing the *szlachta* between the *magnaci* and the lesser nobles was necessary for reforms.[510] What is certain, however, is that the role of the king was limited as well as more concretely defined,[511] whereas the role of the *szlachta*, particularly the Izba Poselska, increased.

Limiting the Political and Judicial Role of the Church

Another major concern of the executionists was the role that the Catholic Church played within Poland and Lithuania. As the Catholic Church was one of the major political powers—if not *the* major political power—throughout the Middle Ages and the early modern period, it was often a natural enemy to the *szlachta*'s growing sense of political power, both within the borders of the union as well as in terms of foreign policy. Suspicion of the Church as well as opposition to it had deep roots in Polish and Lithuanian history. The first Polish ruler, prince Mieszko I, converted to Christianity and married a Bohemian princess rather than risk the wrath of the papacy and the Holy Roman Empire in the 10th century. Thus, the Poles' long history of resisting external threats has been present since the very beginning of Polish history.[512] The 13th century witnessed the invasion of the Baltic and the subjugation of the pagan Prussians and Livonia by the Teutonic Order. Originally invited by Konrad I, Duke of Masovia, to defend his lands against the Prussians, the Order eventually took over the whole region, with the encouragement of the Popes and the Holy Roman Emperors.[513] It was the aggression of the Order that brought the pagan Lithuanians and the Catholic Poles together, laying the groundwork for the political alliance.

Władysław II Jagiełło's conversion to Catholicism when he married Jadwiga was questioned by the Teutonic Order, as it would undermine the legitimacy of their crusades against the "pagans" in the Baltic.[514] As the wars against the Order in the 15th century came to a close with Poland-Lithuania and their Prussian allies victorious, the conciliarist reform movement began within the Church that demanded rule by an ecumenical council rather than the pope alone[515] as if he were a king. Conciliarism was particularly popular with the

[509] The view that the Izba Poselska represented the Rzeczpospolita was articulated by Jan Ocieski—who was a chancellor under Zygmunt I the Old and an ally of Zygmunt II August who nonetheless supported much of the executionist program as a means to reform the state—in the late 1550s, though it was not accepted by the Senat or the king. See: Sucheni-Grabowska, *Wolność i prawo*, pgs. 56-57.

[510] Tadeusz Szulc. 1995. "Historiograficzny bilans polityki ostatniego z Jagiellonów." *Studia z Dziejów Państwa i Prawa Polskiego* 2, pgs. 115-116.

[511] Dubas-Urawnowicz, Królestwo bez króla", pg. 146.

[512] Anna Kowalska-Pietrzak. 2015. "History of Poland during the Middle Ages." In W. Bielawska-Batorowicz, ed. *Poland. History, Culture and Society: Selected Readings*. Uniwersytet Łódźki: Łódź, pg.63; Kazimierz Smogrzewski. 1938. "Poland's Foreign Relations: III. Poland and Her Big Neighbours." *The Slavonic and East European Review* 17(19): 105-120.

[513] Frost, *Oxford History of Poland-Lithuania, passim*; Stone, *The Polish-Lithuanian State*, pgs. 14-16.

[514] Stone, *The Polish-Lithuanian State*, pg. 16.

[515] Christian D. Washburn. 2020. "St. Robert Bellarmine, Conciliarism, and the Limits of Papal Power." *Perichoresis* 18(6): 21-40; Joseph Canning. 2014. *A History of Medieval Political Thought: 300-1450*. Taylor and Francis: Hoboken, pg. 137; Konrad Filip Komarnicki. 2014. "Wiara i prawo. Sobór w Konstancji." *Studia*

szlachta[516] and was supported by theologians at the Akademia Krakowska in the 15th century.[517]

The period of the Jagiellonians in the 15th century was an important step in the development of parliamentarianism.[518] The natural parallels between supporting regional parliamentary representation and officials being selected from the regions they governed against the king, his *magnat* allies, and a bureaucracy that was loyal to him alone and supporting regional Church councils against an authoritarian model of the pope was not lost on the *szlachta*.

As Kloczowski explains:

> The impact of conciliarism on the Polish Church and society was predictable. It was founded on the concept of the Church as the Mystical Body within which—according to moderate conciliarists—two forces operated: pope and council. The concept of the Church as a specific congregation of believers differed fundamentally from that which viewed it as a kind of theocratic monarchy led by the pope as the Vicar of Christ. For the Polish nobility, at that time looking for some form of participation in governing the state, for some anticipation of future democracy, the conciliar Church was more appealing than the theocratic and monarchist Church.[519]

Thus, while many of the executionists' political and parliamentary leaders were themselves Protestant[520], concern for the role of the Church in society was of more universal concern, especially given the historic closeness between the Church and the Piast and then later the Jagiellonian dynasties. The Jagiellonians had always tried to keep close relations with the ultra-Catholic and absolutist Habsburgs,[521] who were the growing power in Europe at the time. This proved another significant flashpoint in foreign policy.[522] Many *szlachta* were frustrated that local officials were enforcing the decisions made by ecclesiastical courts, which the *szlachta* interpreted as violating their right to religious freedom as explicitly

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Redemptorystowskie 12: 293-309; Thomas E. Morrisey. 2014. *Conciliarism and Church Law in the Fifteenth Century: Studies on Franciscus Zarabella and the Council of Constance*. Ashgate Publishing Limited: Farnham; Małgorzata Owczarska. 2014. "Uniwersytet Krakowski w euoropejskim dyskursie politycznym początku XV w." In: Zbigniew Rau and Tomasz Tulejski, eds. *Bellum Iustum versus Bellum Sacrum: Uniwersalny spór w refleksji średniowiecznej Konstancja 1414-1418*. Wydawnictwo Adam Marszalek: Toruń, pg. 149; Paul Valliere. 2012. *Conciliarism: A History of Decision-Making in the Church*. Cambridge University Press: Cambridge; Norman Tanner. 2011. *The Church in Council: Conciliar Movements, Religious Practice and the Papacy from Nicaea to Vatican II*. I.B. Tauris: London and New York; Brian Tierney. 1968. *Foundations of the Conciliar Theory: The Contribution of the Medieval Canonists from Gratian to the Great Schism.* Cambridge University Press: Cambridge.

[516] Jerzy Kloczowski. 2000. *A History of Polish Christianity*. Cambridge University Press: Cambridge, pgs. 70-71; Paul. W. Knoll. 2016. *'A Pearl of Powerful Learning': the University of Cracow in the fifteenth century*. Brill: Leiden; Owczarska, "Uniwersytet Krakowski," *passim*.

[517] Knoll, *ibid., passim*; Owczarska, "Uniwersytet Krakowski," *passim.*

[518] Borucki, *Seymy i seymiki szlacheckie*, pgs. 10-13.

[519] Kloczowski, *A History of Polish Christianity*, pg. 71.

[520] Stone, *The Polish-Lithuanian State*, pg. 54.

[521] Queen Jadwiga had herself been betrothed to William von Habsburg, but she broke it off to marry Jagiełło, who paid a substantial sum to William and converted to Christianity to repair relations. The Jagiellonian dynasty attempted to keep a good relationship with the Habsburgs ever since. See Frost, *Oxford History of Poland-Lithuania*, pgs .8, 10, 17, 34, 47.

[522] Stone, *The Polish-Lithuanian State*, pg.53.

guaranteed by the statutes of Nieszawa, Czerwiński, *inter alia*..[523] Of particular frustration was that the Church claimed the right to the tithing of all members of the *szlachta*, even if they were not Catholic, while the Church and its lands were exempt from all fees and taxes.[524]

Given the powerful position and wealth that the Church held at the time, it is easy to understand why the Protestant *szlachta* would have become so offended: not only was the Church the second largest landholder in the two nations, next to the king himself,[525] but Protestant *szlachta* had to pay taxes to defend the nation from potential invaders. For the Church to then declare that they had to pay taxes to it, even having left the Church, would have certainly added insult to injury. One of the more controversial practices that had begun in the 15th century was the elevation of apostasy, heresy, witchcraft, and not paying tithes to crimes of *lese majesty*, which made religious unorthodoxy and dissent a potential crime prosecutable by the public courts.[526] The executionists' reasons were varied, ranging from being personally tolerant or not very religious themselves, to believing in principles of justice and fairness before the law, to believing in the separation of Church and state, out of their own self-interest and desire to pay less taxes themselves if the Church took up more of the tax burden, etc.

Zygmunt I was an ardent Catholic personally but was not opposed to the idea of reform and in fact corresponded with some Catholic reformers, such as Erasmus.[527] He also recognized that huge parts of Ruthenia (today's Belarus and Ukraine) were Orthodox and that Royal Prussia was predominantly Lutheran in the towns and cities, made the pragmatic decision to accept religious toleration whenever possible. Though the Crown had always had a long history of religious toleration—such as protection of Jews and other religious minorities—during the 16th and 17th Poland and Lithuania opposed the policy of *cuius regio, eius religio* (whose realm, their religion)[528] that was commonly practiced throughout Europe at the time, which gave the local *szlachta* great freedom in practicing their own faith however they wanted on their own estates, though this courtesy did not naturally extend to their serfs. Zygmunt I recognized the importance of keeping the state secular and tried to keep a balance with clergy as members of his council. Though he had to give in to some demands of the Church to persecute Protestants—such as seizing or burning, books, imprisonment, confiscation of property, etc.—in general he tried to ignore or otherwise not enforce much of Church policy. He also recognized that supporting Protestantism could prove politically profitable, as in the 1525 he signed the Treaty of Kraków with his nephew, the German-born grandmaster of the Teutonic Order, Albrecht Hohenzollern, who had converted to Lutheranism. [529] Albrecht wanted political protection to convert Ducal Prussia into a Protestant state with a secular administration, and Zygmunt I agreed to do so by creating it

[523] Sucheni-Grabowska, *Wolność i prawo*, *passim*.
[524] Modrzewski, *O poprawie Rzeczypospolitej*, pg. 157; Godlewski, "Szlachta a duchowieństwo", pgs. 57-58; Godlewski, "Spory szlachty", pg. 54.
[525] Godlewski, "Spory szlachty," pg. 54.
[526] Godlewski, "Szlachta a duchowieństwo", pgs. 37-39.
[527] For a letter written to Zygmunt I by Erasmus, see: Stanisłaaw, *Zbiór pamiętników*, Tom 1, pg. 111-139.
[528] Uruszczak, *Historia Państwa i Prawo*, pg. 221.
[529] Andrzej Sulima Kamiński. 2000. *Historia Rzeczypospolitej wielu narodów (1505-1795): obywatele, ich państwa, społeczeństwo, kultura.* Instytut Europy Środkowo Wschodniej: Lublin., pg. 37.

as a largely autonomous dutchy that was a vassal of the Crown.[530] Thus, the long struggle over the southern Baltic that began with ultra-Catholic German knights crusading against the pagan Lithuanians ended with a Catholic Lithuanian accepting German knights who had converted to Protestantism. Though the problem with Ducal Prussia had been effectively solved, within Poland-Lithuania tensions between Church and *szlachta* only increased under Zygmunt I and Zygmunt II August, and only worsened after the 1532 attempt to codify the laws of the entire nation left the power of the Church intact:

> Almost the entire reign of Zygmunt I was filled with controversies and negotiations to regulate the legal and property status of the Church. They were a consistent expression of general executionist assumptions aimed at subordinating all privileges to the common law contrary to the principle of even distribution of state burdens. The richest dioceses - Gniezno, Kraków, Kujawy, Płock and Poznań - had 46 towns and villages. The general property potential of the Church was obviously much greater although, contrary to popular belief, it did not equal the land ownership of the monarchy. Therefore, the demands of the supporters of the execution of law did not concern trivial matters, and this was what influenced the intensity of the conflict [...]
>
> The regional councils argued for this [the issue of taxing tithing] among other demands for the execution of the law. On the other hand, the whole matter turned out to be controversial in practice. Particularly controversial were the complaints about the enforcement by *starosty* - by virtue of old statutes - of the judgments of church courts against those who were behind in tithing. It happened that the clergy resorted to church curses and to the royal "arm", that is, to the *starosta*'s office. For these reasons, above all, the important problem of separating the competences of the church and secular judiciary, popularly known as the fight against the jurisdiction of clerics, entered the program of execution of law. When the Codification of Laws (1532 *Korrektura*) project maintained the Church's extensive judicial powers and reiterated its former tithing privileges, the *szlachta* took offense.[531]

This was unfortunate, as the principles of the Republic and individual freedom could have been broad enough to incorporate both dissenters as well as Catholics.[532] At the 1542 synod in Łęczyca the clergy more clearly defined their privileges, which Zygmunt I accepted the following year. Though these privileges were only supposed to be a temporary solution

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[530] Henryk Rybus. 1966. "Problem tolerancji religijnej w Polsce w pierwszym okresie reformacji za Zygmunta Starego." *Studia Theologica Varsaviensia* 4(2), pg.93.

[531] "It is bad if in such a strained relationship the government, instead of steadfastly respecting its rights and obligations, gives support to one side. Unless it is willing to learn about the new creed and the social doctrines it brings with it, it will not find the reasons and causes that brought them into the world; it will never know from where, why and what the danger is. It must be admitted that of all the rulers who lived during the Reformation, Zygmunt I showed the most moderation and understanding. If, however, he was firmly convinced of the truth, which he repeated himself after his ancestors, that heresy is the detriment of the Commonwealth, points harmful to the Commonwealth would be found in his reign, the reasons for the Reformation would be removed, the clergy would not be allowed to interfere more than the law permitted and would not violate the laws of the kingdom at the request of the clergy by royal edicts. This king's successors had a duty to defend the Catholic religion, true, but within the limits of their power. The oath for the Catholic religion was not obligatory for them to violate the oaths of national laws, to persecute their subjects, to enact new laws and to serve priests as a tool. The laws of the Republic of Poland were sufficient to defend the New-Believer *szlachta* and the Catholic religion. The principles of the Republic of Poland would be under the guard of the government, no religion would feel left to its own defense, and time, flowing calmly into the future, would carry on its waves everything that the past had given to it," Ludwik Kubala. 1906. *Stanisław Orzechowski i wypływ jego na rozwój i upadek Reformacyi w Polsce*. H. Altenberg: Lwów, pg. 86

[532] Godlewski, "Spory szlachty", pg. 52.

lasting either a year or until the next Seym could convene, in reality they became permanent. At the time the Protestants were weak politically, though they slowly increased in strength over the next twenty-five years. It was not simply the Protestant *szlachta* who were incensed, either, for many Catholic *szlachta* also thought that the Church should not be able to enforce itself on dissenters and had to pay its fair share. Further, the blooming *szlachta* political nation were not impressed with the courts that were meant to handle their affairs becoming an extension of the Church's power.[533] The executionists usually adhered to the idea of supporting the "old laws", not only because they believed stability of law was the best way to secure their privileges, but also as a way to maintain political legitimacy, as shall be explored more in-depth in the next section. Suffice it to say, their efforts to restrain the Church proved an exception to this general trend, for the Church actually had a set of entrenched privileges that had to be rolled back.

As Łukasz Godlewski explains:

> As we already know, one of the leading postulates of the knighthood was the taxation of the clergy. However, in the light of legal provisions, the Church did have a number of privileges which released it from its obligations to the state. Therefore, we must realize that, in the opinion of the *szlachta*, execution is not only the enforcement of the old legal provisions, but also the enactment of new ones that would change the existing legal status. Accepting Corrections (*Korektury*) in this form would mean accepting by the knights, among others Church privileges, not only fiscal but also judicial, which could not be discussed for members of the executionist movement.[534]

Improvement in the executionists' parliamentary fortunes mirrored the overall success of the Reformation within Poland-Lithuania. By the 1550s half of the Polish-Lithuanian Commonwealth was Catholic, about a quarter Eastern Orthodox, and the rest a variety of religions, about 10-15% of the nation becoming protestant. Yet a much higher percentage of burghers and *szlachta* were protestant, which gave them a disproportionate amount of political power.[535] Understandably, these tensons became increasingly untenable as many *szlachta* began converting to Protestantism, with many of them joining the execution movement.[536]

As mentioned earlier, Zygmunt I had attempted to walk the line between his personal and political loyalties to the Church and the pragmatic need of ruling an ecclesiastically diverse nation. His son Zygmunt II August was much more open to the Reformation and had himself even corresponded with Calvin.[537] The laxed approach of the Jagiellonians left the

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[533] Sucheni-Grabowska, *Wolność i Prawo*, pg. 54; Salmonowicz and Grodziski, "Uwagi o Królewskim Ustawodawstwie," pg. 158.

[534] Godlewski, "*Szlachta* a duchowieństwo", pg. 46.

[535] Godlewski, "Spory szlachty", pg. 53.

[536] "During the reign of Sigismund Augustus, the Reformation emerged as a weighty factor in political systems as well, since most of the execution leaders were associated with the Reformed Churches. This circumstance obviously.
affected the temperature of the continued struggle with the clergy's judiciary over the laity as well as with other privileges of the Church. The authority of the church courts now took on a different meaning, for there was a problem of "apostasy" (heresy) more potentially dangerous than the tithing disputes. Theoretically, the question was discussed at the Seymy as to whether the entire - Piast and Jagiellonian - body of the Church's rights was

door open for Protestantism in their native Lithuania, with many powerful Lithuanian *magnaci* becoming Calvinist. A significant complication was added when the powerful Radziwiłł family embraced Protestantism in the 1550s, with cousins Mikołaj Krzysztof Radziwiłł nicknamed Czarny (the Black) and Mikołaj Radziwiłł nicknamed Rudy (the Red) forming an alliance that opposed further closeness between Poland and Lithuania. They also had converted to Protestantism and themselves supported Calvinism.[538]

By the 1550s the majority of *szlachta* in the Seym had become dissenters and would retain the majority throughout the life of Zygmunt II August (until 1572).[539] When the 1552 Seym barred *starosty* from cooperating with and reinforcing the judgements of the ecclesiastical courts, the decision was supposed to last for one year but in fact it lasted until the 1562-1563 Sem when it became permanent. Zygmunt II August did not complain too much and may have even entertained the idea of bringing Catholic priests and Protestant churches together to create something like an Anglican Church for the Rzeczpospolita, with the king as its nominal head,[540] though this interpretation is not universally shared among scholars of the period.[541]

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included in the universal law of the Crown, as the clergymen believed, or whether this resource was merely a loose set of privileges for specific institutions, as the executionists assumed. In particular, Jagiełło's edict against the Hussites from 1424 was attacked, as it unequivocally condemned "heretics" and demanded that "all offices" prosecute, arrest and punish them (including confiscation of property, deprivation of the right to hold office)," Sucheni-Grabowska, *Spory królów*, pgs. 23-24; "In the period of the definitive breakdown of the unity of the Christian world, sealed by the stiff position of the Catholic Church in the legal and dogmatic decisions of the Council of Trent, the issue of the legal guarantee of religious tolerance for Protestant denominations emerged. The situation was aggravated by the progressing process of legal restrictions against followers of various religions in individual countries of Western Europe, combined with bloody wars on the sectarian background. In Poland, the issue of equal rights for Protestants was connected not only with pan-European tendencies to introduce religious absolutism, but also with the development of the above-mentioned nobility execution movement under the reign of Sigismund Augustus.

The fight for the execution of the rights of the crown was, among others, struggle to abolish clerical jurisdiction and involved sharp disputes between the nobility and the clergy over tithes, church judiciary, benefits, and participation in defense spending. When the greater part of the deputies, especially senators and royal officials, moved to the Reformation camp, an opinion began to form among the nobility that the Protestant problem was an internal affair of the Catholic Church, and that existing doctrinal discrepancies should be settled with the participation of both parties at a national council. In connection with this program, demands were made at the Seymy of the king to abolish clerical jurisdiction and to annul the anti-heretical decrees that had been in force so far, especially the Wieluń Edict of 1424 issued by Władysław Jagiełło against the Hussites," Mirosław Korolko. 1974. *Klejnot swobodnego sumienie: Polemika wokół konfederacji warszawskiej w latach 1573-1658*. Instytut Wydawniczy Pax: Warszawska, pg. 34; See also: Uruszczak, "Prawa celem", pg. 168; for more on the connection between the executionist movement and Protestantism, see: Anna Sucheni-Grabowska., pg. 30; Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pg. 191.

[537] Sucheni-Grabowska, *Spory królów*, pg. 24.

[538] Godlewski, "Spory szlachty", pg. 53.

[539] *Ibid.*, pg. 54.

[540] Salo Wittmayer Baron. 1976. *A Social and Religious History of the Jews*. Volume XVI: Poland-Lithuania 1500-1650. Second Edition. Columbia University Press: New York, pg.80.

[541] Sucheni-Grabowska strongly challenges the theory that Zygmunt II August wanted to establish a strong, Protestant national church. Instead, he wanted to reform the Catholic Church in Poland, allowing for a vernacular liturgy, the Eucharist to be presented according to Catholic as well as Eastern Orthodox rites, and allowing priests to marry. See: Sucheni-Grabowska, *Spory królów*, pg. 25. Such notions were actually common at that time, as both Stanisław Orzechowski and Andrzej Frycz Modrzewski were prominent Catholic priests

In 1563 the Seym passed a legal act restoring the old laws and permanently banning the *starosty* from enforcing church laws, made the church pay the *kwarta* to support the common defense, and reclaimed some royal lands from the *magnaci*. This was over the protests of the Church and many of the *magnaci*, as Zygmunt II August realized that allying with the broader base of the *szlachta* provided him with more stable economic support and broader income than simply relying on the *magnaci* ever could, as well as more troops to support his foreign policy of wars against Muscovy.[542] It was not a total victory for the executionists, however, as the power of the Counter-Reformation and the need to keep his alliances with the Church eventually scuppered plans to increase religious freedom. The Crown and the Senat remained allies with the Church, accepting the decision of the Council of Trent in 1564,[543] if not implementing the Counter-Reformation as harshly as elsewhere in Catholic Europe. The question of religious toleration and the role of the Church would remain throughout the life of the Commonwealth, but Poland-Lithuania would always be on the edge of Protestant northern Europe, Catholic western Europe, and Orthodox Eastern Europe.

Strengthening and Stabilizing the Izba Poselska

Perhaps the largest parliamentary dispute during the executionist period was the proper interpretation of the precise meaning of "common agreement" within the *Nihil Novi* constitution, that: "nothing new [*nihil novi*] should be decreed by us or our successors […] without the common agreement of our councillors and envoys of the lands".[544] It is clear that the "us and our successors" means the Jagiellonians and further kings, that the "councillors" refers to the Senat, and that the "envoys of the lands" refers to the Izba Poselska, whose members were elected by regional Seymiki. The difficulty was the exact balance between the two parliamentary bodies. The executionist movement was thus intimately tied into questions of parliamentarianism and the balances of powers not only between the legislative and the king, but also between the deputies and the Senat. The Senators saw themselves as a legislative body and wanted to shape the law, which would naturally be supportive of the king.[545] The deputies, in the senators' view, existed only to manage the various lands throughout the nation, especially to locally manage its defenses whenever needed.[546]

Naturally, the deputies believed that they themselves were the true legislative body, since only they were actually representatives of the will of the people. Deputies, particularly the executionist members, wanted the narrowest interpretation that the king could not make any laws without the Seym, in other words, that it was the Seym that had the power to pass laws.[547] This clearly aligned with the idea that the king was someone who was to be above

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and thinkers who married, though Modrzewski later probably embraced Protestantism while Orzechowski remained Catholic, which brought him into trouble with the Church. The *szlachta* and *magnaci* both came to Orzechowski's aid, and the sentence to excommunicate him from the Church was never carried out. See: Davies, *God's Playground*, pg. 131; Stone, *The Polish-Lithuanian State*, pg. 100.

[542] Sucheni-Grabowska, *Spory królów*, pg 30.

[543] Frost, *Oxford History of Poland-Lithuania*, pg. 443; Stone, *The Polish-Lithuanian State*, pgs. 55-56; Sucheni-Grabowska, *ibid.*, pg. 40.

[544] *Supra*, pg. 143.

[545] Brzozowski, "Zygmunt I", *passim.*

[546] Szulc, *Z Badań nad egzekucją praw*, pg. 64.

[547] Makiłła, *Artykuły Henrykowskie*, pg. 250.

politics as the father of the nation and was to seek to build consensus, rather than to direct policy.[548] According to the executionists, the Senat should serve as an advisory body, but not a voting body. This was a position especially put forward by two leaders of the movement, Jakub Przyłuski and Andrzej Frycz Modrzewski:

> Finally, the king categorically settled the matter, referring to the principles of legislation: he decided that it was a new law, for the enactment of which it was necessary to obtain "the council of senators and the consent of the deputies". But it was this quote, taken from *Nihil Novi* and often quoted in the *konstytucje*, that showed the way to other interpretations as well. The "council" of the Senat did not have to be understood as a body equal to the chamber of deputies when making legislative decisions. Contemporary theorists of the Polish political system considered senators to be "lawmen" (Jakub Przyłuski). This formula was also used by the executioners. Andrzej Frycz Modrzewski attributed an honorable and responsible role to the monarch's council, but at the same time he also proposed "weighing" and not "counting" individual votes, that is, taking senatorial opinions into consideration by the king, and not voting the senate in the literal sense.[549]

The executionists' proposal directly challenged parliamentary practice at the time. As mentioned earlier, the king had a significant role as a parliamentary institution: the king convened every Seym, meaning that he chose when and where it would take place as well as could suspend it if he did not like its proceedings.[550] The king also began the parliamentary process with the royal chancellery convoking local seymiki, the seymiki who elected the seymik marszałek, who then directed the discussions, counted votes, presented conclusions, and edited resolutions. The seymiki also drafted detailed *instrukcje* (instructions) for the deputies that were sent to the regional or national Seym.[551] These *instrukcje* played a critically important role in Polish-Lithuanian constitutionalism in that they served as an effective counter-weight against the trends to centralize political power in the hands of either the king or the Seym. How much freedom the deputies had varied greatly on their local political culture and the issue that was being debated. Summarizing Kutrzeba's review of deputies' role, they had: 1) virtually free reign, 2) a clear command to receive certain guarantees either from the king or in the legislation, 3) a clear prohibition against voting in favor of certain proposals or legislation, and 4) a combination of 2 and 3 in a kind of "give-and-take" wherein the deputies were to reject any legislation that the king wants until certain guarantees were made first.[552]

The Seym followed a specific parliamentary procedure itself, with the monarch's agenda set forth, followed by an uninterrupted statement by each Senator known as their *wota* (vote), [553] before finally the deputies were allowed their turn. Committees were then established between the Senators and the deputies, but due to the limited duration of the Seym the deputies often found themselves in little position to do more than compromise rather than to drive policy or reform. Thus, while the general Seymy nominally had three estates based on the classical republican idea of a mixed republic—deputies elected by *szlachta* at the

[548] Modrzewski, *O poprawie Rzeczypospolitej*, pgs. 23, 27-29
[549] Sucheni-Grabowska, *Spory królów*, pg. 34.
[550] Dubas-Urwanowicz, "Królestwo bez króla?", pg. 146.
[551] Stone, *The Polish-Lithuanian State*, pg. 184.
[552] Kutrzeba, "Parliamentary Procedure in Poland", pg. 40.
[553] *Ibid.*, pgs. 25-26

seymiki, senators nominated by the king, and the king himself ruling due to free election—in practice it was more muddled with the king presiding over the Senat and the deputies having little power to determine the policy or agenda.[554]

One of the first opportunities for the Deputies to flex their political will was the 1520 Seym in Bydgoszcz where the *szlachta* first demanded that Zygmunt I redistribute royal estates and the Izba Poselska barred senators from its debates and required that all deputies were directly elected by seymiki, rather than some being appointed by local senators, as had happened in the past. Zygmunt I agreed in exchange for raising new taxes to pursue a war against Prussia, but did not carry through on the promise to redistribute royal estates. The next was at the 1530 v*ivente rege* election of Zygmunt II August, which was accepted on the condition that Zygmunt I would "review all laws, privileges, and decrees and abolish those that might be incompatible with older laws".[555] The consequences of this was not felt until the 1537 Seym in Kraków, wherein the *szlachta* demanded confirmation that each king would be elected, that all *szlachta* would take part in future elections, and that no king would be elected while another king was still alive.[556]

Tensions ratcheted up in 1548 when Zygmunt II August married Barbara Radziwiłł of the powerful Lithuanian *magnat* family against the wishes of the executionist *szlachta* who feared the Radziwiłł *magnat* family's power as well as giving too much influence to the Grand Duchy, and Zygmunt II August also rejected demands to restrict the royal jurisdiction at the Seym of that year. This set the executionists on a path for the *szlachta* to become equal to the *magnaci* by elevating the Izba Poselska; *de jure* equality was no longer enough for them, and they rallied around demands for *de facto* political power.[557] The equalization was not immediate but was a gradual process. Something of a cycle developed wherein the king would agree to the *szlachta*'s demands to review privileges and statues in exchange for new finances to wage his wars or his foreign policy, but then not carry through on them. When confronted, the king and the senators would argue that enforcement was not possible due to the current war or whatever political situation at the time and try to convince the *szlachta* to postpone the execution until the next Seym.[558] Part of the issue was that the king did not want to subordinate himself to law, but as time wore on moderate senators saw the need for reforms. They also recommended that the king should embrace some aspects of the execution movement in order to steer the movement himself, rather than outright oppose it.[559]

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[554] "The overwhelming majority of the gentry's legislative proposals, even those put forward by the opposition, concerned questions outlined in the king's message to regional diets and in his proposal, as deputies considered it their duty to express their attitude to the king's plans. This did not mean of course that they could not voice opinions that differed from the king's aims and intentions. Nevertheless, it is an indisputable fact that the king's legislative initiative predominated, especially before and during ordinary Sejms," Jan Seredyka. 1985. "From Legislative Initiative to Sejm Acts at the Beginning of the 17th Century." In: Władysław Czapliński, ed. 1985. The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies. Ossolineum: Wrocław, pg. 149; Lewandowska-Malec, "Polish Parliamentarism", pg. 35.
[555] Stone, *The Polish-Lithuanian State,* pg. 40.
[556] *Ibid,* pg. 40.
[557] Makiłła, *Artykuły henrykowskie,* pg. 182.
[558] Szulc, *Z Badań nad egzekucją praw,* pgs. 67, 75-77.
[559] *Ibid,* pg. 41.

There were a series of "execution Seymy" in 1550, 1554-1555, ad 1558-1559 with incremental progress made as the *szlachta*'s political self-organization and awareness gradually increased.[560] The 1558-1559 Seym was when the executionists began to see some progress: by this point Zygmunt II August had accepted that he would have no children with his wife, Queen Catherine, and that there would be a contested election after the Jagiellonian dynasty ended. Though the fact that there would be an election was accepted, there was deep debate between the Senat and the local *szlachta* through their representatives in the Izba Poselska as to who would participate in the election and how it would be conducted.[561] The dispute was not settled during Zygmunt II August's lifetime. By the 1558-1559 the executionists had had enough playing games and had solidified their agenda that the interpretation of the kings powers should be constrained according to the 1504 statute, rather than 1454. However, all redistributions made between 1454 were to remain, but all redistributions made after 1504 were to be annulled, as they violated that law. Though some moderate senators acceded to the demands, they were rejected.[562] When the *szlachta* refused Zygmunt II August's agenda, he dissolved the Seym and retreated to Lithuania, busying himself with the war over Livonia against Sweden and Muscovy, surrounding himself with senators and *magnaci*, and refusing to call a Seym from 1559-1562.[563]

Though it was a failure in terms of producing a parliamentary action, the 1558-1559 Seym was critical in laying dawn the demands that the executionists would carry forward to future Seymy, demonstrated that the senators and the king were governed by their own self-interest more than the good of the state, and was the first time when the *szlachta* were able to carry out a coherent, collective political action.[564] By 1562 Zygmunt II August had neither the military nor the financial resources for his campaign, and finally broke down at the 1562-1563 Seym. The king and the Senat agreed to: strengthen the union between the Kingdom of Poland and the Grand Duchy, allow the reorganization of royal lands, break up Royal Prussia as an autonomous unit and integrate it as several provinces into Crown, and introduce the Polish regional assemblies and the system of land courts into Lithuanian and Ruthenian lands.[565] The 1563-1564, 1564, 1565, 1566, 1567, and 1569 "execution Seymy" dominated the political and constitutional landscape, altogether introducing novel solutions such as: the regular inspection of royal property by agents loyal to the Seym, dissolving all land redistributions made after 1504, extending the 1504 statute to any royal lands made between 1454 and 1504, and the *kwarta*, *inter alia*. Some unresolved questions that remained were whether the king had the right to grant land in perpetuity as well as whether the audits of royal lands were to be publicly published by the Seym, since the publication of laws was generally under the purview of the king.[566]

The strengthening of the Izba Poselska' position had major constitutional implications. Throughout the 15th and 16th centuries the Izba Poselska had existed to ratify

[560] Makiłła, *Artykuły henrykowskie*, pg. 183.
[561] *Ibid.*, pgs. 129-134.
[562] Szulc, *Z Badań nad egzekucją praw*, pgs. 84-86.
[563] Sucheni-Grabowska, *Spory królów*, pg. 19.
[564] *Ibid.*, pg. 88.
[565] Makiłła, *ibid*, pg. 183; Stone, *The Polish-Lithuanian State*, pg. 54.
[566] Szum, "Uniwersalizm," pg. 101.

the decisions made by the king and the Senat, but the executionists had given the Izba Poselska the ability to propose legislation itself.[567] Though each senator was more powerful than an individual deputy, the much, much larger number of deputies and the seymiki they represented were a much larger political and economic force than the *magnaci*, the king, or the Church could muster. The slow chipping away of these other institutions on the path for the Chamber to becoming the dominant political force in the 17th and 18th centuries firmly established the *demokracja szlachecka* "noble democracy", even if the executionists did not achieve all of their goals. These two implications transformed the passive, implicit separation of powers established in the 1454, 1496, 1501, 1504, and 1505 statutes into an active system of checks and balances that had the potential to actually restrain the king. The *szlachta* had used the Seym as the instrument to give the kingdom a new constitutional shape.

While we shall return to the question of *egzorbitancje* a little later, is sufficient to briefly note that while they are difficult to define precisely for modern audiences, they essentially were grievances against the "excesses" of political power and that *szlachta* formally brought *egzorbitancje*[568] to the Seym to demand the attention of the king. In this sense they were perhaps closest to the concepts of the violation of civil rights or when a court case involves a "constitutional" question in American law in that bringing their attention to the Seym or to the courts actually had the direct intention of improving the function of the law, in addition to addressing the grievances of the individual or individuals in question. The other issue—that of implementation of the law—was more pragmatic and direct. A neutral, "public person" (*publicae personae*) was needed that would have the duty as well as the power to go out and sue those individuals who were failing in their duties.[569] The *instygator* evolved to fill in this new role by taking on the duties of actually inspecting the work of the *starosty*, magistrates, and other locally appointed officials. A major duty of the *instygatory* was to ensure that the *kwarta* was being properly collected and administered.[570]

As with the rest of the executionist movement, these changes did not come easily. To both the executionists and the king, it was quite clear that this was a naked attempt to make

[567] Stone, *The Polish-Lithuanian State*, pg. 40.

[568] Tomasz Kucharski draws our attention to how the "egzorbitancje" had a directly *constitutional* implication: "[In] the opinion of the nobility, the basic components of the institution of *egzorbitancje* were: firstly, anticipating the existence of a good old law, secondly, empirically confirming its frequent (and even individual) violations in the past and, thirdly, emphasizing the necessity to enforce it or also preventing its possible violations in the future. An accessory feature should also be added here, i.e., bringing the perpetrators of violations to justice. Thus, *egzorbitancje* appear in this context as allegations of a particular stripe, intended to protect the legal system and prevent violations of standards, repairing as far as possible everything that has already been done against the law. The instrument of this process was not supposed to be purely administrative measures, but a specific parliamentary procedure reminiscing the old regulations, formally confirming their continued validity. The special features of this procedure are the fact that it is implemented by a body with legislative powers, in a form reserved for the creation of new "laws" – a *konstytucja*," Tomasz Kucharski. 2014. *Instytucja egzorbitancji w systemie prawnoustrojowym Rzeczypospolitej Obojga Narodów.* Wydanictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń, pgs. 24-25.

[569] Kaniewska, "Walka o wprowadzenie instygatorów," pg. 76.

[570] Anna Sucheni-Grabowska, *Wolność i prawo*, pgs. 219-220; Anna Sucheni-Grabowska. 1965. "Walka o wymiar i przeznaczenie kwarty w końcu XVI i na początku XVII wieku." *Przegląd Historyczny* 56(1), pgs. 24-25.

massively democratic, systemic reforms.[571] Irena Kaniewska carefully documents the evolution of the *instygatory* within the executionist movement, with the Izba Poselska led by Mikołaj Sienicki first proposing the new office at the 1562/1563 winter Seym. The Senat had an entirely different vision than the Izba Poselska did: the *instygator* would be another person who worked for the king. This was outright rejected.[572]

Unsurprisingly, the reforms ultimately failed, though the *szlachta*—particularly Mikołaj Sienicki—did not give up and presented them again at the 1565 Seym. It is worth examining *why* the king and the *magnaci* rejected the project of the *instygator*, as it sheds significant light as onto the overall manner of constitutional and political thought at the time. The argument used by the king to reject the institution of *instygator* was a very specific interpretation of the *Nihil Novi* legal principle: *Nihil Novi statuem us absque consilio consiliariorum et assensu nuntiorum* ("I would establish nothing without the advice of the councilors and the consent of the messengers [the deputies]").[573] In this interpretation, "consent" meant approval by both the Senat as well as the Izba Poselska. Thus, if the king did not want a law to be approved but did not to come out and directly critique the position of the *szlachta*, he could offer the vague constitutional defense that the Senat had disapproved of the new laws or changes and had advised him not to adopt them. The ultimate collapse of the proposed *instygator* is demonstrative of the emerging form of political governance at the time: the Izba Poselska was rising as the most powerful branch within a mixed form of government but was a far cry away from being a completely dominant branch as in modern understandings of parliamentary supremacy.[574]

As already discussed, one of the major rhetorical techniques used by the executionists was that they were interested in restoring the old laws or ensuring that they were being carried out correctly, but that sometimes this could be used to effectively smuggle in reforms or changes. The king employed the same logic against the executionists in the rejection of the instygatory: the office did not exist in the old law, and hence creating it would be a violation of it. Thus, both the king and the *szlachta* could invoke the concept of fidelity to old laws in support of their political goals, whether to produce changes or to prevent them. As we shall explore next, this culture of jurisprudential conservatism—at least rhetorically—became a basis for legal and political culture in the late 16th century Commonwealth.

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[571] "The seasoned activists of the execution movement, however, were well aware of the fact that these were only half-measures and proposed an interesting systemic solution: the appointment by individual sejmiki of *instygatory* who would be entitled to control local dignitaries and officials. According to the drafters' concept – these *instygatory* would be competent to file complaints against negligent officials in the Sejm in cases of ineffectiveness of their own interventions. The proposal created real opportunities for society to influence the functioning of the power apparatus. However, the project was not approved by the king and the senate. The democratic nature of this initiative is obvious, just as the opposition of the ruling elite, threatened in its prerogative with social irresponsibility, seems obvious," Sucheni-Grabowska, *Wolność i prawo*, pgs. 81-82.
[572] Kaniewska, "Walka o wprowadzenie instygatorów," pgs. 77-82.
[573] *Ibid.*, pgs. 87-88.
[574] *Loc. Cit.*

Changing the Legal and Political Culture

The executionists played a large role in the establishment of 16th century jurisprudential conservatism, which served as a basis of *szlachta* political culture as a whole. As Grześkowiak-Krwawicz explains, the idea of fidelity to older laws was part of *szlachta* culture and the association of the Commonwealth with the collective political body of the *szlachta* themselves. In this sense, Polish political culture was quite similar to other republican movements throughout Europe that connected stability of law with freedom:

> As noble politicians and virtually the entire nobility understood, however, rights not only acted as a direct protection of individual freedoms but also, and perhaps foremost, had to protect the structure that guaranteed freedom – the Commonwealth. *They not only protected the Commonwealth, but created it, imbued it with life, and acted as its soul*. It was for this reason, among others, that the nobility dreaded the breaching of 'the good old laws' – as the entire edifice of the Commonwealth was based on them, every breaching or violation as well as act of disobedience with regard to them by both the ruler as well the citizens could shake its foundations. This was not an exclusively Polish peculiarity. Citizens of 'free states' were skeptical in general toward changes in the laws 'of old', as it was they that guaranteed their freedom.[575]

The *szlachta*'s fidelity to what we would perhaps consider the "letter of the law" was thus one of their major political motivations,[576] and extended to financial records as much as to parliamentary debates.[577] It should also be noted that at this time there was a push to begin using vernacular languages when writing new laws, rather than simply Latin, which is a curious, secular parallel to similar pushes for vernacular usage across Europe during Reformation.[578] The executionists' favoring of "the old laws" along with popular trends to

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[575] Grześkowiak-Krwawiczz, "Noble Republicanism in the Polish-Lithuanian Commonwealth," pg. 55.

[576] Anna Karabowicz. 2014. "Custom and Statute: A Brief History of Their Coexistence in Poland." *Krakowskie Studia z Historii Państwa i Prawa* 1, pgs. 116-117; Sucheni-Grabowska, *Spory królów*, pgs. 45, 57-58.

[577] "The practice of the Crown Chancery of Poland was based on a long-established tradition, and changes in the form and working of the various types of documents were introduced only gradually. The evidence clearly indicates a respect for the past and a desire for continuity in building the future. When important issues were discussed in parliament reference was often made to charters drawn up in the past, and sometimes the actual documents were produced as evidence. For example, during the debates of the parliament of 1564, in which Polish-Lithuanian relations were involved, the relevant charters were produced at the request of the nobles," Paweł Skwarczyński. 1958. "The 'Decretum electionis' of Henry of Valois." *The Slavonic and East European Review* 37(88), pgs. 113-130.

[578] Kaius Sinnemäki and Janne Saarikivi. 2019. "Sacred Language: Reformation, Nationalism, and Linguistic Culture." In Kaius Sinnemäki, Anneli Portman, Jouni Tilli, and Robert H. Nelson, eds. *On the Legacy of Lutheranism in Finland: Societal Perspectives*. Finnish Literature Society: Helsinki, pgs. 39-68; Kenneth G. Appold. 2017. "Lutheran-Reformed Relations: A Brief Historical Overview." *The Journal of Presbyterian History* 95(2), pg. 55; Heinz Schilling. 2017. "1517—A Landmark in World History?" In: Declan Marmion, Salvador Ryan and Gesa E. Thiessen, eds. *Remembering the Reformation: Martin Luther and Catholic Theology*. Fortress Press: Minneapolis, pg. 6; Alexander S. Wilkinson. 2015. "Vernacular translation in Renaissance France, Spain, Portugal and Britain: a comparative survey." *Renaissance Studies* 29(1): 19-35; Sabrina Corbellini, Mart van Dujin, Suzan Folkerts, and Margriet Hoogvliet. 2013. "Challenging the Paradigms: Holy Writ and La Readers in Late Medieval Europe." *Church History and Religious Culture* 93: 171-188; Patrick J. Geary. 2013. "Vernacular Language and Secular Power in Emerging Europe." In: Patrick J. Geary, *Language and Power in the Early Middle Ages*. Brandeis University Press: Waltham, pgs. 56-73; Andrew Pettegree and Matthew Hall. 2004. "The Reformation and the Book: A Reconsideration." *The Historical*

vernacularize religious, political, and legal texts gave birth to a specific kind of narrow, textualist interpretation. The social reality was that all members of the *szlachta* had the same rights before the law and that any of them could serve in any office—at least in theory. This, combined with an increasing political awareness and desire to defend those rights led to a vernacularizing of these texts so that they were easily understandable, with the executionist movement opening a new era in publishing books in Polish.[579] The logic was that many of the abuses received in court could be prevented if all parties to the legal process were equally aware of the law and could understand it, rather than having to rely on legal aide. Thus, one could determine for oneself whether they had received an unfair judgement. Thus, a narrow interpretation of the law, as written in Polish, would serve to solidify the political and legal rights of the *szlachta* as well as to improve the interpretation of law in general.

> The motives of the executionists in demanding a Polish edition of the statutes become clearer when we look at the content of other execution desiderata. Many of the demands made at the time were aimed at improving the administration of justice. The *szlachta*, recognizing the land laws of the time as good, explained the poor functioning of the judiciary by the abandonment or distortion (for various reasons) of legal regulations. The lack of an officially approved, uniform list of laws, translated into Polish, caused jurisprudential chaos and disputes over rights [...].
>
> Any changes in the legal system of the time were possible only with the support of the majority of *szlachta* deputies. The executionists, as representatives of the *szlachta*, represented only its interests in their postulates. Hence, the proposal to publish statutes in Polish, apart from the national aspect, was also of a political nature: statutes in Polish were to serve primarily to secure the rights of *szlachta*. Thanks to this, the execution of the law could enjoy the broad support of the *szlachta*, and the executioners continued to appear on the stage of political life in the country for a long time.[580]

This concept of narrowly interpreting the law was a natural fit for the explosion of republican political thought that blossomed in the 16th century, wherein the Poles revived Cicero's association that freedom comes from the rule of law, which protected the citizens both from any authority, including the king.[581] In this sense, the Crown was not unique, as this sense of conservative constitutional jurisprudence was common in the English political experience as well. In fact, there were significant historical, institutional, and constitutional parallels between the struggle of the Polish *szlachta* and the English nobles in the 16th and 17th centuries. Both groups were led by Protestants and moderate Catholics against Catholic

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Journal 47(4): 785-808; David A. Frick. 1989. *Polish Sacred Philology in the Reformation and the Counter-Reformation: Chapters in the History of the Controversies (1551-1632)*. University of California Press: Berkeley and Los Angeles, pgs. 38-40.

[579] Nowak-Jamróz, "O polski język statutów," pg. 221.

[580] Nowak-Jamróz, "O polski język statutów", pg. 224.

[581] "Indeed, Poles agreed with Cicero that *libertas consistit in legibus* [freedom exists in the laws]. It is often emphasized that from the 16th century onwards, the Commonwealth was perceived by the *szlachta* as a state ruled by law, and therefore one in which the law was the sovereign. Its orders were bound not only by the citizens, but also by the state authorities, and most of all the king. Indeed, both in theoretical statements and, perhaps even more so, in political discussions, the role of law as a barrier protecting the freedom of the citizen against the monarch, his officials or any authority was emphasized," Grześkowiak-Krwawicz, "Staropolska Koncepcji Wolności", pg. 70.

kings that were accused of promoting an absolutist theory of the crown,[582] both the last two Jagiellonians as well as James VII and II demonstrated a disdain for parliament, suspending or ignoring it whenever they thought it convenient to rule by fiat.[583] Both the Polish and Lithuanian *szlachta* as well as the English nobles engaged in rebellions—in Poland-Lithuania in 1537 and 1609 and England in 1688—against their respective Crowns that were relatively quick and relatively bloodless,[584] but with long lasting political consequences. Though the Glorious Revolution has been interpreted as a complete success, bringing about major political, legal, and constitutional changes[585] that would serve as historical, political, and

[582] Sowerby strongly questions the pro-Catholicism, pro-absolutism of James II as a political myth forged by the victors of the Glorious Revolution. The question of whether James II was truly a political advocate of Catholicism or merely a supporter of Catholic rights and toleration in a multi-religious state is still something of debate among historians. His 1687 *Declaration for Liberty of Conscience* was met with skepticism by his subjects as trying to splinter the Protestant movement, weakening it. His contemporaries and historians have often noted that his "toleration" was selective toward his political allies, rather than blanket for the nation, and when he met his political goals would revoke it or change its terms as was convenient. Others see his policies toward toleration as something that was evolving from a political-strategic mechanism towards a universal, natural right. It is nonetheless true, however, that the king did seem to prefer appointing Catholics to positions in his military administration. Though the proportion of Catholics in the king's service were much higher than in the general population, they were still by no means the majority, occupying at most 1/3 of posts within the nation. James II appointed persons from a variety of religious viewpoints to positions of power, including those that were neither loyal to the Catholic Church nor to the Anglican Church, which angered the Anglicans, who saw themselves as the dominant political force. For a sympathetic view toward James II, see: Scott Sowerby. 2013. *Making Toleration: The Repealers and the Glorious Revolution*. Harvard University Press: Cambridge, pgs. 24-34, 44-48, 81-82. For a more traditional view of James II as an absolutist, see: Edward Vallance. 2006. *The Glorious Revolution: 1688—Britain's Fight for Liberty*. Hachette Digital: London. For a view that acknowledges both the absolutist tendencies in Charles II and James II but also acknowledges their attempts at tolerance, see: Hugh Trevor-Roper. 1992. *From Counter-Reformation to Glorious Revolution*. Secker & Warburg: London.

[583] Parliament was too strong of a parliamentary institution for James II to ignore or oppose completely, unlike Zygmunt I and Zygmunt II August who had more leniency to ignore the Sejm if they so choose. Instead, the English kings had a habit of exercising their right to dissolve (prorogue) parliament and call for a new election in the hope that the new parliament would agree to whatever policy they had proposed. This was a tool used by both James II's older brother, the Protestant Charles II in 1681 and James II himself in 1687. See: Edward Vallance, *ibid, passim*.

[584] The idea of the Glorious Revolution as "bloodless" or "quiet" is commonplace in British history. The idea is that it was not so much revolutionary in an extreme sense, but rather a reshuffling of the political elites wherein the Protestants and parliament gained the upper hand. See: Peter Ackryod. 2014. *Rebellion: the history of England from James I to the Glorious Revolution*. Thomas Dune Books: New York; Vallance, *The Glorious Revolution*.

[585] Nelson, *The Royalist Revolution*; Gary W. Cox. 2012. "Was the Glorious Revolution a Constitutional Watershed?" *The Journal of Economic History* 72(3): 567-600; Jack P. Greene. 2011. *The Constitutional Origins of the American Revolution*. Cambridge University Press: Cambridge; Alexander Hamilton. 2008. "The Federalist 26." In: Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*. Oxford University Press: Oxford, pgs. 1261-31; Ian R. Christie. 1997. "British Politics and the American Revolution." *Albion: A Quarterly Journal Concerned with British Studies* 9(3): 205-226; John Phillip Reid. 1995. *Constitutional History of the American Revolution*. Abridged Edition. University of Wisconsin Press: Madison; Harold J. Berman. 1983. "Religious Foundations of Law in the West: An Historical Perspective." *Journal of Law and Religion* 1(1), pg. 27; Ralph F. Fuchs. 1938. "Concepts and Policies in the Anglo-Administrative Law Theory." *The Yale Law Journal* 47(4): 542-543.

constitutional inspiration for the American Revolution and subsequent Constitution,[586] the 1537 *rokosz* and 1609 *rokosz* have been interpreted as failures, with the latter representing the collapse or endpoint of the Polish Golden Age.[587] We will return to this narrow historiosophical interpretation to challenge and contextualize it as insufficiently narrow at a later point.

Grześkowiak-Krwawicz summarizes the consolidation of the *szlachta*'s position and the subsequent changes to the Union as a kind of mixed government, wherein the king was recognized as a necessary part of the system, but also one that was simultaneously the greatest internal threat to it. Eventually this almost became a kind of irrational phobia that would paralyze the Polish-Lithuanian political system:

> At the end of the 16th and the middle of the 17th century, no external threat was felt, while the royal power was still so strong that it was perceived as a real threat to the delicate balance of the mixed government. It is a peculiar paradox of Polish political thought that until the end of the noble Commonwealth's existence it considered the king an indispensable element of government in a free state, but at the same time treated it as a constant threat to the republic and freedom. The latter belief was not a specifically Polish opinion, much attention was paid to this issue by English writers of the seventeenth century - Milton, Harrington, Sidney, and the fear of royal despotism did not leave the English throughout the eighteenth century. However, in Poland, over time, this fear turned almost into a phobia, and in the first half of the 18th century, all ideas for reforming an inefficient system of government were restrained by fear of royal despotism.[588]

While this latter judgement about the Polish-Lithuanian constitutional system may prove too pessimistic for subsequent analysis, it will be returned to later. It is sufficient to merely point out that the solidification of the *szlachta*'s place and the transformation of the political-constitutional culture in the 16th century is something that is broadly agreed upon in the historical literature, regardless of whether or not it is ultimately interpreted in a negative or a positive light.

Connected to the growth of republicanism under the rule of law was the growing identity of the *szlachta* as a political class. As noted earlier, the executionists were advocates of the Polonization of the law and generally suspicious of relying too much on Latin. It should therefore be no surprise that the transformation of the *szlachta*'s political self-understanding as well as the concept of the state followed a similar process of Polonizing the Latin term "Res publica" into "Rzeczpospolita," the Polish version of the term becoming increasingly popular in the political literature from that time forward. The *szlachta* took "r*es publica*" (common thing) literally as a *rzecz publiczna* (public thing) or rzecz *wspólna* (common thing), that was the common property of the citizens (the *szlachta*), or alternatively, that the

[586] Bernard Bailyn. 1992. *The Ideological Origins of the American Revolution.* Enlarged Edition. The Belknap Press of Harvard University Press: Cambridge and London, *passim*; David S. Lovejoy. 1987. *The Glorious Revolution in America*. With a New Introduction. Wesleyan University Press: Hanover.
[587] Oskar Halecki. 1943. *A History of Poland*. Roy Publishers: New York, pgs. 144-145; Wilson, "The Jewel of Liberty Stolen?", pg.8.
[588] Grześkowiak-Krwawicz, "Staropolska Koncepcji Wolności", pg. 67.

rzeczpospolita *was* the collective *szlachta* themselves.[589] There was extensive debate between within 16th century political literature among such thinkers as Andrzej Frycz Modrzewski, Stanisław Orzechowski, Andrzej Wolań, and Andrzej Zamoyski whether a *res publica* was any state ruled by law as Modrzewski believed, or rather something specific to the Polish state, as Orzechowski and Wolań believed.[590] Indeed, a plethora of understandings of Rzeczpospolita abounded, from the official name for the Polish state, to any state ruled by law, to the community of all the inhabitants of the nation, to the community of all the citizens (the *szlachta*), to the specific *monarchia mixta* or *mixtum imperium* based on Aristotle and Cicero that was common throughout 15th and 16th century Europe, or to just the Izba Poselska.[591]

As Grześkowiak-Krwawicz explains:

> *Rzeczpospolita* was something much more than the name of the country, community, or political institution; it was a word which expressed the concept of the state, the location of the citizen within it, and ultimately a vision of authority, a perspective on the world which incorporated a significant number of the political ideals of the nobility.[592]

According to Uruszczak, it was not the form of the state at all, but rather a "common thing, a common good, a common cause" (*wspólną rzecz, wspólną sprawę, wspólne dobro*).[593]

This revival and reformulation of classical republican ideas was not the only conception of the state in the 16th century, with its main rival being the traditional or dynastic view of politics that just as God was the natural father of humanity and the pope was the father of the Church, the king the father of the state. However, even in this context there was something of a change in this relationship in that the king was only "father" so much as the Commonwealth was "mother" and the *szlachta* "the sons", hinting at a marriage of sorts between the king and the Commonwealth. However, this "marriage" metaphor was more a phenomenon that emerged in the 17th century as a consequence and evidence of the executionists' success, as we shall address in the next chapter.[594] For now, it is necessary only to point out that there was this kind of natural continuation in *szlachta* political thinking from centuries of *szlachta* self-rule through the *wiec*, to the election of a king—often a foreigner—to deal with external threats as well as to serve as a judge among the *szlachta*, to a republican understanding of the king as the guardian of the nation under the law, to the contractarian understanding of the king as "father" held under the terms of marriage to the

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[589] Grześkowiak-Krwawicz, "Noble Republicanism", pgs. 36-41; Koehler, Krzysztof. 2012. "The Heritage of Polish Republicanism". *The Sarmatian Review* 2, *passim.*

[590] Grześkowiak-Krwawicz, "Noble Republicanism," pg. 37.

[591] Grześkowiak-Krwawicz, "Noble Republicanism," pgs. 36-39; Opaliński, "Civic Humanism", *passim.*

[592] Grześkowiak-Krwawicz, "Noble Republicanism," pg. 36.

[593] Uruszczak, "In Polonia", pgs. 14-15; Edward Opaliński. 1995. *Kultura polityczna szlachty polskiej w latach 1587-1652: system parlamentarny a społeczeństwo obywatelskie*. Wydawnictwo Sejmowe: Warszawa, pgs. 27-29, 32.

[594] Opalński is also careful to point out that the king was often referred to as "father" out of respect, rather than this deeper symbolic meaning as "the father of the nation", and that we must be careful to recognize that he was not necessarily universally regarded in such a position. When a king was acting in such a way that the *szlachta* disapproved of, the king was sometimes referred to as "step-father", as the later king Zygmunt III was. See: Opaliński, "Postawa *Szlachta* Polskiej", pgs. 794-796.

"mother" of the Commonwealth.[595] The executionists did not complete this transformation, which developed through the 17th and 18th centuries, but it can be said that they helped open the door to it. In this sense, the constitutional role played by the executionists regarding the transformation of political culture was in reassessing the sources of political legitimacy: that the king could and *should* be held to account to something higher than himself.

As a final point, the late 16th century has often been criticized by historians—particularly Ukrainians and Lithuanians—as a period of aggressive "Polonization" as the Polish *szlachta* grew to social and political dominance. The problem was more complex than that: many of the local *szlachta* in Lithuanian and Ukrainian lands interpreted "Polishness" not as a matter of culture, language, or ethnicity, but as political freedom. Many of these same local *szlachta* wanted that political freedom for themselves.[596] The success and legacy of the executionist movement was very much that of facilitating the development of a *szlachta* political cultural that went beyond localized self-governance to grasping the totality of the political system and reforming political identity at the regional and supra-regional levels.

As Szum explains:

> However, the prestige of the Chamber of Deputies grew steadily and its real participation in the work of the parliament was increasing. The Chamber of Deputies made extensive use of their legislative initiative, prepared draft resolutions and participated through its representatives in giving them the final shape, which was previously only available to chancellors. There was also a large share of województw and seymiki, which were undoubtedly a significant achievement in their activities on a national scale.
>
> *Szlachta* activists of the execution movement successfully combined their determination in pushing through the nationwide reform program with loyalty to particular seymiki and their voters. This balance resulted from the popularity of the idea of the enforcement of rights among the *szlachta* and the strong personality of the leaders of the movement, as well as the relatively good political orientation of the active participants of the seymiki. They demanded not only the enforcement of the old laws, but also the reform of state institutions. *Szlachta* activists acquired a political culture and gained the ability to think independently and independently at the regional and supra-regional level.[597]

The Izba Poselska was no longer a passive institution but had become a real check to the king's power.[598]

Coda: The Executionist Movement at the Crossroads of Constitutional Politics

The tumultuous relations between Zygmunt I and Zygmunt II August and the executionists reshaped the destiny of the Polish-Lithuanian Union, leaving significant changes in the management of royal lands, the relationship between the Crown, Lithuania,

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[595] See: Opaliński, "Postawa *Szlachta* Polskiej", pgs. 794-796.

[596] "The execution program originated from different hierarchies of values than are now in our contemporary consciousness. The intentions of the politicians of that time were not to Polonize other nations, uniting with the Republic. There were analogies here with the understanding of freedom in the sphere of conscience, leading to religious tolerance. Similarly, ethnicity did not differentiate between citizens of the Jagiellonian Republic," Sucheni-Grabowska, *Spory królów*, pg. 46.

[597] Szum, "Uniwersalizm," pg. 24.

[598] Makiłła, *Artykuły henrykowskie*, pg. 188.

Prussia, and Ruthenia, the role of the Church in the political and legal system, the management of courts and other public institutions, the balance of power within the two chambers of the Seym, the balance of power between the Seym and the Crown, how law was interpreted, and the political culture. It was a powerful and sweeping force, the "the executionist movement" being in Józef Siemieński's words "a *Sturm-und Drangsperiode*"[599] for Poland-Lithuania. At one point, Zygmunt I's disdain for the Seym was so great that he attempted to introduce Seym deliberations that would carry out his will without him even being here. However, he was more or less forced to attend from 1540 to his death in 1548. By 1555, the king was seen as a parliamentary state itself, and both political reality as well as the prevailing political culture of the time increasingly saw the nation as a *monarchia mixta* close to Aristotelian and classical republican ideas.[600] To varying degrees, the executionists' modest intentions to hold Zygmunt II August accountable to the 1454 and 1504 statutes had developed into a far-reaching and complex movement that touched nearly every aspect of the union.

Ultimately, historian Norman Davies gives a high appreciation of Zygmunt II August's achievements:

> [He] was interested in all the progressive movements of the age, from Protestant theology to 'Executionist' politics, and naturally took the part of lesser men who were battling against the privileges of bishops and magnates. Yet he would have nothing of violence and bias; and refused categorically to be drawn into the religious quarrels of the age. His famous statement [was] that he was 'King of the people, not of their consciences.'[601]

Undoubtedly, the executionists' reforms were incomplete, falling far short of what they wanted: there was no unified legal system, no unified system of weights and measures, nor free commerce; and though Royal Prussia was fully incorporated, there was no closer union between the Kingdom of Poland and the Grand Duchy; the administration of the state and its finances as well as the appointment of ministers was not completely in the hands of the *szlachta*, and there was no complete religious toleration.[602] Whether the executionists' reforms went far enough, or whether they were halted mid-way is a matter that remains for historical speculation: while latter kings would have more or less absolutist visions of the throne, the *szlachta* would never again simply accept a passive and subservient position in society. [603]

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[599] Siemieński, "Polish Political Culture in the 16th Century," pg. 73.
[600] Opaliński, "Civic Humanism", pg. 156.
[601] Norman Davies, *God's Playground*, pg. 115.
[602] Opaliński, "Postawa szlachty", *passim*; Uruszczak, "In Polonia", pgs. 17-18.
[603] "The interaction of the participants in the Sejm changed significantly in the 16th century. The *szlachta* played a special role in this matter, pushing for the executionist program, which was essentially a program of repairing the state and repairing the law. The political power of the nobility grew then in an unprecedented way. The monarch, who had so far resisted the demands, was forced to succumb to them. The Sejm of 1563 (at which, what is significant, Zygmunt II August appeared dressed in a *szlachta's* garb) initiated a series of reforms consisting in the implementation of the noble vision of the state. As a result, the *szlachta*, with a number of civil liberties, became a collective sovereign, while the monarch - an elected ruler, representing the majesty of the Republic of Poland, was subject to a number of legal and financial restrictions in internal relations. At that time, however, no legal norm declared this state of affairs - it was a process that lasted several dozen years, it is not possible to precisely define its beginning and end," Izabela Lewandowska-Malec, ed. 2013. *Demokracje polskie: tradycje—współczesność—oczekiwania*. Kraków: Księgaria Akademicka, pgs.56-57.

IV. Solidification of Republican Ideas: Modrzewski vs. Orzechowski

This work is neither an intellectual biography nor a history of ideas. Nevertheless, as has been consistently observed, so much of what is "constitutional" is that which goes beyond purely textual examination. Though our approach may favor a "text-first" approach, a fair evaluation of the constitutionalist spectrum must include a variety of broader, sociological, ideological, or anthropological approaches to law, as when Montesquieu deeply concerns himself with climate or religion.[604] It is in this sense that it is useful to examine the political thought of Andrzej Frycz Modrzewski (1503-1572) and Stanisław Orzechowski (1513-1566) to more deeply grasp the prevalence and development of republican thought within 16th century Poland-Lithuania, though for our purposes they are indicative of general trends—bellwethers—rather than determiners of politics, given that while both men were *szlachcice*, neither directly held office themselves.

With our purpose being *illustration* rather than *substance*, it will suffice for us to only look at each authors most well-known and influential works, *Commentariorum de Republica emendanda libri quinque* (*O Poprawie Rzeczypospolitej* / *On Improving the Republic*) (1551) and *Rozmowa albo Dyjalog około egzekucyjej Polskiej Korony* (*Discussion or Dialogue about the Execution of the Polish Crown*) (1563), respectively. Modrzewski and Orzechowski's writings both reflect the strong pragmatic streak of 16th century political writing in the Crown, which often simply copied or otherwise highly relied upon the ontological foundations established by Greek thought, adapted to whatever social problem was most pressing at the time. In this sense, it has been forwarded that it should be considered as political writing rather than political philosophy as such.[605] Modrzewski's was written with the Council of Trent in mind,[606] where he was a delegate, while Orzechowski wrote a negative reaction to the 1562-1563 "execution" Seym in Piotrków,[607] where the movement really had its breakthrough.

Both men shared broad similarities in that they had spent significant time studying abroad, followed unorthodox religious beliefs (though there is no doubt that Orzechowski remained a Catholic), supported a mixed theory of government, believed in positive freedom under the law, promoted the idea of a supreme court, advocated for the preservation of old laws, and had similar visions of a Commonwealth that treated all of its citizens equally.[608] Modrzewski was the protegee of Jan Łaski who served as Primate of Poland-Lithuania under Zygmunt I and had comparatively moderate views, often supporting the Commonwealth's

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[604] Charles Louis de Secondat, Baron de Montesquieu. 1777. *The Spirit of Laws*, Vols. I and II in *The Complete Works of M. De Montesquieu*. Translated from the French in Four Volumes. Evans and W. Davis: London, *passim*.
[605] Pietrzyk-Reeves, "O pojęciu 'Rzeczpospolita'", pg. 38.
[606] Waldemar Ziętek. 2006. *Koncepcja ustroju państwa Andrzeja Frycza Modrzewskiego (1503-1572). Studium filozoficzno-prawne*. Krakowska Szkoła Wyższa im. Andrzeja Frycza Modrzewskiego: Kraków, pg. 86; Stone, *The Polish-Lithuanian State*, pg. 100.
[607] Stanisław Orzechowski. 1858. *Dyalog albo Rozmow Około Exekucji Polskiej Korony.* Printed by Kazimierza Józefa Turowskiego. Nakładem Wydawnictwa Biblioteki Polskiej: Kraków, *passim*.
[608] Opaliński, "Civic Humanism," pgs. 157-158.

interests versus those of Rome.[609] In a sense, Łaski, Modrzewski, and Orzechowski were a trio of religious and political reforms, who helped transition Poland-Lithuania from the medieval period to the Renaissance period most prominently being a revival of republicanism.[610] As Opaliński notes, this combination of conceptualizing the Crown as a republican Commonwealth and the preservation of laws went together and was often seen as a way of proposing or defending legitimate reform attempts. The moderate supporters of the king as well as the executionists both claimed to advance the "true" vision of republicanism.

> It is worth noting the argument used by the author Orzechowski. Together with Modrzewski, he was co-author of the theory of mixed government in the Commonwealth. Notwithstanding this fact, he alludes to forefathers who supposedly not only introduced such a system, but consciously chose it as the best of the best. This kind of argumentation was characteristic of Polish political writings. As a rule, the propagation of new institutional arrangements was dressed in the costume of a distant, hazy past. This was a way of fending off charges of introducing new arrangements that might be harmful.[611]

Ultimately, perhaps the most significant difference between them was that Andrzej Frycz Modrzewski was seen as "the main ideologist and theoretician" of the executionists,[612] whereas Orzechowski strongly opposed it. The reason for this firm opposition—despite demonstrating many similar arguments as well as a similar, republican political vision—reveals a tension within Polish political thought that was carried within the Republic until its last days: what should the proper relationship be between the Crown, the Catholic Church, and Polish-Lithuanian republicanism?

Modrzewski studied at the Faculty of Liberal Arts at the Akademia Krakowska, where he extensively studied the works of Aristotle.[613] In 1523 he began his clerical service under Primate Jan Łaski. From 1531-1532 he studied at Wittenberg in a Lutheran university and travelled throughout Europe, meeting Erasmus at Rotterdam, Martin Luther, John Calvin, and Philp of Melanchthon, though he was arguably the closest to the latter. During this period, he met Erasmus and, at the behest of his patron, bought Erasmus' library after his death and brought it to the Crown. In 1547 he was part of the Polish delegation to the Council of Trent and advocated for removing the celibacy requirement of priests. Though it is a question of some debate since he never officially converted, by the end of his life he is often accepted as a Protestant minister, marrying in 1560. The remainder of his life was spent in polemical religious debates—Orzechowski was one of his opponents—and by the end of it he held a theological position quite close to many of the more radical protestant sects. [614] Modrzewski was a strong advocate of humanism throughout his life, which led to a kind of unique pragmatism: "[a] significant feature of Frycz's political theories is the close fusion of religious, political and social problems. The religious ideal of the humanist was, above all, the principle of love for God and neighbor, implemented in the practice of social life."[615]

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[609] Mirosław Korolko. 1978. *Andrzej Frycz Modrzewski: humanista, pisarz*. Wiedza Powszechna: Warszawa, pgs. 10-11; Stone, *The Polish-Lithuanian State*, pgs. 98-99.
[610] Kubala, *Stanisław Orzechowski*, pgs. 66-74.
[611] Opaliński, "Civic Humanism", pg. 159.
[612] Stone, *The Polish-Lithuanian State,* pg. 40; See also: Uruszczak, "Prawa celem", pg. 168.
[613] Ziętek, *Koncepcja ustroju państwa Andrzeja Frycza Modrzewskiego,* pg. 17.
[614] Ziętek, *ibid.*, pgs. 17-25, 41-44; Stone, *ibid.*, pgs. 98-100.
[615] Korolko, *Andrzej Frycz Modrzewski*, pg. 109.

Orzechowski studied at Wittenberg under Luther when Luther was arguably at the peak of his power, staying there for three years. Fearing his son would become a Protestant, his father commanded him to leave Germany, and Orzechowski continued on to Italy where he attended lectures at Padua University (1532) and the University of Bologna (1540), then on to Venice and Rome.[616] Despite this, he remained loyal to the Catholic Church, though he took lessons from the political situation throughout Europe, particularly in Germany. Controversially, he advocated for the end to celibacy, and he sought approval to marry from Rome. When there was only silence, he took it for tacit permission, marrying in 1552 around the time of the Piotrków Seym when the *szlachta* were beginning to move against the Church and the Senat. His marriage was widely publicized throughout the Crown and was well-attended by the *szlachta*, becoming something of a *cause célèbre*. When he was threatened, he turned to his allies for support.[617] He preached what he practiced, believing that celibacy caused more pain to the Church by exposing priests to distraction and temptation, and was also against human nature, and used extensive exegetical arguments from the scriptures supporting women and marriage.[618] He also wanted the pope to be "catholic" in the original sense, that is as a universal Church that represented all of Christianity, even if they did not officially recognize him as spiritual leader. To this end, he wanted the Church to recognize Greek Orthodox Catholicism and reconcile with them.[619]

While both men may have strayed from their Catholic roots, neither of them ever declared direct opposition to the Church. This is because the humanist and conciliarist traditions were strong within Polish Catholicism, which was an atmosphere more tolerable of new ideas and dissent. Proof of this toleration as well as the overall waning strength of the Church in the mid-16th century is given by Modrzewski and Orzechowski being protected from reprisals and charges of heresy by combination of support from the *szlachta* at large, their specific patrons, as well as by Zygmunt II August's reluctance, refusal, or inability to punish them.[620]

The first main element shared in their writings was a revival of the concept of mixed government, which was characteristic of 16th century Polish political writers, often to claim legitimacy in a political debate.[621] While republicanism was quite popular across Europe during this period, in this the Crown—later Poland-Lithuania—generally remained unique, especially with the king serving more as a guardian of the state—at least ideally—rather than

[616] Kubala, *Stanisław Orzechowski*, pgs. 3-4.
[617] *Ibid*, pgs. 28-32, 40.
[618] *Ibid*., pg. 145-146, 256-259.
[619] *Ibid.*, pgs. 2-5, 10-11, 24.
[620] *Ibid., passim*; Stone, *The Polish-Lithuanian State*, pg. 100.
[621] "It is worth noting the argument used by the author Orzechowski. Together with Modrzewski, he was co-author of the theory of mixed government in the Commonwealth. Notwithstanding this fact, he alludes to forefathers who supposedly not only introduced such a system, but consciously chose it as the best of the best. This kind of argumentation was characteristic of Polish political writings. As a rule, the propagation of new institutional arrangements was dressed in the costume of a distant, hazy past. This was a way of fending off charges of introducing new arrangements that might be harmful," Opaliński, "Civic Humanism", pg. 158; See also: Kubala, *ibid.*, pgs. 38-39.

the king being synonymous with the state itself. Thus, the king was also subject to the law.[622] There were several understandings of republicanism at the time, with the main sources being Aristotle, Cicero, Polybius, and Plato, though Cicero and Polybius were probably the most important sources, followed by Aristotle.[623] Polybius in particular was important because he advocated a political system of "mixed government" in a more general sense, which was particularly useful for the actual political situation in 16th century Poland-Lithuania.[624] Modrzewski followed this general trend, agreeing with Cicero that virtue and morality should be the highest aims and with customs, morals, and moral education being the basis of a successful society.[625] Thus, Aristotle's idea of the good life was not enough,[626] encouraging instead a more active role for the state. Orzechowski also agreed and noted how the mixed system was the best way to defend the *szlachta*'s rights.[627] In addition, other forms of republicanism existed, with Krzysztof Warszewicki (1543-1603) and Wawrzyniec Goślicki (1530-1607) favoring Platonism.[628] Other important thinkers who revived or engaged in discussions concerning classical republican ideas—even if not advocating for classical republicanism itself per se—were Andrzej Zamoski, Andrzej Wolań, Sebastian Petrycy, Łukasz Górnicki, Piotr Skarga, Stanisław Zaborowski, Jakub Przyłuski, *inter alia*.[629]

Both Modrzewski and Orzechowski shared a positive conception of freedom under the law, wherein individuals' desires were limited to what was good, natural, or legal. In this way, they were themselves both influenced by as well as contributed to the debates between law and freedom, which in some sense was *the* most important political question of Polish republican thought.[630] For Modrzewski, this is captured by his support for the classical republican formulation of the Commonwealth as a political and social system that promotes

[622] "The United Provinces of the Netherlands also had a republican system. Unlike these republics, Poland and then Poland-Lithuania retained the systemic form of a monarchy with a crowned ruler at the head. He constituted in the body of the Republic its head, and thus was only one of its members, who was subject to the law, like all other state organs. The concept of a mixed state system (*monarchia mixta, respublica mixta*), which was widespread in Poland, entrusted the monarch with the role of a symbol of the unity of the state, maintaining the solemnity of the Republic. At the same time, the theory of the mixed state recognized oligarchic and democratic institutions in the form of the Senat and the Sejm as components of the state's political structure. The Polish kAing did not embody the state itself, as was the case in European modern absolute monarchies, where it was fully legitimate to concentrate the essence of the state in the person of the ruler - according to Louis XIV's classic formula l'Etat c'est moi – who is the state," Uruszczak, "In Polonia", pg. 16.

[623] Pietrzyk-Reeves, "O pojęciu 'Rzeczpospolita'", pgs. 38-41; Damian Chmielecki. 2016. "Ustrój państwa polsko-litewskiego w latach 1573-1581. Ustrój mieszany, czy demokracja szlachecka?" *Acta Erasmiana* XII, pgs. 67-69.

[624] Chmielecki, "Ustrój państwa polsko-litewskiego", pgs. 67-69.

[625] Modrzewski, *O poprawie Rzeczpospolitej*, pg. 20.

[626] Ziętek, *Koncepcja ustroju państwa*, pgs.43-44.

[627] Chmielecki, "Ustrój państwa polsko-litewskiego".,pgs. 70-71.

[628] Opaliński, "Civic Humanism", pgs. 157-159.

[629] Grześkowiak-Krwawicz, "Noble Republicanism", pgs. 36-39; Pietrzyk-Reeves, *ibid*, pgs. 48-51.

[630] "At the center of the debates that intensified during periods of heightened political activity, especially triggered by a growing external threat or internal crisis, were always the values centered around the two main concepts encoded in the civic consciousness of the political people of the Republic: law and freedom. These central concepts delineate the "field of discourse," that is, the area of knowledge that includes "formal identities, thematic continuities, transfers of concepts, networks of polemics," Szulc, "Historiograficzny bilans", pg.76.

the common good of its members (the citizens) as they who are both able to rule (participate in government) as well as to be ruled.[631] For him, even the king was within this category.

> But the lord, who in his heart diligently believes that he is ruler over the people, not for himself, but for that people, will understand so much that you have nothing of his own, but all of the Commonwealth; and for those things which are common to all, I will try to make everything bring honor and benefit to the Commonwealth.[632]

For Modrzewski, both the elected nature of the king as well as the duty and ability of the *szlachta* to protest and change just laws was important. Princes in nations with hereditary monarchies had no need to learn the virtues and justice necessary to rule.[633] Instead, kings should develop: 1. *prudence* in order to avoid flatterers and to learn from the best sources such as wise men, books, or the scriptures; 2. *moderation* so as not to be swayed by emotion or temptation; 3. *justice* to reward others' virtues and to punish their crimes accordingly, to treat everyone equal, build consensus, all to promote the common good; justice applied to enemies as well as allies; 4. *generosity* to know who to help, how much to give, and when to give it; 5. *courage* and a stout heart to endure everything well, both successes and setbacks, all for the good of the nation. Finally, the king must recognize that *virtue* is inherent to kingship, with the king ruling by example as well as by judgements and by statutes.[634]

Modrzewski's understanding of virtue is thus practically important, which was a key feature of the Commonwealth, as noted by Koehler: "Virtus, or virtue, is the key term of the Polish system. In the language of the Commonwealth, virtue had a political value, just as it did in the thought of antiquity. We know that virtus is accomplished in the sphere of day-to-day dialogue (negotium) and is related to the community's obligations."[635] This "virtuous discourse" had three main aspects: civic humanism, the idea of golden mean or golden mediocrity[636], and the importance of *szlachta* universally serving in the military.[637] For

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[631] "And since it is part of a good republican government that not only those who rule should keep their duty, but also those who are ruled: therefore those who are also diligent and faithful do their office, therefore let them do their duty," Modrzewski, *O poprawie Rzeczpospolitej*, pg. 65.

[632] *Ibid*., pg. 32.

[633] "Later it came to pass that such authority was entrusted to the king's sons, about whom was this grace, not only for the state, but also for whom the virtues and affects of their noble ancestors were to follow. However, in many nations it has become customary for royal sons to ascend to the state after their fathers - but in the case of Poles it is not enough to be born a royal son; it is necessary for one who would wield this supreme power to be chosen. For what the helmsman is in a ship, that seems to be the king in a kingdom; and it is certain that no wise man chooses the helmsman to the nave for the sake of the righteousness of their parent's, but for dignity and skill of steering; and so also kings are not to be selected for the nobility of the family, but for the skill in ruling the republic. And since the kings of Poland are not born, but are elected by the permission of all the states, they are not afraid to use this trait in such a way that they may, according to their will or law, make a tax on their subjects, or constitute something for eternity. For they do everything either according to social permission or according to the purpose of laws," *ibid.*, pg. 23.

[634] Szulc, "Historiograficzny bilans", pg. 22.

[635] Koehler, "The Heritage", pgs. 1661-1662.

[636] Modrzewski uses the term "mierność", which translates to mediocrity, indifference, or average-ness. However, what he is trying to express is more so due to the golden mean restraining one's ambitious to stay with what is natural and good, then to be somewhat morally or ethically "subpar." This retooling of mediocrity as moderation (mierność vs. umiarkowanie) is made by Cyprian Bazylik, a recent translator of Modrzewski. See: Modrzewski, *O poprawie Rzeczypospolitej*, pg. 22; Koehler, *loc it.*

[637] Koehler, *Loc. Cit.*

Modrzewski, the moral education of the *szlachta* and the royal family was of utmost importance, for he believed that good morals were more fundamental that any laws. If society had good morals, then no laws would be needed: if it had poor morals, then the laws would not be carried out, no matter how good they were. Rather than being concerned with minutiae of the political or legal system, Modrzewski was more concerned with a mixed government that would seek to promote the common good, taking after his theoretical inspiration, Cicero.[638] As such, Modrzewski believed that the state should promote public moral education, part of which was teaching the importance of the true understanding of liberty, which was not complete freedom, but rather a proper balance between excessive legal restrictions and self-discipline.[639] This true freedom would preserve the best society for everyone:

> As for freedom, indeed, true freedom does not lie in the freedom to do what one pleases, nor in too much law against those who have committed the principal crimes, but in the restraint of blind, stubborn and eager rashness, and in the rule of reason, according to which the best doctrines and the most holy life is in the world; to which also belongs in the right discipline, in the equal right to describe, in equal description of the law, in equal conduct of equal matters cloaked by all regard to persons, and in equality of judgment, cancellation, and right of execution..[640]

As the leading theoretician of the executionists, Modrzewski supported a variety of political, legal, and institutional reforms. To Modrzewski, laws had a function as social educators about morals and customs. Codification was desirable whenever possible because this would make the law clear for everyone,[641] and accordingly he believed that there should be one legal system for the whole nation.[642] Ultimately Polish customary law was superior and more powerful than statutory law.[643] In general, he was not concerned with a specific codification of enumerated rights, but rather wanted to create a good system for their implementation. While he supported keeping old laws whenever possible, he recognized that sometimes it was necessary for laws to change for the good of the republic. In Modrzewski's own words:

> With full reverence, therefore, I refer to the laws of the homeland of which I am a son, for it is right to attribute to them both the long preservation of it and the flourishing it has experienced. There are, however, among them some that one might think that at one time, at the beginning, were established for good reasons and in the best of mind, and yet passage of time itself and considerable abuse seem to require, and even demand change and correction,

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[638] Dorota Pietrzyk-Reeves. 2012. *Ład rzeczypospolitej: Polska myśl polityczna XVI wieku a klasyczna tradycja republikańska*. Księgarnia Akademicka: Kraków, pg. 57.
[639] Pietrzyk-Reeves, "O pojęciu,", pgs. 48-49; Ziętek, *Koncepcja ustroju państwa*, pgs. 31-33.
[640] Modrzewski, *O poprawie Rzeczypospolitej*, pg. 94.
[641] Ziętek*, Koncepcja ustroju państwa Andrzeja Frycza Modrzewskiego,* pg.93.
[642] "Frycz stated that there is no rationale for retaining many types of law in one state, for they bring confusion to social life and hinder the existence of many citizens. He believed that the list of laws should be short and clear, so that everyone could easily use them. Every legal provision should have a justification, i.e. indicate the essential meaning of the provision and the intention of the legislator in issuing it," *ibid.*, pg. 81.
[643] "The Republic, therefore, is often governed by these customs, and I am not sure, if not far better, than by written law. For customs, which for some cordial reason, more of us are held back in duty than either the greatest wages or the gravest legal torments," Modrzewski, *O poprawie Rzeczypospolitej*, pg. 9; See also: Karabowicz, "Custom and Statute", pg. 117.

> if we want to permanently keep our homeland in its thriving state and pass it on to posterity without any damage.[644]

In terms of institutional reform, Modrzewski wanted offices that were temporary, with fixed dates and were non-renewable.[645] After a person left their office, they would be held accountable for whatever happened during their tenure. This was a good way to restrain the king, who alone had office for life. Local offices should have required local residency, and that officeholders should be trained to serve the public, which should serve as their qualification, rather than bribery, purchasing the office, royal favors, etc. Judges should be educated in the law and highly trained, as well as paid by a fund from the state treasury to ensure their independence. They should take an oath of loyalty to the state itself, rather than to the king or the Seym. If judges were found to have committed fraud, accepted bribes, or any other offense, they were to be removed from their office and themselves put on trial with the maximum penalty of death.[646]

In the Seym, the Senat should be a purely advisory body, with no actual weight to their votes.[647] As other executionists, he wanted to improve commerce: currency speculation should be illegal, and prices and goods should be fair. Radically, those who became poor through no fault of their own should be cared for by the state, with clergy and wealthier citizens (the *magnaci*) financing their care through special taxes. The clergy should also be more accepting of commoners into its orders, rather than predominantly drawing on the *szlachta*.[648] The king should be elected by all regions within the nation so he could be a true representative of the people, most radical of all, townsfolk and peasants should also be able to vote.[649] A law could only be just if the people consented to it.[650]

Orzechowski's political thought was quite similar to Modrzewski's, with both men focused on the concept of the Republic as the rule of law, the proper role of the Church, and the true meaning of the execution of the law. While Modrzewski is often revered as the premier political thinker of the 16th century, Orzechowski is often considered important, but flawed due to his work being more polemical and less well thought-out,[651] often changing

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[644] Quoted by Ziętek, *, Koncepcja ustroju państwa Andrzeja Frycza Modrzewskiego*, pg. 74.
[645] *Ibid*., pg. 56.
[646] *Ibid.*, pgs. 86-87.
[647] *Ibid*, pg. 57.
[648] Stone, *The Polish-Lithuanian State*, pg. 99.
[649] Ziętek, *ibid*, pg. 62.
[650] "They also urgently review all the bills; if they bind anything harmful to the Commonwealth, that they might set t hemselves up against it. And therefore no laws or statutes are valid, one that the deputies did not permit," Modrzewski, *O poprawie Rzeczpospolitej*, pg. 34.
[651] For example, though he wanted to reform the courts, Orzechowski was not sure how to do it. It was clear that he wanted to work within the existing system as much as possible, reorganizing it, but he did not give precise descriptions of this new organization, how many members they should have, how those members should be selected, etc. He was inspired by the reforms he had observed in Germany but did not want to copy them over into Poland completely either. On the other hand, Modrzewski is much more focused on the legal system, with no other judicial reform attempt in the 16th century as developed as his. See: Balzer, *Geneza trybunału koronnego*, pgs. 157-165.

his views when it suited him,[652] with critics going so far as to denounce him as an opportunist.[653] Indeed, the fact that Orzechowski considered himself a Catholic and fought against dissenters while at the same time disregarding the teachings of the Church himself is something of a conundrum, and he was ridiculed by both dissenters/reformers as well as orthodox/conservatives.[654] Curiously enough, Orzechowski spent much of the latter part of his life in polemics against Modrzewski and tried to prove him as a heretic.[655]

Nonetheless, they are considered to be "co-authors" of the theory of mixed government in 16th century Poland-Lithuania,[656] with both influenced by Cicero.[657] Orzechowski's concept of the Republic[658] was quite similar to Modrzewski's: it was a "gathering of citizens and community of law" for the benefit of all, and that—once properly established—should reign over the Kingdom of Poland indefinitely. This was because, according to Orzechowski, the proper execution of law by a community of citizens gathering together to ensure the common good, is a self-regulating enterprise:

> I will say that the Republic is a meeting of citizens, a community of law and a society of usefulness, so that it is free and lasting in Poland for ever. And wherever this meeting, or the assembly of the Polish Republic, deviates from the uniform law and benefits, on either side, there the execution in the Commonwealth is a designs whereby a good carpenter straightens his leaning house with a block and tackle.[659]

Orzechowski believed in Plato's concept of philosopher kings. He believed that kings could be brought up to this level through the Church. The executionists were a direct threat to the "last hope in the Lord and in royal wisdom". If they were to be followed carelessly,

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[652] Opaliński goes so far as to refer to Orzechowski's *Dyjalog* as "propaganda", Opaliński, "Civic Humanism", pg. 157. See also: Sucheni-Grabowska, *Wolność i Prawa*, pg. 20.

[653] Reacting to the view of Rhett Ludwikowski on Orzechowski, Koehler writes: "And finally, they ask Orzechowski's work a question that is perhaps one of the most important issues when dealing with the work of the parish priest from Zurawica. This question is about his opportunism, so often raised by literary historians; and they give a surprisingly pertinent answer that directs attention to the humanistic discourse patronized by Machiavelli: "Orzechowski is not particularly original in his opportunity – an opportunism that, clothed and embellished with Machiavellian political theory, was the style of the age and came to Poland along along with news of the lives of the Borginas, Sforzas, or Medici," Krzystof Koehler. 2004. *Stanisław Orzechowski i dylematy humanizmu renesansowego*. Wydawnictwo ARCANA: Kraków, pg. 15.

[654] Kubala, *Stanisław Orzechowski*, pgs. 45-46.

[655] Stone, *The Polish-Lithuanian State*, pg. 100.

[656] Opaliński, "Civic Humanism", pg. 158.

[657] Przemysław Krzywoszyński. 2010. *Stanisław Orzechowski — ideolog demokracji szlacheckiej*. Wydawnictwo Poznańskie: Poznań, pg. 31.

[658] One slight difference could be that there was some ambiguity in how Orzechowski employed the term "Rzeczpospolita", which could mean the state, the estates in the Sejm (the King, the Senat, and the Izba Poselska as a kind of political community unto themselves), and the entirety of the *szlachta* collectively. *Ibid*., pg. 48.

[659] Opaliński, *Dyalog*, pg. 11. The original Polish is somewhat difficult to translate: "tam exekucya w rzeczypospolitej bywa jakoby modła jak, wedle której dobry cieśla nachylony dom wstawia w klobę swą." This is because the archaic term "kloba" has been replaced with modern "kluba" (block), but a block in the sense of late-medieval / early modern carpentry. As Ewa Młynarczyk explains, carpentry metaphors were often used by social commentators in the Commonwealth, which are sometimes lost to modern audiences, with Młynarczyk explicitly referencing Orzechowski's usage of "kloba". See: Ewa Młynarczyk. 2017. "Z zagadnień motywacji związków frazeologicznych (na przykładzie połączeń wyrazowych z nazwami narzędzi ciesielskich." In: Maciej Mączyński, Ewa Horyń, and Ewa Zmuda, eds. *W kręgu dawny polszczyzny*. Tom IV. Akademia Ignatianum w Krakowie: Kraków, pg. 123-124.

then the Kingdom itself would be lost.[660] Orzechowski compares the executionists with reckless carpenters, who in their haste to make changes actually destroy what they are building:

> [H]owever, I am simply saying that you will overturn the Polish crown from the ground with such an execution as you are taking; and you will surely do as the careless carpenter had done, who strains the house already carelessly tilted on its block and tackle, dragging it to the other side, from which the house will upend. You too, by this stubborn execution of your Republic, will surely upend the hill with your feet.[661]

He took a more literal approach to "execution", however, in the Latin sense of the king carry out his duties. The whole first *Dyalog* is dedicated to correcting what "execution" means, as the king fulfilling his oath according to the Republic and to God. He thus announces that he aims to defend the Crown as well as the royal courts.[662] He again repeats the model of the carpenter who is the judge of his own work:

> And I do not understand otherwise; we have already called for it first, that as the carpenter has a good design, which shows the carpenter, whether the house stands straight or crooked, so the king's oath shows the king, whether his crown stands straight, or to which side it leans. Therefore, the execution is nothing else, it is enough to make the king's oath.[663]

> First of all the king of Poland must see the altar from which he took the crown, the sword and the scepter, and judge for himself, if he owes anything to that altar or not; then let him also see the priest who seated him on the royal throne, if he did not take it or did not allow it by his own right; finally, let the king himself see it, to omit it: *Nosce te ipsum* [know thyself], if he is such a king in Poland, as he swore to be under his oath at the time of his coronation. And when you see three things well and get to know yourself, this execution will be found easily.[664]

> The Polish king is nothing else but a carpenter, that is, the supreme executor of his kingdom; for every supreme executor is called *architecton* in Greek, *faber* in Latin and carpenter in Polish; I cannot explain it any other way. Our king, the Polish *architecton*, has an oath, as another of his fashions, according to which he exercises his crown. This alone shows him, if Poland stands in measure, that is, to which side it leans. [...]
>
> Polish execution is nothing else, but the preservation of the Polish Republic in its rights and privileges, according to the oath of the Polish king [...].
>
> Therefore, the design of the *architect* of this, that is, the oath of the Polish king, at this Sejm falls; and as without a design a carpenter is not a carpenter, so no rightful king is a king without an oath, which oath, law and privileges, both to the papacy, that is, to the clergy, in his kingdom, as well as to other secular people.[665]

Orzechowski's understanding of the Republic as a community of citizens and the proper understanding of execution were intimately connected together, given that

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[660] Orzechowski, *Dyalog*, pgs. 5-6.
[661] *Ibid*., pg.11.
[662] *Ibid.*, pg. 3.
[663] *Ibid.*, pgs. 29-30.
[664] *Ibid*, pg. 31.
[665] *Ibid.*, pgs. 11-12.

Orzechowski's concept of freedom was contextual.[666] Perhaps Orzechowski's opposition to the executionist movement was more practical than theoretical, specifically due to its connection with Protestantism.[667] Though he adopted some reformist or heterodox views, Orzechowski always supported Catholicism, one reason being that the priesthood and the Church was passed down from Christ Himself and that this wisdom was necessary for the common good. He thus promoted a "Polish Catholicism" that was intimately tied to the Republic,[668] while Modrzewski was clearly a conciliarist,[669] believing that no Church could represent all of Christianity. Rather, Christ's Church should be ruled by a ecumenical council where all denominations would participate. This same council should elect the pope.[670] To put it in an oversimplified manner, perhaps we could say that Modrzewski was trying to "Polonize" the Church by introducing traditional Polish *szlachta* values of the assemblies to the Church, whereas Orzechowski was trying to bring the Church to the Crown by creating a Polish Catholicism.

Objectively, it seems that Orzechowski does not generally disagree with the idea that a movement to correct the king was sometimes necessary, given that he understands true philosopher kings are rare and that human can err in interpreting natural and divine law. Rather, given that he shared with Modrzewski the concept of a limited, positive approach to freedom under the law, he seems to have disagreed with the executionist movement in Poland-Lithuania at the time. The executionists' asserting that they had the sole right to determine when the king disobeyed the law and their attempt to separate the Crown and the courts from the Church violated his vision of a *Catholic* Polish republican social order. On the contrary, the executionists interpreted their movement as trying to have the king fulfil his obligations under the law. That is, the king himself—or his allies among the Church and the *magnaci* —could not be the standard determining whether or not his oaths were fulfilled. One the one hand this could be interpreted as the *szlachta* replacing the king's self-judgement with their own, but on the other it could be that they truly grasped the meaning of "*lex est rex*": that the law is something that stood outside from any particular person or institution but was a higher standard that all could be held to. In other words, they were divorcing the *judgement* function of law—determining whether or not it had been fulfilled—from the *execution* aspect of law—the actual carrying out of law. The same party that carried out the law could not have the final say as to whether it carried out the law or not, which could only be judged by a third party according to some external standard. In this sense it seems clear that the different meanings of *execution* reveal the development of the self-understanding within Polish-Lithuanian republican thought that the historical division between 1. *writing* the law in a parliament or legislature from 2. the king as both *executor* of the law and *judge* of the law's execution was a tripartite division.

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[666] "For Orzechowski, freedom was a criterion for belonging to the nobility and it guaranteed the proper functioning of the state. Addressing the king, he reminded that the law guaranteed freedom, which was understood as the property and personal security of the nobility. Pictorially presented as a "robe" together with a jewel-symbol of nobility and a "will" representing universal law, it made the nobleman a joyful and courageous man. It was an extremely suggestive image in which freedom was equated with Polishness," Krzywoszyński, *Stanisław Orzechowski*, pg. 71

[667] Modrzewski, *O poprawie Rzeczypospolitej*, pg. 9.

[668] Kubala, *Stanisław Orzechowski*, pgs. 94-95.

[669] Stone, *The Polish-Lithuanian State*, pg. 99.

[670] Kubala, *ibid.*, pgs. 68-71.

Both Orzechowski and Modrzewski ultimately became associated with advocating for radical judicial reforms,[671] both ultimately embracing the idea of a supreme court that stood independently from the king. It was Orzechowski who ultimately put this idea forward first in a pamphlet in 1543, *Fidelis subditus sive de institutione regia*: *Quod fieri non potest, quam diu pivatarum rerum ipsi fuerint iudices, atque utinam aliquando illa praeteritorum comitiorum valeat sententia, quae censuit constituendum esse iudicium in regno ex delectis iudicibus, ad quos omnes controversiae rerum privatarum deferantur, et ut ab iis nulla sit provocatio, sed illorum iudicio stetur, quiquid decreverint*.[672] Modrzewski supported this idea. However, it would be the generation after the executionists that would finally achieve this dream by establishing the Crown Tribunal (Trybunał Koronnego) in 1578. This would come about only after the Great Interregnum following Zygmunt II August's death in 1572 and the unleashing of executionist and other reform movements in the Konfederacja Warszawska, the *pacta conventa*, and the Henrician Articles in 1573. The ideas of toleration, mixed monarchy, and the Izba Poselska as the *szlachta*'s political weapon against the *magnaci* and the king would remain steadfast elements of Polish-Lithuanian political life until the end of the Republic.

V. The Henrician Articles as the First Polish-Lithuanian Constitution

Interregnum and the Konfederacja Warszawska as Constitutional Preludes

Towards the end of Zygmunt II August's life, it became clear that he would die childless. As the last male Jagiellonian in Poland-Lithuania, the future of the dynasty—and by extension the union between the Kingdom of Poland and the Grand Duchy—was in crisis. The rights of both had been confirmed separately, with Zygmunt II August confirming Lithuania's privileges and separate institutions as late as 1569,[673] merely three years before his death. The last crisis of comparable magnitude was when Jadwiga was elected "king" of the Kingdom of Poland before she was then engaged to Władysław. After her death, Władysław II Jagiełło granted a series of privileges in order to retain the Polish Crown, establishing the Jagiellonian "dynasty".[674] Zygmunt II Augustus' last male relative—his cousin King Louis II of Hungary and Croatia—had died without legitimate children some 50 years prior.

Following the pattern of Jadwiga and Władysław Jagiełło, the natural choice would be to continue the Jagiellonian dynasty through one of Zygmunt II Augustus' surviving three younger sisters: Sophia (1522), Anna (1523), or Catherine (1526). Sophia had married Henry V, Duke of Brunswick-Lüneburg, converting to Lutheranism and enveloping herself in the

[671] Bednaruk, *Trybunał Koronny*, pgs. 37-40. Orzechowski was also known for some very radical criminal justice reforms as well, such as abolishing the death penalty. See: Przemysław, *Stanisław Orzechowski*, pg. 110.
[672] For a reprint of the text, see: Stanisław Orzechowski, Teodor Wierzbowski, and Jan Karol Kowaleski. 1900. *Stanisława Orzechowskiego "Fidelis subditus" w redacyi I-ej z roku 1543.* K. Kowalewskiego: Warszawa. For a discussion of the text's content, see: Ziętek, *Koncepcja ustroju państwa,* pgs. 87-88
[673] "Przywiléj Zygmunta Augusta Króla Polskiego, Wielkiego Księcia Litewskiego, Władzy Marszałka Litewskiego", in Włodzimierz Stanisław Broel-Plater. 1858. *Zbiór pamiętników do dziejów polskich*. Tom 1. Drukarnia Gazety Codzinnéj: Warszawa, pgs. 17-18.
[674] *Supra* n.371-373.

complex politics of the German nation states, and Catherine had married King John III of Sweden. John III and Catherine took the exact opposite approach as Sophia, becoming strong advocates of the Counter-Reformation in Sweden, which was something unpalatable to the Polish *szlachta* after nearly 50 years of fighting to limit the power of the Church. There was also the natural problem of a union between Poland-Lithuania and Sweden, which was one of their direct competitors for power in the Baltic in Livonia.[675] Lastly, due to Anna stubbornly refusing suitors throughout her life, the *szlachta* began to look beyond Poland for potential opportunities to begin a new dynasty altogether. This produced something of a "rulers' market" (targ władców)[676] wherein rulers from across Europe sent various candidates, especially the Habsburgs, the Swedes, and the Muscovites.

As Zygmunt II August's life drew to its close, the clergy, the *magnaci*, and the lesser *szlachta* were already working out what they would do after his death, negotiating with the king while he was still alive. Of paramount importance was the question of the Polish-Lithuanian union: while some argued that it was merely a personal union of the Jagiellonians and should expire with their extinction, it was generally realized that the two partners had more to gain from continued cooperation and Zygmunt II August began to negotiate with the *szlachta* about the future of the union. As with the failed Union of Mielnik nearly seventy years prior, there was concern that the Lithuanians would resist any attempts at greater union. Zygmunt II August was surprisingly heavy handed in reigning in the Lithuanian *szlachta*. The Radziwiłł family, was particularly difficult to deal with, especially given that they had fallen out over the years.

> Zygmunt August forced union on his terms by taking an unexpectedly hard line and using his ducal authority to "return" the "disputed" Ukrainian palatines of Volhynia, Bratslav, and Kiev to Poland. He then demanded that Red Mikołaj Radziwiłł and other Lithuanian nobles with Ukrainian estates swear allegiance to him as king of Poland. He further dispatched representatives to Ukraine to elicit oaths of allegiance from local nobles, who gladly complied in order to get Polish military protection against Tartar raids, and replaced recalcitrant local officials. Threatened with sanctions, Lithuanian nobles accepted the Union of Lublin, which was proclaimed June 28, 1569.[677]

It is worth examining the 1569 Union of Lublin in greater detail to understand what its precise constitutional provisions were, outlined in Tables 3.9, 3.10, and 3.11 below.

[675] Davies, *God's Playground*, pg. 261.
[676] Szulc, "Historiograficzny bilans", pg. 659.
[677] Stone, *The Polish-Lithuanian State*, pg. 62.

Table 3.9 Enumeration of Constitutional Archetypes of the Union of Lublin, 1 July 1569[678], Part One

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
2	Firstly, that, although there have been the old records of friendship and alliance rendering the growth and improvement of the Commonwealth, and thus of the Polish Crown and the Grand Duchy of Lithuania, etc.; nevertheless, since there can be seen somewhat of a trusting appearance in them that is different from good and sincere brotherhood, and therefore, for a stronger coupling of the common and reciprocal fraternal love and to the eternal defence of the communal and undoubted fraternal faith of both countries for time eternal.	A closer, permanent union declared	Horizontal Organizations of Institutions	Ontology
		Union Promotes Common Defense	National Defense	Teleology
			Common Good	
3	That the Kingdom of Poland and the Grand Duchy of Lithuania are already one inseparable and undifferentiated body; and hence an undifferentiated and single, shared Commonwealth of two states and nations has risen up and joined together as one people.	Two Nations, One People, One Commonwealth	Horizontal Organizations of Institutions	Ontology
4	And with this dual nation, so it may have for time eternal one head, one lord, and one common king commanding, who shall be elected by the joint votes by Poles and Lithuanians, the place of election to be within Poland, and thereafter anointed for the Kingdom of Poland and crowned in Kraków. The election of whom according to Aleksander's privilege is not to be impaired or hindered by the absence of either party, for the councils and all the estates of the Polish Crown and the Grand Duchy of Lithuania are to be summoned obligatorily *et ex debito*.	All *szlachta* to vote for the head of the Commonwealth	Consent and legitimacy	
		Elections proceed according to Aleksander's Privilege	Sources of Law	
		Election Cannot be Impaired	Consent and legitimacy	
		Both Polish and Lithuanian Delegations Must be Present	Representation, Participation, and Citizenship	

[678] *The Union of Lublin*, The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. https://polishfreedom.pl/en/union-of-lublin/ [Accessed 7 July 2022]. Translated by Tristan Korecki and Philip Earl Steele.

Table 3.10 Enumeration of Constitutional Archetypes of the Union of Lublin, 1 July 1569, Part Two

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
1	[D]uring this insecure time, living without a king as our superior Lord, we all have diligently sought at the convention of Warzawa, by the example of our forebears, that we ourselves might retain and preserve the peace, justice, order, and defence of our Rzeczpospolita. Therefore, by firm and unanimous accord and sacred vow, we all hereby pledge this reciprocally, in the name of the Rzeczpospolita entire, and do commit ourselves upon our faith, decency, and conscience.	Rzeczpopsolita (the state) as Distinct from the King, Association of Rzeczpospolita with the Szlachta; Election of the King by *Szlachta* Consensus and not separately by the Poles and Lithuanians.	Legitimacy, Representation, Political Decision-Making	Ontology
2	Firstly, to make no severance between ourselves, nor any dismembering to allow within the single and indivisible Rzeczpospolita, that no one part without the other elect a Lord for itself […]But rather, in accord with the place and time as herein assigned, to arrive and gather into a Crown assembly, so that this act electionis , by the will of God, be brought to sound effect.			
2	He [the king] shall firstly vow to us [the *szlachta*] to uphold all the rights, privileges, and liberties which are, and which we shall submit to him *post electionem* .	King's Duty to Preserve the Szlachta's Rights	Hierarchical Organization of Institutions	
			Legitimacy	
3	[W]e hereby promise to rise against every such who would ever choose and convene, at any other sites or times, for an election, or wish to cause tumult at an election, or receive the servant populace *privatim* , or, dare to oppose the election as *conclusae* by all in accord.	Protection of Electoral Process	Political Decision-Making	Epistemology
	[W]e who be d*issidentes de religione* shall preserve the peace between ourselves and shed no	Religious Mutual Coexistence	Consent and Legitimacy	Ontology
			Enumerate	

<table>
<tr><td></td><td>blood out of differing faith and practices in the Churches</td><td></td><td>d, Individual Rights</td><td></td></tr>
<tr><td rowspan="3">9</td><td rowspan="3">We also promise to one another that in going to the appointed election, and being at the place, and upon returning to home, we shall do no violence to the people or amongst ourselves, whatsoever.</td><td rowspan="3">The Right to Peaceful Participation in Elections</td><td>Political Decision-Making</td><td>Epistemology</td></tr>
<tr><td>Enumerated Individual Rights</td><td>Ontology</td></tr>
<tr><td colspan="2">Political/Electoral Procedure</td></tr>
<tr><td rowspan="2">10</td><td rowspan="2">All of these things we promise to one another, and for our descendants, to be enduringly preserved, and kept sub fide, honore, et conscientijs nostris. And he who would wish to oppose this, and to disturb the common peace and order, contra talem omnes consurgemus in eius destructionem [against the rest, to their own destruction].</td><td rowspan="2">Szlachta to Defend and Maintain the Confederation and Promise to Destroy Those Who Oppose it</td><td>Representation, Participation, and Citizenship</td><td rowspan="2">Ontology</td></tr>
<tr><td>Consent and Legitimacy</td></tr>
</table>

The first collection of legal provisions tightened the relationship between the Crown and the Grand Duchy, addressing the concern that the union was merely apparent. Instead, the Poles and Lithuanians had become one people and created the Commonwealth that existed as two nations but served the common good and mutual defense as both of them. While it is difficult to find a modern equivalent of this type of union. Some have argued that the Union of Lublin effectively transformed the Commonwealth from a personal union to a federation,[679] but this might be too strong, and that it is perhaps best thought of it as a singly body that has multiple organs within it. It also clarified and refined the process of electing the king, in that he was to be chosen by a joint gathering of Lithuanian and Polish *szlachta*, with strong protections to make sure that the *szlachta* did not have their voting rights tampered with in anyway. Neither the Lithuanians nor the Poles had the right to choose not to attend an election Sejm, thus establishing political legitimacy for both regions.

As we have addressed before, in some sense, the process of electing a king was always paradoxical and the legitimacy that the king granted was always retroactive, e.g., how could the king sign the *pacta conventa*, which would allow him to become king, if laws were only legitimated by someone who was already king? Opening up alternative definitions of institutions—was the Polish-Lithuanian king really a "king" or closer to a modern president elected for life, was the union of Poland and Lithuania really a federation, was it really a republic or an oligarchy masquerading as a republic, *inter alia*—is as ahistoricist as it is needlessly confusing. Instead, we choose to be consistent with our terminology, though admitting for some quirks and caveats along the way.

Finally, the King of the Crown of Poland and the Grand Duchy of Lithuanian were both offices held jointly by the same person who was elected. Whereas the Jagiellonian era had often been marked by the Lithuanians' and Poles' trying to elect a separate leader—and in fact the union was temporarily split when the Poles elected elder brother Jan I Olbracht as king while his younger brother Aleksander ruled Lithuania until Jan's early death reunited them—the Union of Lublin removed the possibility of either nation going their own way. It seemed that although Zygmunt II August had struggled against the executionist movement earlier in his own reign, he eventually decided that the *szlachta*'s project for unity would be better for the country.

The second collection of legal provisions is generally more practical in nature, establishing the principle that the king—upon his coronation—must automatically confirm the laws of the nation as well as the privileges granted to the *szlachta*. This is worth remarking upon, in that it clearly established a sense of constitutional continuity. Many times, the previous kings had promised to acknowledge these rights and privileges—often during a time when the king needed support such as the need to wage war or to secure dynastic stability—but it was always an *ad hoc* process. The permanence of *szlachta* rights and privileges was instead part of the transition toward modern constitutionalism. The second collection also demonstrated that the executionists had won Zygmunt August over on the idea that there should be no restrictions to trade within the Commonwealth. Finally, while there would only

[679] Natalia Jakowenko. 2011. *Historia Ukrainy do 1795 roku*. Translated by Anna Babiak-Owad and Katarzyna Kotyńska. Wydawnictwo Naukowe PWN: Warszawa, pg. 196.

be one, unified Seym for both the Crown and the Grand Duchy, both would retain their own separate ruling councils. In some sense, this too was a victory of the executionist movement in that on the one hand they generally favored increasing political concentration and streamlining of institutions. All of the planning paid off, with Zygmunt August's death in the summer of 1572 produced something of a planned interregnum. To a very real extent, Polish and Lithuanian institutions functioned much as they had before, with Seymiki, the Church, and local courts and administrators carrying on,[680] with local *szlachta* forming *konfederacje*, which established temporary jurisdictions governed by *Sądy kapturowy*.

The difficulties, constitutionally speaking, revolved around the king as the highest executive of justice, the person who resolved disputes between the constituent parts of the Union, and the head of foreign policy and the military. Since justice was done in the name of the king, no appeals were possible. Other important constitutional questions were clear continuations of the executionist movement and the struggle between the *szlachta* against the *magnaci*, the king, and the Catholic Church, which generally condensed into two main issues: the process of the election itself and the issue of religious toleration. Naturally, the senators and the *magnaci* wanted to keep the election of the new king for themselves, but the power the lesser *szlachta* had gained during the last few decades meant they were able to force an election where all the *szlachta* could participate.[681] The final result of this process was the Konfederacja Warszawska, a roadmap of sorts created at the convocation, which was to guide the interregnum period.

The constitutional principles of the Konfederacja Warszawska are summarized in Table 3.11.

[680] "At regional and local levels, too, during the first interregnum the common good took precedence over all rivalries. In the area of defence and local security, the interregnum did not represent a sharp break; skillful use of existing mechanisms allowed the *szlachta* to maintain continuity and stability," Bues, "Formation", pg.70. See also: Makiłła, *Artykuły henrykowskie*, pg. 307; Sucheni-Grabowska, *Spory krolów*, pg. 57.

[681] As Makiłła describes: "In the situation of the 1572-1573 interregnum after the death of King Sigismund Augustus in 1572, the problem of the election, and in particular the conditions and manner of its conduct, was raised once again. However, the main problem with the election of a new monarch at that time was to decide on the form and manner, as well as the scope of the election. The decision regarding political domination during the interregnum was also not without significance - whether the election was to take place with the significant participation of senators who considered themselves the main ruling factor during the interregnum - or, taking into account the existing legislation, especially from the times of King Zygmunt I - and above all taking into account the strong position of the *szlachta* from the time of the execution movement - the election would, however, take place with the general participation of the *szlachta*," *Artykuły henrykowskie*, pg. 161.

Table 3.11 Enumeration of Constitutional Archetypes of the Konfederacja Warszawska, 28 January, 1573[682]

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
1	[D]uring this insecure time, living without a king as our superior Lord, we all have diligently sought at the convention of Warzawa, by the example of our forebears, that we ourselves might retain and preserve the peace, justice, order, and defence of our Rzeczpospolita. Therefore, by firm and unanimous accord and sacred vow, we all hereby pledge this reciprocally, in the name of the Rzeczpospolita entire, and do commit ourselves upon our faith, decency, and conscience.	Rzeczpopsolita (the state) as Distinct from the King, Association of Rzeczpospolita with the Szlachta; Election of the King by *Szlachta* Consensus and not separately by the Poles and Lithuanians.	Legitimacy, Representation, Political Decision-Making	Ontology
2	Firstly, to make no severance between ourselves, nor any dismembering to allow within the single and indivisible Rzeczpospolita, that no one part without the other elect a Lord for itself […]But rather, in accord with the place and time as herein assigned, to arrive and gather into a Crown assembly, so that this act electionis , by the will of God, be brought to sound effect.			
2	He [the king] shall firstly vow to us [the *szlachta*] to uphold all the rights, privileges, and liberties which are, and which we shall submit to him *post electionem* .	King's Duty to Preserve the Szlachta's Rights	Hierarchical Organization of Institutions Legitimacy	
3	[W]e hereby promise to rise against every such who would ever choose and convene, at any other sites or times, for an election, or wish to cause tumult at an election, or receive the servant	Protection of Electoral Process	Political Decision-Making	Epistemology
			Consent and	Ontology

[682] All of the citations are to be found at *The Konfederacja Warszawska*, The Polish History Museum, Warszawa: *The Legal Path of Polish Freedom*. https://polishfreedom.pl/en/the-warsaw-confederation/ [Accesed June 12 2021].

<table>
<tr><td rowspan="2"></td><td>populace privatim , or, dare to oppose the election as conclusae by all in accord.</td><td></td><td rowspan="2">Legitimacy</td><td rowspan="2"></td></tr>
<tr><td>[W]e who be dissidentes de religione shall preserve the peace between ourselves and shed no blood out of differing faith and practices in the Churches</td><td>Religious Mutual Coexistence</td></tr>
<tr><td rowspan="3">9</td><td rowspan="3">We also promise to one another that in going to the appointed election, and being at the place, and upon returning to home, we shall do no violence to the people or amongst ourselves, whatsoever.</td><td rowspan="3">The Right to Peaceful Participation in Elections</td><td>Enumerated, Individual Rights</td><td></td></tr>
<tr><td>Political Decision-Making</td><td>Epistemology</td></tr>
<tr><td>Enumerated Individual Rights</td><td>Ontology</td></tr>
<tr><td rowspan="2">10</td><td rowspan="2">All of these things we promise to one another, and for our descendants, to be enduringly preserved, and kept sub fide, honore, et conscientijs nostris. And he who would wish to oppose this, and to disturb the common peace and order, contra talem omnes consurgemus in eius destructionem [against the rest, to their own destruction].</td><td rowspan="2">Szlachta to Defend and Maintain the Confederation and Promise to Destroy Those Who Oppose it</td><td colspan="2">Political/Electoral Procedure</td></tr>
<tr><td>Representation, Participation, and Citizenship</td><td rowspan="2">Ontology</td></tr>
<tr><td></td><td></td><td>Consent and Legitimacy</td></tr>
</table>

The Konfederacja Warszawska clearly continues several of the movements that occurred throughout the long 16th century, perhaps most importantly being the shift of power and the state away from the king toward the *szlachta*. The king was to be elected by the *szlachta* and the function of the state was to guarantee their rights; should those rights be violated, then the *szlachta* promised to defend their rights and privileges, against *anyone* who might challenge them. The *szlachta* also took the right upon themselves to secure the religious process and to punish anyone who stood in the way of the election. Thus, they were guaranteeing both the process of the election as well as the product of that election, namely the choosing of a king and the protection of their rights respectively.

One of these rights was the freedom to practice religion without bloodshed or any injury. In fact, one of the provisions within the Konfederacja Warszawska was essentially to preserve the religious status quo. It seems reasonable to conclude that the Konfederacja Warszawska is arguing that the religious sphere was to be outside the boundaries of the law, which was to only intervene to prevent conflict between the Churches or the persecution of individuals based on their religious beliefs. As such the Konfederacja Warszawska should be viewed in some kind of pragmatic light rather than necessarily elevating religious toleration to a constitutional principle itself, but rather as an extension of the *szlachta*'s rights beyond the reach of the state, rather than the modern conception of a completely secular state. Makiłła argues that because the principle of religious toleration was never fully accepted, the Konfederacja Warszawska should be thought of more as some kind of "operational law" rather than necessarily as a constitution.[683] While this may be true in a strict "Constitution with a capital C" sense of our modern understanding, it is not "constitutional" in the broader sense of the spirit of law, i.e. that the provision of religious toleration in the Konfederacja Warszawska may be thought of as "constitutional" even if whether or not the Konfederacja Warszawska was considered "a Constitution".

Another point worth indicating is that the Konfederacja Warszawska has a provision that specifically addresses the openness and security of the election process itself, which in today's parlance may perhaps be described as "commitment to free and fair elections". It is somewhat difficult for modern audiences to appreciate how the electoral and political processes—representation, voting, parliamentary procedure, etc.—was itself something that had to be worked out in detail. This is because for much of the modern, democratic world, the act of voting itself is something that is more or less taken for granted—i.e. the concept of regular, predetermined elections, "one person, one vote" and "majority rules", *inter alia*—with the concept of "voting" following automatically. This point, though subtle, is crucially important for understanding how the evolution of the Polish-Lithuanian Commonwealth's constitutional system contributes to scholarly work in the field of constitutionalism more generally and will be addressed more in the final section of this chapter. For now, it is sufficient to indicate that audiences accustomed to constitutional, political, or legal practices that are still immature in an earlier time period to read those earlier practices as if they were complete and miss the process of said maturation, and that the exegetical method is important to recover and illuminate such nuances.

[683] Makiłła, *Arktykuły henrykowskie*, 296-297.

The Konfederacja Warszawska clearly defines the role of the state as to protect the rights of the *szlachta* and that the *szlachta* will take it upon themselves to defend those rights when necessary. However, it is not clear *how* the *szlachta* should determine when those rights or violated—whether by the Seym, the Seymiki, the courts, the *wojewody* and local administers, etc.—and what the legal recourse should be, either procedurally—i.e., trials, how they are convened and who would convene them—or substantially—what are the exact punishments, what are the standards of evidence, etc. It is also not mentioned what should happen if it is the king or one of the king's agents who breaks the law or otherwise threatens the rights of the *szlachta*. While some scholars have indicated that the executionist movement and then the subsequent Konfederacja Warszawska and Henrician articles should be understood as either working toward some kind of social contract or as a social contract in of themselves,[684] this would be a grave historiographical error: social contractarianism emerged within 17th and 18th century Anglo and later Anglo-American thought and would be inappropriate to apply to 16th century Poland-Lithuania.

Though there are some similarities—such as the shift away from negative, general rights to more concrete, positive rights, the emergence of neutral state institutions, as well as some movement toward secularization of political institutions (or at least movement away from the Catholic Church specifically)—such a deeper comparison would require the construction of an ideal type, i.e., the *spirit* of (social) contractarianism, away from the original Anglo-American context. This abstraction would then have to be brought down into the Polish-Lithuanian institutional contexts and clothed as it were in real social facts. Or perhaps alternatively, while holding the Anglo-American conception as an ideal type, the individual Polish-Lithuanian institutions may have to be "brought up" as it were to produce their own ideal type, with the two abstract types, Polish-Lithuanian (social) contractarianism and Anglo-American (social) contractarianism then compared. Both these research tracks—first, abstraction from one set of specific social facts to the general construction of an ideal type to then apply that ideal type to another specific set of social facts (real -> ideal -> real), and second to move from one specific set of social facts to an ideal type and then from another specific set of social facts to an ideal type and then comparing those types together (real -> ideal vs. ideal <- real) would be worthy endeavors.. However, they are also beyond the scope of our inquiry. To sum up this digression somewhat concretely, while such modern conceptual short cuts are tempting, they are to be avoided and it is to be accepted that to a certain degree past institutions, practices, and ideas remain impenetrable, such as *polis* represents an order before the modern division of state, society, and community. In keeping with our theme of transhistorical comparitivism, however, significant room remains for just such an endeavor, and it must be honestly said that work on comparative social contractarianism—or perhaps correcting the hitherto overlooked contributions of Polish-Lithuanian thought to social contractarian theory and practice—remains to be done, but nothing more can be contributed here other than pointing out an intellectual itch that remains to be scratched, so to speak.

The *Konfederacja* also played the critical role of explicitly building—or perhaps more accurately, *claiming*—to establish constitutional continuity in that it served to

[684] Rzewuski, "Umowa Społeczna," pgs. 27-29.

legitimate all of the all konfederacje that existed at the time. This was unique for several reasons; first, that because the *Konfederacje* were voluntary, quasi-extra-parliamentary institutions. Second, these self-governing parliamentary bodies cut across secular and religious lines, as well as across Protestant, Catholic, and Orthodox divisions. Thirdly, *konfederacje* were generally regionally specific and were an outgrowth of traditional, geographically centered governance. The *konfederacje*—tied together by the Konfederacja Warszawska—were the first real opportunity for mass political action by the *szlachta*.[685]

> Resolutions passed during the *konfederacje*'s deliberations were absolutely binding on the participants of the *konfederacja* to comply with them. This form of assembly was an expression of the political subjectivity of the entire *szlachta*. Both lay and clerical senators as well as the *szlachta* participated in its deliberations and decisions. *Konfederacje* during the first two interregna were a manifestation of equality before the law within the *szlachta*. Occasionally, in some województw, townspeople were involved, especially during defense-related assemblies.[686]

In this sense, the Konfederacja Warszawska should be thought of within the continuity of parliamentary institutions from the *wiece* to the seymiki and was something of a maturation of the executionist movement in that the *szlachta* did not just exercise political power in theory, but in actual practice. The interregnum also allowed for the crystallization of the *szlachta*'s power by demonstrating that—albeit with several significant caveats—state institutions and courts were able to function relatively well. The processes of strengthening the *szlachta*, strengthening the Seym—particularly the lower house—and increasingly relying on geographic delimitations of power and self-governance were interconnected with each other. However, while one may be attempted to made broader parallels with geographically diffuse systems of political authority such as federalism in the 13 colonies and then the United States or the Swiss canton system, it must be first acknowledged that this was not the result of some thought-out plan or political principle, but rather a spontaneous and pragmatic reaction to the disappearance of a centralized political authority in the personage of the king and the paralyzing of any centralizing institutions. In some sense it was a return to historical roots of the Polish-Lithuanian political culture, but this lack of explicit association of geographical conceptions of sovereignty with fundamental constitutional principles complicated any processes of reform.[687] In fact, this divorce between political practice and constitutional principle is something of a recurring theme not only in the Polish-Lithuanian constitutionalism but in the history of constitutionalism *per se* in that it is a frequent frustrater of reforms by means of obscuring the existence of problems in the status quo in the first place.

There was significant belief that the interregnum provided the opportunity to

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[685] Władysław Smoleński. 1919. *Dzieje narodu polskiego*. Nakład Gebethnera i Wolffa: Kraków, pgs. 117-118.
[686] Dubas-Urwanowicz, "Królestwo bez kroła?", pg. 156.
[687] "In this situation, the circumstance of the absence of a ruler was seen as convenient for establishing the special position of the states, and thus the Sejm representing their interests. This situation created a clear rationale for also raising the issue of lawmaking and establishing the interrelationship between the various organs of the state with a stake in this process. Determining the competence of the Sejm, and then legally guaranteeing this scope in an act of a constitutional nature, was obvious in such a situation. These provisions were made, however, without actually establishing the strict scope of the matters envisaged for decision by the Sejm, or requiring the Sejm's cooperation," Makiłła, *Artykuły henrykowskie*, pg. 269.

finishing repairing the republic,[688] though—as we shall see—pragmatic concerns generally took precedent, and the reforms were not as aggressive or as complete as the more radical thinkers would have wished for. Finally, it also preserved the status quo on the religious situation, and was thus something of a watershed moment for the Polish Reformation until that point, [689] thus preserving the hard-won pragmatic balance that the moderate Zygmunt II August and the Protestant executionists had achieved. As we shall soon see, all of these elements played important roles in the election of the next king, Henryk Walezy (Henry Valois) of France, and the Henrician Articles which bear his name.

The Election, Pacta Conventa, and Henrician Articles as Constitutional Dilemmas

Of the many nations who sent candidates to the election, the French candidate, Henryk III Walezy (Henri de Valois), eventually proved victorious as something of a compromise candidate. Though he was a Catholic and from a nation with a traditionally strong monarchy, his father Henry II had pursued an active, anti-Habsburg policy. The Habsburgs were also nearly constantly embroiled in conflicts against Turkey to the southwest, and Poland-Lithuania was afraid of waging a war on three fronts against Muscovy to the East, the Swedes to the North, and Turkey to the south and east. Furthermore, France was quite wealthy at the time, and promised significant financial and military aid in defense of Poland-Lithuania, especially as a counter-balance to Muscovite aggression,[690] with Henryk promising to pay for any war against Muscovy with his own personal treasury. In addition, Henryk and the French promised to support free navigation and brokering peace with the Turks and the Tartars. The full list is given in the "Kondycye, Które Podał Król Francuzki do Polski" (The Conditions that the French King gave to Poland)" summarized below:

> 1. He wants to give the Commonwealth two million, that is, twenty times one hundred thousand zlotys each, to redeem the disappointed things, and for other needs.
> 2. At his own expense raise and end the fight against Muscovy.
> 3. Make a contract with the Turkish Emperor for Wallachian land […]
> 4. To destroy the Muscovy on the Narwa port, and to free our navigation from the kings of Denmark and Sweden.
> 5. Give birth to a confederation with the Crown [of France] so that they will eternally help each other against any enemies, with money and with people, whenever necessary.
> 6. Covenant with the Turkish Emperor and make peace with the Tartars.
> 7. To take the princess as his wife, the privileges of the kingdom, and that's all that I will need, vow to, and hold to unviolated.[691]

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[688] For a sample, see: "Pokazanie Błędów i Naprawy ich w Rzplitéj Naszéj Podczas Tego Bezkrólewia" in Włodzimierz Stanisław Broel-Plater. 1858. *Zbiór pamiętników do dziejów polskich*. Tom 2. Drukarnia Gazety Codzinnéj: Warszawa, pgs. 23-129.
[689] Mirosław Korolko. 1974. *Klejnot swobodnego sumienie: Polemika wokół konfederacji warszawskiej w latach 1573-1658*. Instytut Wydawniczy Pax: Warszawska, pg. 28.
[690] Stone, *Polish-Lithuanian State*, pg. 118.
[691] Włodzimierz Stanisław Broel-Plater. 1858. *Zbiór pamiętników do dziejów polskich.* Tom 3. Drukarka Gazeta Codziennej: Warszawa, pg. 19.

These promises were again reiterated in a concrete series of articles, which were part of a multipart series of promises given by Henryk if his candidacy was accepted and then negotiations around those terms, summarized in: "Artkuły Poselstw: Głowne Punkta, Które Przedstawia Poseł Króla Fancuszkiego" (The Envoy's Articles, Key Items Presented by the Envoy of the French King) and the "Poselstwa Francuszkiego Korzyści" "The French Envoy's Benefice.[692] In terms of foreign policy and the military situation in Central-Eastern Europe, an alliance with France was simply the best offer among the discussions with Muscovy, Sweden, and even Stefan Batory of Transylvania.[693]

Many *szlachta* had very serious concerns with Henryk's personage and candidacy, as while he himself seemed to flirt with some degree of toleration—perhaps better put as moderate anti-Protestantism, relatively speaking—in the wars of religion in France in the 1560s and 1570s he himself led the armies against the Huguenots on behalf of his older brother, Charles IX,[694] and has been considered an architect of the 1572 St. Bartholomew's massacre.[695] There was great concern that he was pro-Catholic, and that religious freedom thus had to become a more fundamental law that was beyond the power of the king to change. In other words, religious freedom had become fully *constitutional* as a pre-condition for his election, and that both Protestant and Catholic *szlachta* would support his kingship only if he abided by it.

However, Henryk and the French were concerned that religious freedom—among other elements—were too sharp restrictions on the power of the king, weakening not only his power but also weakening the unity of the state by breaking down the traditional alliance between King and Church

As Makiłła explains:

> The introduction to the act of a constitutional nature as well as giving the provision on religious freedom the significance of a constitutional principle depended on the circumstances of the election. This matter became more understandable in relation to the person of the main candidate for the Polish throne, who began to gain importance during the election, the French prince Henry. He was suspected quite unequivocally of only supporting Catholics, as well as acting as an inspirer of and even a participant in the bloody crackdown against the Huguenots that had taken place in Paris a dozen months earlier. Understandably, the issue of securing religious freedoms, in view of his expected elected, clearly indicated the need to guarantee religious freedom in the form of a fundamental law. This matter was visible against the background of the polarized positions of the main political groups that arose in connection with their attitude towards the elect. Both Catholics and Protestants were among his supporters. It was similar in the camp of his opponents. As it turned out later, the provision on religious freedom also became a reason for serious reservations on the part of the French

[692] *Broel-Plater,. Zbiór pamiętników do dziejów polskich.*, pgs. 184-187.

[693] There were multiple exchanges between the envoys of France, Sweden, Batory, and Muscovy with the Polish- Lithuanian Commonwealth, sometimes given as letters, promissory documents, or even fully fleshed out treatises. For the complex series of exchange and negotiations, see: Stanisław, *Zbiór pamiętników*, Tom 3, pgs. 20-21, 58-65, 139-183, 188-200.

[694] James B. Wood. *The King's Army: Warfare, soldiers, and society during the Wars of Religion in France, 1562-1576.* Cambridge University Press: Cambridge, pg. 74; R.J. Knecht. 2010. *The French Wars of Religion, 1559-1598*. Third Edition. Pearson Education Limited: Harlow. pg. 39-42, 62.

[695] Knecht, *ibid.*, pg.49; Stone, *Polish-Lithuanian State*, pg.118.

> court, expressed during the stay of the Polish delegation in Paris. During the final negotiations about Henry's assumption of the Polish throne, the consolidation of the camp striving to recognize the point of religious freedom was noticed. It also raised concerns on the part of the elect himself, who saw in the provision on religious peace both a weakening of the unity of the state and his own limitation.[696]

While Henryk and the French were concerned about the stability of political power and authority, the Polish-Lithuanian *szlachta* were ultimately concerned about religious toleration and consent of the *szlachta* as necessary for securing of peace. This foundational principle was very clearly elucidated in a speech given before the 1573 Convocation Seym, titled: "Zdanie O Konferacyi Warszawskiéj" (An Opinion About the Konfederacja Warszawska):

> There are only two pillars on which the wholeness and health of the Commonwealth and all preservation of her order and security belong: faith and justice. With faith we render to God, and with justice we preserve peace. There cannot be a whole and healthy Commonwealth, where you have no consent; consent cannot be where you have no peace; peace cannot be where you have no justice; justice cannot be where you have no religion; religion cannot be where all live as they please; all feed as they please, where all believe as they please; all believe as they please, where there is a *konfederacja* for believing as one pleases. Therefore, where there is a *konfederacja* for everyone to believe as he pleases, there you do not have a healthy and whole republic, but a pity to quickly collapse; and indeed there is no Republic, but a strange mixture and everlasting wretchedness.[697]

Evidencing just how serious the constitutional principle of religious freedom was, Henryk ultimately took an oath to respect Polish freedom in Notre Dame and his older brother, King Charles IX also had to swear an oath to recognize Polish freedoms as well as to extend toleration to French Protestants.[698] Thus, the wars of religion in France were nominally put on hold.

The process of electing Henryk was anything but straightforward, however. After a series of difficult negotiations among themselves to reach a consensus on electing Henryk,[699] an envoy was sent to inform him of his election on the condition that he would sign an agreement and gave an oath that he would sign the new constitution of Poland-Lithuania—what would become known as the Henrician Articles. In other words, the process of *selection* to the candidacy of kinship—or what Frost refers to as "prelection"[700]—the *acceptance* of that candidacy, the *election*, and the *signing of the constitutions and laws* of Poland-Lithuania as king were distinct yet connected constitutional moments. This presented something of a constitutional catch-22: a law did not become binding until the king had signed it, but Henryk

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[696] Makiłła,*Artkyuły henrykowskie*, pg. 297.
[697] Broel-Plater, *Zbiór pamiętników polskich*, Tom 1, pg. 84.
[698] Stone, *The Polish-Lithuanian State*, pg. 119.
[699] "The election worked in practice through the gradual elimination of the candidates who polled the least votes, until only three candidates remained. Then every possible effort was made by patient discussion to persuade the minority to join the majority party. The contemporary idea of a free election required the voluntary adhesion of the opposition to the will of the majority. When this had come about and the last minority group had accepted Henry, it was considered that the electoral decision was unanimous, even though their notion of unanimity was not quite the same as ours," Skwarczyński, "The 'Decretum electionis," pg. 128
[700] Frost, *Oxford History of Poland-Lithuania*, pg.4, 49.

was asked to give an oath that he would abide by the Henrician Articles and sign them *after* he became king. Technically, since there was no king to sign the articles given to Henryk, there was no legal weight to them. Thus, when signing the articles of his election, Henryk was essentially hiring himself to the position. The question thus remained: what if Henryk broke his promise and did not follow all of the actions he had promised to do when he became king, once he actually became king? Were his oaths somehow given transcendental legal weight, or was the legitimacy of kingship a constitutional ship of Theseus in that the pre-election, election, and post-election Henryks were different constitutional persons?

While this constitutional dilemma seems arcane and overly nuanced at first glance, upon deeper and more critical reflection it penetrates to a deeper question inherent in all reflections upon constitutionalism: the paradox of constitutionalism and ultimate sovereignty. Constitutions are documents that legitimize political and legal institutions, but where is the source of constitutions' own legitimacy?

To speak in general terms, the question of the true sovereignty within a nation is critical in a sense as it is what legitimizes the constitution, which then legitimizes and structures the rest of the nation. The constitutional dilemma around the ship of Theseus that was Henryk's crown was so poignant because it occurred in a context when there was a shifting in this sense of legitimacy away from the king and the church to the *szlachta* as a collective body. The question remained: what if Henryk chose not to abide his oath and sign the articles given to him, but instead wanted a hand in shaping the new laws of Poland-Lithuania himself? Such question was not purely theoretical but had happened before when King Aleksander I Jagiellończyk refused to sign the Mielnik articles once he was crowned, though, ironically those Mielnik articles themselves had introduced the right of the *szlachta* to *rebel* against the king if they believed he had broken his obligations.

The Polish-Lithuanian delegation themselves had ambivalent answers to this question: those who wanted a stronger (generally more Catholic) monarch supported the idea of a looser interpretation in that the king did not have to accept any new laws that he did have any input in making. An advocate for this was Jakub Uchański, archbishop of Gniezno, primate of the Kingdom of Poland, and interrex who oversaw the electoral process. Though he was known for relatively liberal views toward the Reformation, the Konfederacja Warszawska and the documents submitted to Henryk—which would be later known as the Henrician Articles—went too far for him and much of the clergy, who tried to block these reforms along with other members of the *magnaci* and the Senat.

The other faction—mostly of lower *szlachta*, often protestant or moderate Catholics—argued that if the king refused to uphold his oaths upon receiving his crown it could lead to a loss of confidence and legitimacy, and perhaps even the *szlachta* threatening to rescind the offer or simply refuse to obey him, with open rebellion a real possibility.[701] Both sides had some legitimacy to their argument. There was historical precedent for kings having to swear an oath before their election, as was the case with the beginning of the Jagiellonian dynasty as well as Ludwik I Węgierskiej. However, it was also the case that the

[701] Makiłła, *Artykuły henrykowskie*, pg. 95-96.

king's pre-election oath had been historically vague, as well as the *szlachta* having a very weak mechanism for enforcing the king's compliance. The *szlachta* after the execution movement was much more unified and politically self-aware than they had been during Aleksander Jagiellończyk's time, however, and this time took *de non praestanda oboedientia* seriously. Eventually, Henri backed down with the *szlachta* faction winning out over the *magnaci* and the Church. It was another concrete example of how the 16th century was a process of clarifying what had been vague for previous kings. [702]

Henryk's submission to the *szlachta*—or at least his promise to submit to them—upon his coronation exemplifies the development of *ius commune* in that the king himself was subject to the law. At the time this came to be manifested in the slogan, *lex est rex in Polonia et in Lituania*,[703] which was soon adopted across the political spectrum. It was not debated whether or not the king had unlimited power or not, but rather what the precise scope of his power would be. Refinement of *ius commune* also marked a noted shift in the conception of the *szlachta*'s privileges. Whereas privileges were originally understood in a transactional sense where the king granted them to receive political support for a particular task, as time progressed, they began to take on a more universal and general meaning and were applied to everyone in the category of "*szlachta*", rather than particular persons or geographically specific *szlachta* families.

The *szlachta* winning the right to participate in the election of the next king was symbolic of the executionist movement's victory in undermining the role of the king as the sole interpreter of the law. As long as the king was the source of political legitimacy, privileges were always to some degree as the king could override them or ignore them as he pleased, which was something that occurred from time to time throughout the Jagiellonian period.[704] However, the equating of privileges with *ius commune* simultaneously established "the law" and "the *szlachta*" as the supreme powers within the country, which meant a shift in not only the specifics of policies such as court proceedings, fines, taxes, etc. but also at the constitutional level as power shifted away from the monarch towards the *szlachta*. This *ius commune* was treated as specific, positive limitations on the king's power.

The final problem before Henryk's election was procedural. Similar to the Konfederacja Warszawska, the question of the electoral process itself became quite serious. While the question of who would vote had been resolved in favor of the whole *szlachta*, the question of voting procedure and counting was still unresolved. This was of fundamental importance, and served as the foundation of the coronation process, as Makiłła explains:

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[702] "By the coronation oath, the ruler undertook to observe all the laws in force in the Kingdom - both the rights of states and the rights of every community and individual, including, of course, privileges. Formally, the coronation oath placed the law above the king. In fact, however, it was lex imperfecta [an imperfect law]. The nature and scope of the king's commitment was very vague. This was made visible by the political events that took place in the 16th century," Uruszczak, "Specie privilegium", pg.27.

[703] Szczepankowska, "Prawo i Wolność," pg. 77.

[704] "The practice was far from that ideal. The Sigismund Monarchy invariably treated privileges as acts equivalent to statutes or other acts of common law. Moreover, it was believed that the king, by virtue of his authority, could always deviate from the generally applicable norm in the event of necessity or for the public benefit. In the late Jagiellonian times, despite the growing role of parliamentary legislation, the importance of royal privileges in the legal system of the state did not diminish," Uruszczak, "Prawo celem polityki", pg. 165.

> Circumstances of the elective convention started on the 6 April 1573 imposed a certain course of events. These circumstances determined the convention's own philosophy of action, characterized by a peculiar dynamic that affected the nature, content and meaning of the legal acts, concerning the system, adopted during the electoral congress. The lack of experience in carrying out such a complicated undertaking determined the course of the entire congress. It was necessary to determine the course of the election itself, and above all, the manner of casting votes, which was not established during the convocation. These problems put forward at the very beginning by representatives of some provinces, questioning the validity of the decisions made during the convocation, which many understood to be an institution that had no basis in the legal order, were the first major problem from the point of view of the fundamental purpose of the convention that needed to be resolved.[705]

The legislative procedures at the Seym were deeply concentrated on creating consensus among the *szlachta*, wherever it was possible. The initiative usually belonged to the monarch, who would present a motion to the parliament, whose members would elect a member among themselves to be Marszałek, who would lead all parliamentary proceedings and organize the Izba Poselska. The Marszałki were of critical importance: given that the Seym did not have clearly written rules for parliamentary procedure, they quite often had to create their own for each session under the Marszałek's careful eye. While this may seem counterintuitive today, there was some reason to it: if the attendees of the Seym did not have a clearly established parliamentary procedure, then it would be even harder for any one person—especially the king or allied senators—to "game" the system.[706]

After the speeches by the senators, the deputies could then break themselves up into various committees (*komisji seymowych*) on an *ad hoc* basis, which would sometimes be attended by senators, with the exact scope of committe were highly variable and dependent on the circumstance.[707] In this way each Seym committee was unique. Unlike the parliamentary bodies of today, the Seymy were for a very limited amount of time, which encouraged the deputies to create compromise and limited, practical solutions. Usually, the resolutions that the *szlachta* passed were accepted by the senators, and then passed onto the monarch himself for final approval, whereupon they would become law.[708] This parliamentary procedure was noteworthy for its circularity, its deference to the monarch, as well as to weak internal divisions within the government, both between the king and the parliament, as well as between the two houses within the Seym itself.[709] Given that the legislative process began and ended with the king and his allied senators, much of the contributions of the deputies were often procedural and practical, rather than substantive.

The election and then coronation progress followed a similar pattern. Henryk's representatives reached out to infuential members of the *szlachta*which then created an agreement of sort upon the conditions for Henryk's election. The *szlachta* promised to rise

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[705] Makiłła, *Artykuły henrykowskie*, pg. 38.
[706] Kornat and Uruszczak, 2018. *550 lat parlamentarzymu rzeczypospolitej*, pg. 111.
[707] Andrzej Korytko. 2017. "*Na których opiera się Rzeczpospolita": senatorowie koronni za Władysława IV Wazy*." Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego: Olsztyn, pgs. 168-173.
[708] Szum, "Uniwersalizm relacji", pgs. 30-31.
[709] A parallel developed occurred in England with the concept of the "king-in-parliament". See: Lewandowska-Malec, "Demokracja deliberacyna", pg. 59.

up against anyone who refused to recognize the results of the election, or who tried to interfere with the election in anyway. This included a rejection of majoritarianism as we would understand it today, in that it could not simply be assumed that the will of the majority would automatically be imposed on the minority. Rather, what was necessary was attempting to reach a consensus at every step possible.[710]

The election process was complex, with an estimated 40,000 *szlachta* gathered to vote *virtim*.[711] The procedure followed in three broad stages: each candidate had an advocate that would make their case in the Senat, followed by a senatorial debate. Then, there would be so-called voting per województwo. Finally, there was a return to the Senat in which those groups who did not vote for the majoritarian position were—in theory—to be won over through hours if not days of persuasion and debate. One by one the losing candidates would either retire from the discussion or change their votes to another candidate, and by a process of elimination consensus was reached until Henryk was confirmed as king.[712] According to their understanding at that time, Henryk's election was considered to be unanimous.[713] As with other parliamentary procedures, the senators played an important role in determining the election.[714]

Henryk was formally elected in September of 1573, but did not arrive in the Crown until January of 1574, with the coronation taking place in February of that year. While he did swear to uphold religious toleration, he did not sign all of the documents that were given to him, which later became known as the Henrician Articles. This marked his reign with much tension between himself and the Polish-Lithuanian political elite, with Henryk being seen as too extravagant for the more conservative *szlachta*.[715] There were reform proposals presented to him such as making improvements to legal procedure and the court system, but he was instead interested in a more traditional role with himself as the highest legal authority in the land.[716]In May of 1574 his older brother died unexpectedly without heirs, and Henryk fled in secret on June 18th-19th to return to France to claim his brother's throne. This explicitly violated the conditions of his kingship, which included giving up his hereditary rights to

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[710] "A free election, as understood by people at that time, required the fulfilment of certain conditions: among them, that the voters should not have been under any sort of pressure when forming their opinions. Therefore bribery, force, shouts of approbation or acclamation were not allowed […] It follows that there was no question of the automatic imposition of the will of the majority on the minority; that would have been regarded as the use of force to make the minority accept the choice of the majority against its own will. According to the theory of free elections, it was necessary for everybody to be persuaded by argument and to be personally convinced of the need to change his vote. Therefore discussion, persuasion and debates followed in the Senate, at which deputies from each palatinate were also present," Skwarczyński, "Decretum electionis", pg. 124.

[711] *Ibid*., pgs. 121-123.

[712] *Ibid*., pg. 126.

[713] "The election worked in practice through the gradual elimination of the candidates who polled the least votes, until only three candidates remained. Then every possible effort was made by patient discussion to persuade the minority to join the majority party. The contemporary idea of a free election required the voluntary adhesion of the opposition to the will of the majority. When this had come about and the last minority group had accepted Henry, it was considered that the electoral decision was unanimous, even though their notion of unanimity was not quite the same as ours," *ibid.*, pg. 128.

[714] *Ibid*., pg. 127.

[715] Tazbir, "Ze studiów nad ksenofobią," pgs. 661-662.

[716] Bednaruk, *Trybunał Koronny*, pg. 55.

France, and angered the *szlachta* who demanded that he returned. For nearly a year they demanded he return and negotiated terms for his kingship to be restored, but six months into the negotiation process he was crowned king of France in February of 1575, and by May 1575 his claims to the Polish-Lithuanian Crown were vacated by the Polish-Lithuanian political nation. This led to immense anti-foreigner feelings and reprisals in the Commonwealth,[717] throwing it once again into the chaos of an interregnum. However, since Henryk did not fully accept the documents that were given to him, to some his kingship had never been truly legitimate, and the period from the death of Zygmunt II August in 1572 to the election of Stefan Batory in 1576 are considered to be Great Interregna[718]

As addressed in an earlier chapter, modern constitutional theory generally categorizes constitutions into either the "written" or the "unwritten" categories, but a more accurate and nuanced understanding is whether or not constitutional systems are arranged hierarchically with one text being supreme or more horizontally with a wide variety of texts more or less on the same playing field, constitutionally speaking. Thus, *writtenness* and the *stand-aloneness* of constitutional texts are themselves variables to be taken into account, rather than simply assumed *a priori*, which establishes a spectrum of varying constitutional constellations. A "quasi-written" constitution would occupy an intermediate position wherein there is a central text that is relatively "weak"—that is bereft of constitutional details and positive provisions, uses vague language, specifically enumerates and identifies sources of law or pre-existing legal texts that it relies upon, etc.—and thus does not stand alone, but rather is at the core of a tight constitutional constellation.

Where does 16th century Polish-Lithuanian constitutionalism fit in this framework? The multistep process of negotiation, preselection, election, coronation, and then signing post-coronation arguments—both to bind the king personally in the *pacta conventa* as well as to confirm the general laws and organization of society—elucidates the sophisticated nature of 16th century constitutionalism in the Polish-Lithuanian Commonwealth. The Konfederacja Warszawska, the *pacta conventa*, and the Henrician articles are generally acknowledged as the three cornerstones of 16th century constitutionalism within the Commonwealth.[719] Each of these may be considered as an individual constitutional moment, generally representing the *preselection* (preconditions for receiving candidacy for the throne), *coronation* (assumption of kingship). Logically, they form a coherent whole, but chronically they are distinct. For us, the two main questions of 16th century Polish-Lithuanian constitutionalism are to understand the relationship between these documents as well as whether the Henrician Articles themselves should be thought of as a *constitution per se*.

Addressing the first point, one possibility is to address the question chronically, with the Konfederacja Warszawska considered as an act prior to the election and thus not of the same constitutional weight. Makiłła also notes that part of the reason why the Konfederacja

[717] Tazbir, "Ze studiów nad ksenofobią," pg. 664.
[718] Dubas-Urwanowicz, "Królestwo bez króla?", pg. 147. Henryk Walezy's reign was so short and chaotic that the period from the death of Zygmunt II August and the election of Stefan Batory is one, long "Great Interregnum." Perhaps the most authoritative work on this topic is Płaza. See: Płaza. *Wielkie bezkrólewia*, *passim*.
[719] Grześkowiak-Krwawicz, "Anti-monarchism", pgs. 47-48

Warszawska did not itself rise to the constitutional level was due to the controversy surrounding the question of religious tolerance and freedom. The Konfederacja Warszawska could be thought of as practical law given that not everyone wanted to elevate the concept of religious toleration to a constitutional principle itself. By the time of Henryk's election, however, the Protestant *szlachta* had been able to make religious toleration have a constitutional weight, though it remained controversial.[720] Perhaps this may be attributed to the unique politics of the time, with the ultra-Catholic Habsburg Emperors of the Holy Roman Empire considered some of the greatest threats to the Commonwealth at that time as well as the *szlachta*'s hesitancy over Henryk's role in the religious wars in France. Either way, though there was a shift in accepting the necessity of religious freedom connected with the rise of the lesser *szlachta* and Protestant *szlachta*, it remained controversial and perhaps the weakest element of constitutional continuity.

If the Konfederacja Warszawska is considered to be a prior act, then another categorization is to put the *pacta conventa* and the Henrician articles as complementary elements of the same constitutional standing.[721] Each of them fills unique, yet complementary roles: the Henrician Articles create the general system, whereas the *pacta conventa* bound the king to fulfill specific obligations. Such an interpretation makes sense, especially if one considers the process of electing something akin to recreating/renewing the social contract. Poland-Lithuanian constitutional history had long employed the idea of oaths in public life, as well as part of the legal system.[722]

A third categorization is to treat the Konfederacja Warszawska, the Henrician Articles, and the *pacta conventa* as separate constitutional acts, with the Henrician Articles as the true constitution because it was to be timeless and enduring, whereas the *pacta conventa* was specifically written for Henryk and thus temporary. The *pacta conventa* was also written last, after the Henrician Articles.[723] Thus, while the *pacta conventa* was part of Polish-Lithuanian constitutionalism, it cannot be considered to be part of "the" Constitution.

Concerning the latter issue of the Henrician Articles themselves as a "constitution" or not, the main issue in the debate is whether they are the same kind of act as the 1791 Constitution or not. That they are on the same constitutional level is the fulcrum on which

[720] Makiłła, *Artykuły henrykowskie,* pgs. 296-299.
[721] Rzewuski, "Umowa społeczna", pg. 38; Uruszczak, "Species privilegium", pgs. 33-34.
[722] Paweł Rogowski. 2016. *Przysięga w średniowiecznym prawie polskim*. Wydawnictwo KUL: Lublin.
[723] This was the interpretation by Sobociński, as recounted by Makiłła:
"The relationship between the Henrician Articles and the *pacta conventa* was based primarily on the common circumstances of their adoption during the first election of 1573. W. Sobocinski made a fundamental determination of the mutual relationship between the Henrician Articles and the *pacta conventa*. He referred to some views in the literature on the subject in relation to the Henrician Articles, constituting the constitutional law, and the covenant pacts, constituting an agreement between the Estates of the Commonwealth and the newly elected Polish king, containing the elect's obligations assumed by him before his accession to the throne. Sobociński decided that both acts cannot be treated on the same plane, as occurring inextricably in connection with the sole reason that they were drawn up during the same, first election. In 1573, the Henrician Articles were first adopted, being the result of work on the revision of laws and constituting an act regulating general systemic issues. Only later were the *pacta conventa* drawn up, serving as an agreement between the Estates of the Commonwealth and the elect, the purpose of which was to secure political solutions, including the adopted contractual provisions," *Artykuły henrykowskie,* pg. 358.

our analysis of the development of the constitutional continuity of the Polish-Lithuanian Commonwealth appears to turn. However, for the sake of the overall argument, ultimately whether or not the Konfederacja Warszawska, the *pacta conventa*, and the Henrician articles are on the same *exact* ontological plain or whether they are merely constitutional in a broader, transhistorical sense is not important. The critical piece is that they are outgrowths from within the same system in terms of ideas, practice, and institutions, as well as that this has been clearly demonstrated. Further determination as to which of them is the most or least constitutional would be akin to arguing whether breathing or eating is more important for a living organism: though certain aspects are more important depending on the organism and the specific context, they are all important in the long-term.

Having so established that they are all part of a complete understanding of 16th century Polish-Lithuanian constitutionalism, it is necessary to reflect back upon what the greater characteristics of said constitutionalism entails. In modern Polish political and legal thought, perhaps no sole author has addressed the constitutionalism of the Henrician Articles more thoroughly than Dariusz Makiłła, upon whom our analysis relies extensively. Makiłła underlines how there were at least *four dimensions* to the Article's constitutionality: their function in organizing statutory law, their architectonic nature of re-founding and reshaping the system, their direct legitimacy through the *szlachta* as the dominant political class, and finally their contributions to constitutional procedure.

In the first instance, they were an extension of already existing statutes, trying to implement them in a more systematic manner, though ultimately imperfect; this first sense may be thought of as organizing *statutory* law. The second is that they were attempting to establish principles for the organization of the political and legal system. This may be thought of as identical to the modern understanding of constitutionalism as architectonic, wherein the creation of a constitution may be a deliberate act, but one highly dependent on specific historical context.[724] Little substance in the Henrician Articles was new, with much of its ideas common at the time, with special dedication owed to the thought of Jakub Przyłuski.[725]

As such, the Henrician Articles were not a clean break, constitutionally speaking, but were more of an outgrowth of the system and was thus messy, with many provisions unclear and strewn together without any underlying organization. This is perfectly consistent with reform movements throughout the 16th century, which often relied on compromises to have incremental, specific provisions, rather than clearly outlining or defining principles. Often their meaning was narrowed and determined in the process of their application. As Makiłła summarizes:

> Being general in nature, the individual provisions of the Articles were full of partial definitions. In principle, the Henrician Articles were more like single norms, referring to often separate issues taken up at the stage of their conception by the drafters of the Articles, than full legal principles, although they sometimes performed such a function. At the same time, the Henrician Articles, while containing norms concerning the constitutional institutions and

[724] Makiłła, *Artykuły henrykowskie*, pgs. 54, 85-86.
[725] Dariusz Makiłła. 2019a. "O doktrynalnych źródłach konstytucjonalizmu w XVI-wiecznej Polsce." In Łukasz Cybulski and Krzystof Koehler, eds. *Retoryka, polityka, religia w Pierwszej Rzeczypospolitej*. Warszawa: Wydawnictwo Naukowe UKSW", pgs. 41-44.

> the principles of the Commonwealth's constitutional law, indicated, by way of a kind of postulate, what and how it should be. In this sense, they were more a guideline of conduct than they were a description of the situation. The interpretation that could be used in the process of their application proved, as later times showed, sometimes the most significant factor verifying their value and meaning. At the same time, because of the way in which specific behavior was designated, the points of the Articles were imperative norms, despite the fact that individual provisions acted as *lex imperfecta*.[726]

The third aspect of the Henrician Articles' constitutionalism should be thought of as illuminating the shift toward the *szlachta* as the source of political legitimacy in the Commonwealth. The Konfederacja Warszawska, Henrician Articles, and *pacta conventa* were all the result of processes in the absence of a king. That these extra-constitutional practices (pozakonstytucyjnym)[727] were able to frame 16th century Polish-Lithuanian constitutionalism reveals that the true source of legitimacy had shifted toward the *szlachta*. The acceptance of these extraordinary acts answers the tension of constitutions as explanans and explanandum if one accepts that the main focus of sovereignty itself is extra-constitutional, in this case the will of the *szlachta*.

The fourth and final dimension the Henrician Articles' contribution of 16th century Polish-Lithuanian constitutionalism was procedural in two senses: the way they were enacted as a template for future constitutional changes as well as how they reorganized the system themselves. In the first sense, the splitting of the Henrician Articles and the *pacta conventa* into two separate constitutional moments defined not only the election of Henryk III Walezy, but also the next two kings: Stefan Batory and Zygmunt III. Batory agreed to accept the Henrician Articles as well as marriage to Anna Jagiellonian. As he was a ruler of Transylvania, Batory was familiar with Polish-Lithuanian constitutional culture and institutions, which were quite similar to those of Transylvania at the time with a multireligious, multiethnic state with a strong parliament. Though the terms of his *pacta conventa* were slightly different, he accepted the Henrician Articles wholesale.[728] By accepting them the way that Henri should have done, Batory effectively granted them full legitimacy.

> By distinguishing the Articles in the form of a separate law, however, and making their separate approval, King Stephanus was, on the one hand, repeating the procedure for the approval of the Articles provided for King Henry, which would indicate that he was recognizing that the Acts had indeed not come into force during Henry's reign and needed to be approved once again. Thus, King Stephen was giving the Articles their distinct character as a law of special distinction, of fundamental importance to the state.[729]

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[726] Makiłła, *Artykuły henrykowskie*, pg. 117.

[727] "However, matters important to the state system were also often regulated in acts of an extra-constitutional nature, i.e., adopted under different conditions and in a different extraordinary mode, outside the ordinary functioning of the parliament. Constitutional acts also included constitutions that were formally incomplete in nature, since they regulated only part of the constitutional matter. The Henrician Articles were among such acts. Although they were adopted during the interregnum, i.e., without the participation of the king as an important factor in legislation, they were adopted during the deliberations of the assembly, which, despite the absence of the king, was considered to have the power to legislate," *ibid.*, pg. 363.

[728] Stone, *The Polish-Lithuanian State*, pgs. 122-123.

[729] *Makiłła, ibid.*, pg. 101.

This splitting of these constitutional moments was significant because the idea of an oath between the king and the *szlachta* as part of the elective process was not itself new, but the more forceful defense of a constitution that was a permanent institution beyond the reign of any one king was important, especially given how past kings had made promises and then subsequently reneged on them once elected. Along more purely procedural lines, the Henrician Articles organized political and legal decision-making.[730]

Perhaps the greatest weakness of the Henrician Articles was that they only treated the power of the king negatively, and on this point were more of a summary of the already existing tradition and institutions. In terms of constraining the power of the kings the Henrician Articles thus took on a passive character, only emerging as it were in situations when the king violated them. Thus, the king was often free to do what he wanted in areas when the Henrician Articles were unclear, or which were outside the original intention of the articles. The combination of a lack of a mechanism for constitutional amendment, an ambiguous understanding of the king's obligations, and weak mechanism for limiting or checking the power of the king meant that the constitutional system established by the Henrician Articles was not completely designed but rather a mix of design as well as outgrowth from its context. Thus, it was limited in both its content as well as its scope and remained so throughout the Great Interregna to 1576.

> Above all, however, the Henrician Articles — constituting a constitutional act — arranged in a sense, and in a way systematized, a number of situations having a legal and systemic significance. It should be stipulated, however, that they did this only in the scope of certain matters, i.e. only those problems which, in the heated circumstances of the election parliament and under the conditions of a certain political compromise which occurred Above all, however, in connection with the election of the ruler, were considered by their authors as provisions so important s and acceptable and feasible by all — that they were included in an act which, after long vicissitudes related to the circumstances of the Great Interregnum, was accepted and approved, and was announced in the constitution of the Coronation Sejm in

[730] Makiłła sums up this distinction between these procedural, constitutionalist contributions of the Henrician Articles quite nicely:

"Przyjmuje się ponadto, że Artykuły henrykowskie, przyjęte w sposób właściwy dla ustaw, będąc formalnie ustawą wieczystą, od strony materialnej miały również charakter ustawy konstytucyjnej, co znajdowało dodatkowo odzwierciedlenie w sformułowaniu zawartym w przywileju nadanym przez króla Henryka (articuli seu leges). Fakt ten potwierdzać miałoby stosowane wobec tych aktów także pojęcia statutów i konstytucji, zastrzeżonych właśnie dla uchwał sejmu walnego, co wskazywałoby na celowe działanie twórców Artykułow, zmierzających do nadania Artykułom statusu ustawy. Pojęcie łacińskie articuli użyte zostało więc wyraźnie w stosunku do Artykułów w potwierdzeniach królów Henryka Walezego i Stefana Batorego, podczas gdy do paktów stosowano pojęcie conditiones, czyli warunków, na jakich miało się odbywać wykonywanie władzy, ale przede wszystkim warunków, na jakich miało dojść do objęcia władzy przez elekta. Tym samym można uznać, że Artykuły henrykowskie jako ustawa, przeprowadzona wprawdzie w sposób okrężny i wydłużony do kilku postępujących po sobie czynności, niemniej w drodze procesu legislacyjnego, posiadała znaczenie konstytucyjne w ustroju Rzeczypospolitej.

Konstytucyjny natomiast charakter ówczesnych Artykułów henrykowskich jako aktów prawnych wynikał nie tylko z zastosowania formalnego trybu, w jakim je uchwalano, lecz przede wszystkim z funkcji, jaką akty mające charakter konstytucyjny spełniały w praktyce. Akty, w wyniku których dochodziło do zmian w ustroju, względnie pod wpływem których dokonywano zmian bądź interpretacji prawa, ważnych dla ustroju, zawarte były istotnie w konstytucjach. Podejmowano je w trybie utrwalonym tradycją, a więc w drodze uchwalenia ich przez sejm," *Artykuły henrykowskie,* pgs. 360, 362-363.

> 1576. Thus, from the very beginning, the Henrician Articles had, in terms of the legal forms of their appearance, a complex character, changing in the course of its acquiring legal force, just as they were limited in scope in their content.[731]

Perhaps the easiest way to summarize the Henrician Articles is that they were some kind of bridge between the Medieval period and the modern period, a kind of quasi-constitution, relative to the understanding that emerged in the 18th century.

This distinction between constitution and constitutionalism is important for us and broadly align with what Makiłła refers to as the distinction between "acts of a constitutional nature" and functionally "constitutional acts", as revealed by Makiłła's reflection upon the Henrician Articles:

> In this state of affairs, the Henrician Article were stuck in the middle between acts that are primarily formal and partially ideologically like other acts specific to the late Middle Ages, while functionally and partly ideologically they were already acts of a constitutional nature. Externally, they were formed in the form of a privilege, while functionally they were already a constitutional act, i.e. a *konstytucje*.[732]

A textualist examination of the acts themselves will be the easiest way to substantiate these claims: not only is there such a distinction between constitutionalist, constitutional, and statutory components of the system that the Henrician articles contributed to, but that these elements are firmly rooted within their historical context in a clear constitutional continuity.

I. Henrician Articles and Pacta Conventa as Reflection of 16th Century Constitutional and Political Reform: Textual Evidence

Perhaps the clearest way to consider the Henrician Articles is as something of a culmination of the executionist movement, which itself encapsulates the 16th century struggles between the *szlachta*, the *magnaci*, the Church, and the king. Though there is some structure to the Articles, they are not organized by principle or coherent constitutional theory, such as the 1789 US Constitution, and the 3 May 1791 Constitution being broken down into specific subsections that each pertain to a specific branch of government. Due to this, the Articles are somewhat difficult to read, with each individual article sometimes containing a broad array of provisions touching on multiple subjects of constitutional interest. As such, they will not organized according to any external ordering but will instead be presented in the order one reads them in the document,[733] with each article's text then categorized

[731] Makiłła, "*Artkuły henrykowskie* (1573-1576). *Zakres wprowadzanych zmian*", pg. 157.
[732] *Ibid.*, pg. 401.
[733] The full translation may found at, *Henrician Articles*, The Polish History Museum, Warszawa: *The Legal Path of Polish Freedom*. https://polishfreedom.pl/en/document/the-henrician-articles. [Accesed June 21 2021]. It is important to note that there have been multiple versions of the Henrician Articles with some inconsistencies between the versions. The first version was presented to Henry himself on May, 12 1573. However, there was a second version published for the punlic register of Warszawa on May 20th of that same year. There were other versions produced in September of 1573. There was also the version given to Bathory in 1576 and then the one that was published in that same year after his coronation. Much of the difficulty is that many of the separate versions of the Henrician Articles come from the private collections of prominent *szlachta* families throughout

according to the archetypes that we have employed throughout our analysis. In keeping with the theme of respecting the complexity of 16th century Polish-Lithuanian constitutionalism, several constitutional outcomes may have multiple corresponding archetypes. Afterward, a fuller discussion shall proceed, highlighting the importance of each article and attempting to answer the question of how and why each one emerged. It is beyond both the scope of the author's competence as well as the constraints of this work to address each and every article with the attention they deserve, though all will be addressed. Similarly, while the Articles presented here are the original text, many have been abbreviated for conciseness. Tables 3.12 through 3.17 inclusive present the Henrician Articles.

that time period before the *Volumina Legum* reproduced the Henrician Articles when it was printed in 1732 and then it was reprinted in 1859. The particular version used here comes from May 12, 1573. For a more detailed discussion on the various versions and some nuanced differences between them, see Makiłła, *Artykuły henrykowskie*, pgs. 13-18.

Table 3.12 Enumeration of Constitutional Archetypes in the Henrician Articles 1-3, May 12, 1573

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
1	That during our lifetime, we and our descendants […] shall not nominate, or elect, or present in any shape or form no matter how conceived, a king, and place him as our successor upon the State, and this for the reason that always and for time eternal after our demise, and of our descendants, the free election [of the monarch] may remain	Confirmation of Free Elections of Polish-Lithuanian Kings	Representation, Participation, and Citizenship	Ontology
			Consent and Legitimacy	
			Decision-Making	Epistemology
2	[C]ertain citizens of the Crown, mindful of the threat of seditions and tumults that may give rise to schism or discord in religion, have stipulated among themselves by a singular *Konfederacja* that in this respect, as concerns religion, they should be preserved in peace. This [*Konfederacja*] we promise to uphold in peace, for time eternal.	Religious Toleration Established	Legal Sources	Ontology
			Enumeration of Individual Rights	
3	[T]he sending of legations to foreign countries, and the hearing and dismissing of foreign legations, also the gathering or accepting of certain armies and soldiers, we and our descendants are to commence no such thing, or do so, without being counselled by the Crown Councils of both the nations, violating in no wise matters belonging to the Seym.	King cannot Make Foreign Policy without Senat's Consent	Horizontal Organization of Institutions	

The beginning of the Henrician Articles is organized naturally and logically, laying out clear foundations for the system as well as bridging the constitution with previous legal and political events. Chief among these two is that it acknowledges the process of elective kingship and the Konfederacja Warszawska. The *szlachta* were very concerned that the contractual nature between their interests and the candidacy of future kings be preserved. It also explicitly banned the practice of *vivente rege* elections so as to prevent another situation with Zygmunt I and Zygmunt II August. This is consistent with the fact that raising the Jagiellonian heirs to the throne had always been technically by election, though the process was more or less automatic with no rival claimants being accepted while the dynasty ruled. Furthermore, in situations where a king died without heirs, the first natural candidate was to a younger brother. Thus, while the kingship was technically elective, it was essentially dynastic.[734] This largely unspoken agreement had only been violated by Zygmunt I with the *vivente rege* election of his son and was one of the main points of contention between the *szlachta* and the last two Jagiellonians, fueling the same fire that led to the executionist movement. The beginning of a new dynasty was certainly uncertain and the *szlachta* were concerned about Henryk bringing ideas of a stronger French monarchy.

Similarly, the Konfederacja Warszawska was a struggle to maintain the ties between the Kingdom of Poland and the Grand Duchy, continue legal and political practices whenever possible throughout the interregnum, as well as to acknowledge religious freedom and diversity. It was explicitly recognized in the second article that religious discord may easily translate over into political problems, e.g. "seditions and tumults". While this had always been a looming threat during the process of the Reformation and Counter-Reformation, the Jagiellonians had avoided it by compromising with the executionist movement and the Protestant and reformist Catholic *szlachta* to prevent the Counter-Reformation from leaving as strong of an imprint as in other countries in Europe in the same period. This culminated in the Konfederacja Warszawska, which established the Rzeczpospolita, stipulated for an elected king, and asserted the rights of the *szlachta* to freedom in religion as well as unfettered political participation. The Konfederacja Warszawska was explicitly legitimated by the second article.

The third article addresses issues of foreign policy, such as dealing with foreign emissaries as well as accepting possible foreign troops. It also explicitly deals with the question of the king gathering—presumably—domestic troops, hence the distinction between "gathering" and "accepting" in the text. While the preselection agreement between France and Poland-Lithuania explicitly mentioned that French military aide would come in case of war between the Commonwealth and Muscovy or the Ottomans, the *szlachta* wisely feared a foreign king looking for possible pretenses to invite foreign armies onto domestic soil. While this had largely been avoided by the Jagiellonians, there was great tension and pressure from the Habsburgs to ally against the Ottomans. While the Jagiellonians had generally managed this tension successfully, keeping Poland out of any large-scale wars wherein Polish-Lithuania soil was ever threatened, the *szlachta* did not want to leave this to chance and imposed a rule that all foreign policy as well as the management of the army had to be done with the express permission of the Senat.

[734] Bues, "The Formation of the Polish-Lithuanian Monarchy," *passim*.

Table 3.13 Enumeration of Constitutional Archetypes in the Henrician Articles 4-6, May 12, 1573

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
4	As regards war or a levée en masse, we are not to commence anything without the Seym's consent from all the Estates, nor are we and our descendants the Kings of Poland to lead the Crown Knighthood beyond the Crown borders of both the nations as war-time custom has it […]And if we, with consent of all the Estates, be willing to lead our subjects beyond the borders, and they having voluntarily consented with us to do so: then, per each of the mounted knights separately, no person excluded, including dismounted gentrymen under the duty to serve at war, we shall give them prior to our setting-off from the borders five grzywnas each […] And if we have not moved them beyond the borders within two weeks, then they shall no longer be obliged to stand by us any longer.	Power to Declare War Given to the Seym	Horizontal Organization of Institutions	Ontology
		Wars Are to be Mainly Defensive, but to Go Beyond the Borders of the Nation Requires the Consent of the *Szlachta* for a Period of Up to Two Weeks and at the Personal Expense of the King.	Purpose of the State	Teleology
5	The Crown frontiers of both the nations and of all the States belonging to the Crown, obliged we are and shall remain, and so too our descendants, to provide with defense against the incursion of any enemy, bearing the expenditure upon ourselves, and keeping the quarter [kwarta] in force according to the Polish statute.	King Has the Responsibility of Common Defense	Horizontal Organization of Institutions	Ontology
		King and the Quarter (*kwarta*) pay for the Common Defense		

6	Therefore, we and our descendants are not to establish anything on our own authority, but instead are most diligently to endeavor that we bring all into unison, considering all the arguments which prove to be in accord with the law, and common liberties, and for the greater benefit of the Rzeczpospolita, and [discarding those] which do not prove to be in accord with the freedoms, laws, and liberties as bestowed to all the States. And if we be unable to bring all to a single and concordant opinion, then our conclusion shall be that which most adheres to the liberties, laws, and customs, according to the laws of every land and the good of the Rzeczpospolita.	The King is to Build Consensus within the King's Council		
		When Consensus Cannot be Reached, the King Interprets Law Narrowly	Decision-Making	Epistemology

The next three articles continue the theme of the Seym constraining the executive power. Article Four specifically limits the power of the king to raise an army as well as to lead that army beyond the borders of the nation without the expression permission of the Seym. Notably, it mentions "the Seym's consent from all the Estates" (*pozwolenie seymowe wszech stanów*), suggesting that the Seym was already becoming identified with the collective will of the political nation. This particular article gave the power to declare and manage war to the Seym. This latter position was consistent with the just war theory developed as part of Polish humanism and political doctrine, which was in constant tension with the expansionist policies of the Jagiellonian monarchy in the Baltic. It should be remembered that—with great irony—it was the policies of the Jagiellonian monarchy that gave the *szlachta* much of their rights, as they would only grant military and financial support for these external campaigns in exchange for the guaranteeing of their rights. Once the *szlachta* had reach sufficient political self-awareness, they realized that they did not have to continuously give their consent for military affairs in exchange for their rights: they could simply take the power to wage military affairs themselves.

The fifth article combines the themes of giving the Seym the power to raise and manage taxes as well as the Seym having the power to determine military affairs.[735] It declares that the king's duty was to oversee the defense of the border. Even further, the king was to not only oversee said defense, but also to *provide* for the defense with his own funds. It also concludes by making the *kwarta* permanent. The fifth article thus brings about the project of the executionist movement to make the king actually respect the *kwarta*.

Article six organizes the power between the king and his Council, specifically concerned with political decision-making. It defines the king's parliamentary role as trying to build consensus in his Council when a decision needs to be made. This is significant because it subtly shifts the king away from being a source of legislative power to instead being more dependent on a collection of advisers, whose opinion he was to mediate. [736] Shifting the king's role from an active policymaker to a passive coordinator of the senators would naturally be more representative of the interests of the whole political nation. When such a decision cannot be made, the default position is for the king to support as narrow an interpretation of the law as possible, again taking into consideration the good of the Rzeczpospolita. Article 6 is particularly important in that there is a weakening of the king's ability to interpret the law, which is shared with the same, whereas the execution and judgement of the law had both been the king's prerogatives. This clearly weakened the king's power as well as more precisely defined it within the Council. They are also important because they assert that—though not in these express terms—*lex est rex* in the sense that when a decision cannot be made, past legal decisions are to be adhered to. This served the purpose of not only instructing the king on what to do, but also of stabilizing constitutional continuity and harkens back to *Nihil Novi.*

[735] Makiłła, *Artykuły henrykowskie*, pgs. 188-192.
[736] *Ibid*, pgs. 177-178.

Table 3.14 Enumeration of Constitutional Principles in the Henrician Articles, 7-10

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
7	[W]e hereby establish, and will it to be everlasting law, that for each General Seym, instituted and nominated be sixteen persons from the Councils of the Crown, from Poland as well as from Lithuania and the other states belonging to the Crown, this being conveyed to all the estates, to the other Crown officials, Polish and Lithuanian alike, who would continually be with us, honoring the person of our majesty and common liberty, without the counsel and advice of whom we and our descendants are to do nothing.	Establishment of a Permanent Body of Senatorowie Rezydenci	Horizontal Organization of Political Institutions	Ontology
8	The designation of these Senators at the Seym is to include 16 persons concurrently, four for each half-year: one from the Bishops, the other from the Wojewody, and two from the Castellans; in the order that they sit at the Council.	Membership of the Senatorowie Rezydenci		
9	The General Seym of the Crown is to be convened within two years at the furthest, and wherever there be urgent and dire need of this for the Rzeczpospolita, then upon the advice of the Lords of both the states, as the time and need of the Rzeczpospolita may require, we shall therefore convene it, and shall conduct it no longer than up to six Sundays at the furthest.	Regular Term and Duration for the Seym Determined Emergency Seymy Possible	Frequency and Length of Parliamentary Sessions	Epistemology
10	We also promise by our solemn word that we and our descendants shall not use any signet-ring nor any individual seal in matters resting with the Rzeczpospolita, whether within or without, as the only [valid such] are the Crown seals that are with the chancellories and the vice-chancellors, Polish as well as Lithuanian	Separation of King from the State	N/A	N/A

The next three articles generally touch upon the Seym and how it is organized. Article Seven and Article Eight created a permanent body of advisers to the king, consisting of sixteen persons from across Poland-Lithuania. Without these persons, the king was not to take any actions. This was the culmination of a long-term process throughout the 16th century to actually make the king held accountable to a permanent institution—the Senatorowie Rezydenci. The idea that a permanent institution was needed to hold the king to account was floated around throughout the executionist movement and became a serious idea during the interregnum.[737] Such an institution had never existed during the history of the Rzeczpospolita, and it was the Henrician Articles that specifically detailed how it was to be composed.[738] However, the Henrician Articles did lack a mechanism to ensure that the king actually followed the advice of this body, nor did it describe any consequences if the king refused to listen to his advisers or came to a different conclusion than they did. Thus, the check on the king's power by the formal body was symbolic and generally passive.

Article Nine establishes the regularity of the Seym, which was to meet once every two years or whenever an emergency situation would arise for up to six weeks. This was a serious change to the previous system, wherein Zygmunt I and Zygmunt II August would sometimes go for years without calling a Seym, particularly if the king and the *szlachta* had a serious disagreement. That it could also be called for emergency situations upon the consent of the *szlachta* was necessary. Again, the wording lacks a strong positive character to compel the king to act, because these Seymy were still called "upon the advice of the Lords". The prerogative for calling Seymy was still up to the king, who could—theoretically—refuse the demands of the *szlachta* to call a Seym during emergencies. As the text notes, "we [the king] shall therefore convene it, and shall conduct it". Despite these ambiguities and lack of positive enforcement mechanisms, it was still an improvement over the old system where the calling of Seymy was an *ad hoc* process.[739]

Article Ten was yet another instance of separating the king from the state, with the

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[737] Makiłła, *Artykuły henrykowskie*, pgs. 218-221.

[738] *Ibid.*, pgs. 219-221, 228.

[739] "Podsumowując problem zwoływania sejmów, sformułowany w ósmym punkcie Artykułów henrykowskich, należy podkreślić, że było to rozwiązanie, które w sposób nowy regulowało istotny problem organizacyjny funkcjonowania sejmu. Sejm był już wówczas trwałą instytucją ustroju Rzeczypospolitej. Nie unormowany jednak ustawowo był sposób jego działania, w tym tryb powoływania, który nadal pozostawał oparty na rozwiązaniach zwyczajowych. Stuacja ta była korzystna dla dworu królewskiego, nie zainteresowanego zmianami, pozwalającymi – jak pokazywała to praktyka rządów ostatnich Jagiellonów – na samodzielne działania ze strony króla. Wprowadzenie więc do Artykułów henrykowskich, w okresie bezkrólewia rozstrzygnięć, które nie tylko, że gwarantowałyby ciągłość jego działania, ale ustalałyby zasady i warunki jego zwoływania, stanowiło wyraz zdecydowanej świadomości projektodawców artykułów. Stanowiło również dowód ich dbałości o prawidłowy stan funkcjonowania najważniejszej dla narodu instytucji polityczno-ustrojowej. Dokonując jednak unormowania kwestii zwoływania sejmów, projektodawcy tego rozwiązania nie ustrzegli się przed stwierdzeniami nie do końca doprecyzowanymi, pozwalającymi na dokonywanie różnych interpretacji. Dotyczyło to przede wszystkim wprowadzenia obowiązkowego terminu zwołania sejmu. Rozwiązanie zastosowane przez projektodawców Artykułów odnosiło się w zasadzie jedynie do kwestii częstotliwości i procedury zwoływania sejmu oraz okresu jego działania. Formułując bowiem sprawy porządkowe, w praktyce wprowadzono zasadę ustrojową, dotyczącą funkcjonowania najwyższego organu władzy. Nie precyzując bezpośrednio problemu odpowiedzialności za jej wykonanie, w rzeczywistości wiązano tę zasadę z monarchą," *ibid.*, pg. 247.

king only able to use the official seal when conducting state business, rather than a personal one.

Table 3.15 Enumeration of Constitutional Archetypes in the Henrician Articles, 11-15, May 12, 1573

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
11	The crown offices of both the nations must be preserved in entirety, thus we shall neither obstruct nor repress the courtly offices; but indeed, to solid and worthy people of merit, of both the nations, and not to foreigners, shall [such offices] be given whenever they are vacant.	Preservation of Polish and Lithuanian Institutions	Horizontal Organization of Institutions	Ontology
		Foreigners Barred from Office	Representation, Participation, and Citizenship	
12	So that there be no doubt whatsoever concerning the gentry's lands, they must always remain free, with all the benefits which might ever emerge in those lands, as shall their ores of all sorts, and salt orifices, and we, and our descendants, shall not forbid their free use for time eternal.	*Szlachta* Have Free Use of Resources on their Lands	Enumerated, Individual Rights	
13	We also promise that we shall not admit any exposition or argument from an alien law so that the tributes from our ancestors' estates, bestowed under hereditary law, might be considered as naught; for so it is that they were expressly bestowed under feudal law.	Rejection of Foreign Sources of Law	Sources of Law	
14	The *starosty* [i.e., sheriffs] of frontier and court castles and of the main cities, and also those main cities that have no starosta, are to swear to the Kingdom and the King; that during any interregnum they shall not discharge the castles and cities to the	Frontier to be Managed During the Interregnum	Horizontal Organization of Institutions	

	detriment of the Rzeczpospolita, and to none other than the King who has been freely, and upon the consent of all, elected and crowned, on pain of death and loss of noble rank and property.		Purpose of the State	Teleology
15	The Crown of the Kingdom of Poland must be kept at the Crown treasury in Cracow by the Lord Treasurer of the Crown, under the seals and keys of the senators and the Castellan of Cracow and of Troki,.	Separation of King from the State	N/A	N/A

Whereas the earlier sections contained some organization, the next five articles do not hold to any real pattern. Article Eleven acknowledges separate offices for both the Crown and the Grand Duchy. They are to be staffed with "worthy people of merit" from their respective nations, and not to foreigners. The exclusion of foreigners was compatible with the executionists and other reformers' demands, which was for local persons to take care of the local offices, as well as to not have foreigners to these offices. With Henryk being a foreigner, a certain part of the *szlachta* distrusted him. While being a foreigner was useful to the Commonwealth in that he was a neutral party and also a weak king, reliant upon his advisers and the Seym, it also led to dangers of foreign intervention as well as to the adoption of a political culture that the *szlachta* would disapprove of. The Eleventh Article addresses both of these concerns.

The Twelfth Article specifically addresses the *szlachta*'s freedom in the management and ownership of their private land. Accordingly, whatever natural resources were found in those lands were to be used at the discretion and pleasure of the local owner, rather than the will of the king at the time. This free usage of resources was a demand of many 16th century reform movements as power shifted back to the local level.

The Thirteenth Article concerns the sources of law. The king promises to not accept any "exposition or argument from an alien law" that would explicitly contradict any of the hereditary rights and ownership under the Polish-Lithuanian feudal system. 16th century Poland-Lithuania was a complex overlap of multiple legal systems, jurisdictions, and property rights.[740]

The Fourteenth Article concerns the management of court castles and cities during times of interregna, wherein they shall be managed only for the good of the Rzeczpospolita, and only for the king who is freely elected upon the consent of the whole *szlachta*. This article is significant for it separates the personage of the king from the kingdom with the phrase "to swear to the Kingdom and the King". This implies that the Crown properties that are nominally owned by the king in reality belong to the Commonwealth, and are only entrusted to the king, who then distributes them. The *szlachta* who manage these estates are to be remember that they do not own them, and they manage them on behalf of the common good. This is clearly a continuation of many themes throughout 16th century reform movements, in that property management of public property is to be done for the common good, and that those who manage such lands are to be reminded that they do not own them. That this continues even during the times of interregnum only reinforces the independence of the Rzeczpospolita as that which endures beyond the reign of kings.

The Fifteenth Article again addresses the separation of the king and the state, with the Crown of the Kingdom of Poland to be kept by the Crown treasury and the Lord Treasurer. It is not the personal property of the king.

[740] *Supra* n. 313, 314, 317.

Table 3.16 Enumeration of Constitutional Archetypes in the Henrician Articles, 16-18, May 12, 1573

<table>
<tr><th>Article #</th><th>Text</th><th>Outcome</th><th>Constitutional Archetype(s)</th><th>Constitutional Archetypes-as-Such</th></tr>
<tr><td rowspan="2">16</td><td rowspan="3">Certain countries of the Crown of Poland have ascribed common judicial justice to themselves, taking it from the royal person; which we permit them to do, and shall not inhibit, with the addition that others who should also will to so establish at their place, are always to be permitted, and this amendment must be free upon their joint permission. And, should they wish to have it placed upon our royal person, then we shall place it upon ourselves, we and our descendants. And similarly, also the Lords Councils, and all the estates of the Grand Duchy of Lithuania</td><td rowspan="2">Both the Kingdom and the Grand Duchy have the Right to Establish and Retain Local Courts</td><td>Hierarchical Organization of Institutions</td><td rowspan="3">Ontology</td></tr>
<tr><td rowspan="2">Horizontal Organization of Institutions</td></tr>
<tr><td>17</td><td>The Senat has the to Raise, Create, and Collect Taxes</td></tr>
<tr><td></td><td>We stipulate, in particular, that we shall not raise or establish any taxes whatsoever, nor collections upon our royal names, and of the clerical councils, also new custom-duties on our cities, in Poland and in the Grand Duchy of Lithuania, and in all our Lands belonging to the Crown, unless with the consent from all the Estates at the General Seym; neither shall we establish or admit the monopolies on these things which come from the states of the Crown, both Polish as well as Lithuanian ones.</td><td>Monopolies Cannot be Established by the Crown without Consent of the Estates</td><td></td></tr>
<tr><td>18</td><td>And, since there is much that is conditional upon our marriage for the good of the Rzeczpospolita, we hereby promise and pledge, for ourselves and for our descendants, the Kings of Poland, never to ordain or undertake anything concerning our marriages, against the notice and assent of the Crown Councils of both nations […] we shall seek no opportunities for living outside marriage, or for divorce, whatsoever.</td><td>The King’s Marriage Under the Purview of the Crown Councils of Both Nations</td><td colspan="2">International Affairs of the Rzeczpospolita</td></tr>
</table>

The next three articles follow broad themes of distinguishing hierarchical and horizontal organizations of political institutions in the Commonwealth. The Sixteenth Article acknowledges that several local jurisdictions have taken up providing justice for themselves, whereas this right would normally be held by the king. The king officially acknowledges and allows this devolution of judicial power and court organization, while announcing that other jurisdictions may choose this same action whenever. As we shall see in the following section, this was a step toward the development of the Trybunał Koronny (the Crowin Tribunal) in 1578. However, the king always retained the possibility for those jurisdictions to return to his management, should the local jurisdictions choose to transfer that power back. This is important because it is essentially acknowledging *konfederacje* and the Konfederacja Warszawska and is a rare moment in comparative constitutional history wherein a higher level of government is acknowledging devolution of its powers to subsequent units without the higher-level government initiating a process of decentralization.

The Seventeenth Article refers to the horizonal organization of political institutions, giving the Seym power to "raise and establish any taxes whatsoever", and forbidding establishment or formation of any monopolies, unless their was consent given by the Seym. This was compatible with the executionist movement's goals to remove or minimize the king's ability to wield fiscal power, while at the same time guaranteeing economic freedom throughout the Commonwealth. The Eighteenth Article specifically addresses the king's right to marriage, which had to be approved by the Seym. Sexual relations outside of marriage and divorces both prohibited. This not only secured questions of succession, but also prevented any undesirable political alliances.

Table 3.17 Enumeration of Constitutional Archetypes in the Henrician Articles, 19-21, May 12, 1573

Article #	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
19	All of the conditions, proposed and strengthened in our name, by the envoys of His Majesty the French King, we shall all fulfill and do solemnly vow to uphold.	The King to Uphold his Preselection Oaths	Sources of Law Consent and Legitimacy	Ontology
20	All of what might else ever be proposed to us upon the coronation, of their liberties and rights, by the Crown Estates of both the nations, we do accept and are obliged to accept, and to vow, confirm, and hold eternally for time evermore, we are obliged to fulfill and do vouchsafe, upon our faith and our oath, on our word, and do promise, and confirm, for time eternal.	The King to Uphold the Pacta Conventa and Other Obligations Upon Coronation		
21	And should we (God forbid) trespass against the laws, liberties, articles, or conditions, or fail to fulfill them, then we shall render free the Crown citizens of both the nations from the obedience and loyalty owed to us.	Legitimation of Rebellion if King Violates the Law	Legitimate Processes of Constitutional Change	Epistemology

In the Nineteenth Article, the king simply promises to uphold all of the promises that Henryk's representatives made when seeking the Crown.

The Twentieth Article was Henryk's promise to uphold any other proposed amendments, changes, or amendments of rights by the *szlachta* before his coronation.

The Twenty First and likely most important of all the Articles specifically sanctions the act of rebellion against the king should he violate any of the Henrician Articles. It is enormously important that it refers not only to breaking the laws or the Articles, but also "fail[ure] to fulfill them". This meant that the king would not only be held to account for what *he did*, but also what *he did not do*.

When juxtaposed with the other acts, the Nineteenth Article is an acceptance of the promises that Henryk himself proposed and were accepted by the *szlachta*; the Twentieth Article yields political self-determination of rights to the *szlachta*, not at any moment in time, but throughout the king's reign; the Twenty First Article outlines the consequences should the king not uphold his promises or violate the law. However, what would constitute a violation? What was the precise meaning of the phrase: "then we shall render free the Crown citizens of both the nations from the obedience and loyalty owed to us"? Did it mean open rebellion? Abdication and exile? As we shall see, the rest of the long 16th century essentially concludes by working through these very questions.

VII. The Trybunal Koronny and True Separation of Powers

The period of 1563-1578 was one of largely strengthening state institutions, during which period the Seym rose to power as the main body for reaching consensus as well as balancing the parliamentary states and the diverse political groups throughout the nation. It is important to remember that these ideas and practices were not new within Poland-Lithuania, since in the 14th and 15th centuries the *szlachta* were actively participating in courts at the regional level but had largely taken a more passive role during the Jagiellonian dynasty. The apex of the royal control of the judiciary came after the 1523 *Konstytucje Processus*, which made the royal court the regular court of appeal.[741] By the mid-16th century under Zygmunt I it became clear that this system had broken down, with the courts poorly managed and overworked, as with other institutions of governance at that time.[742] To relieve this burden, throughout the 16th century Seym courts were added wherein the king selected some senators to intervene on his behalf, or sometimes the king and one or both chambers of the

[741] Makiłła, *Artykuły Henrykowskie*, pg. 307.

[742] "Under the cover of the "golden" age, Polish society hid a painful and deep wound in its bosom. If we wanted to find even a bit of an exaggeration in the complaints of our contemporaries, it is certain that these complaints, to a large extent, were not without reason. Legal security had collapsed, the knots of order had loosened, and the Polish state found itself faced with the sad necessity of admitting the fact that it could not do justice to its first task, the maintenance of regular justice. There was no ill will on the part of those appointed to fulfill this task; there was only the simple, necessary consequence of a given judicial organization." Balzer, *Geneza trybunału koronnego*, pg. 106. See also: Pudłowska, *Historia ustroju i prawa polski: w pigułce*, pg. 79.

Seym would serve as a special court. This was particularly important whenever there were interregional disputes or claims were made against the king himself.[743]

The first signs of series, constitutional reform began in the 1540s, partly inspired by Orzechowski's 1543 brochure *Fidelis subditus sive de institutione regia*.[744] In it Orzechowski argued for a separate court, but while he offered a sophisticated critique of the current system, his proposal was light on positive reforms. It is difficult to say the exact impact that it had as well as when it made its way into the political discourse, given that judicial reforms were not addressed at the 1548 Seym at all. The idea increased in popularity among the *szlachta* and was opposed by Zygmunt I and his allies, but as the king declined during his long reign other affairs arose that took precedence.[745]

Orzechowski was not alone in calling for such changes. Przyłuski advocated for three supreme organs of power: the king, the Seym (which was both a legislative and a judicial body) and the Senat so that no one of them held complete authority over the other.[746] His system was organized both hierarchically as well as horizontally, with the position of the Church and the regional bodies below the king, the Seym, and the Senat.[747] Andrzej Frycz Modrzewski agreed with many of his ideas, and addressed them more systematically, such as creating a system of rotating judges to avoid any one family or political faction receiving too much power.[748] He wanted the judges to be chosen by lot from a pool of candidates representing all the provinces. An odd number was specifically chosen so that it would have to rely on majority vote and that the possibility for tiebreaks always existed. He also wanted the judges to be salaried out of funds set aside by the Seym from taxes on the Church. The court would also be sustained by court fees. The judges were to be highly qualified, well-educated in law and well-trained, rather than just appointments based on personal friendships or connections. Judges should not receive any other material benefits beyond their public finds and should take an oath of loyalty to the state. Judges should have their positions revoked and be subject to criminal sanctions including up to the death penalty if fraud and bribe were proven against them. He created an organizational chart to completely restructure the judiciary, which was partially realized when the Trybunał Koronny (Crown Tribunal) was established in 1578.[749]

At the 1563 Seym the *szlachta* had largely split into two groups. The first group did not want to make any reforms because the position of the king as the supreme judge allowed him to decide in cases between two *szlachcice*, who were nominally equal before the law and thus unable to judge amongst themselves. The power of the king was thus intimately connected with the principle of *szlachta* equality. The second group advocated for a one-time grand court at a Seym wherein the *szlachta* would make systematic changes.[750] In terms of

[743] Makiłła, *Artykuły Henrykowskie*, pg. 305-306.
[744] *Supra*, n 674.
[745] Makiłła, *ibid*., pgs. 111-115.
[746] Dorota Pietrzyk-Reeves. 2020. *Polish Republican Discourses in the Sixteenth Century*. Cambridge University Press: Cambridge, pg. 215; Makiłła, "O doktrynalnych źródłach konstytucjonalizmu", pgs. 41-43.
[747] Makiłła, "O doktrynalnych źródłach konstytucjonalizmu", pgs. 42-45.
[748] Ziętek, *Koncepcja ustroju państwa*, pgs.87-88.
[749] *Ibid.*, pgs. 86-88.
[750] Balzer, *Geneza trybunału koronnego*, pg. 141.

modern constitutional understanding, this could perhaps be thought of as something close to a constitutional convention. Due to the staunch opposition of the king and the *szlachta* being unable to find consensus, the 1563 attempts at judicial reform failed. However, they were critically important for the development of 16th century Polish-Lithuanian constitutionalism.

> The courts of 1563 form an important symptom in the history of efforts to reform Poland's highest judiciary. In themselves they did not constitute a reform, they were only a transitional institution; but they had the great significance that for the first time they realized the idea of creating a supreme instance without the participation of the king himself, that for the first time they broke the cardinal principle on which the previous Polish judiciary had been based. None of the earlier drafts, from the time of Sigismund Augustus, nor the ordinance of 1553, dared to settle this question so single-mindedly and firmly. For the thought of a thorough and lasting reform, this was already a triumph of incalculable importance.[751]

Within two years reforms were already underway, with the 1565 Seym convening a parliamentary court involving the entire Seym,[752] though both the 1563 and 1565 reforms proposed for this higher judiciary to only have an appellate function. Over the next two decades this gradually shifted, with reforms in the judiciary following the broad theme of the *szlachta* reclaiming the power that they originally had. Bearing in mind the strong classical republican influences at that time, the *szlachta* were making a concentrated effort to build their society around the concept of *mixta monarchia* or *mixtum imperium*.[753] As we have observed, much of this debate revolved around the role of the law and of the organization and management of the judiciary. In fact, the interregna had concretely demonstrated how difficult maintaining such a balance truly was in practice, with the law, the king, the Seym, the nation, and the *szlachta* all vying to take the place of sovereign.[754] It also presented the opportunity to make serious judicial reforms.

As Balzer explains:

> At that time there was a conviction in Poland, which was not concealed at all, that an interregnum was the best time to extract concessions from the king; and since the question of the judiciary involved concessions of no small importance, therefore it was quite natural that it should be placed in the order of matters requiring the quickest possible resolution. And these are the reasons why, in the times closest to the death of Zygmunt August, the reform movement, mostly concentrated in the Chamber of Deputies, raises anew the question of justice.[755]

There was enormous risk to any process of judicial reform, with any potential reforms having the potential to create more problems than solutions. The Polish-Lithuanian system had multiple, glaring weaknesses such as the manner of election for the next king or the form of government that could function in his absence. The interregnum was a dangerous opportunity in that it was the easiest way to push through extensive reforms, given that there

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[751] Balzer, *Geneza trybunału koronnego*, pg. 156.
[752] *Ibid*., pg. 173.
[753] Szum, "Uniwersalizm relacji samorządu", pg. 22; Grześkowiak-Krwawicz, "Noble Republicanism," pgs. 41-42; Opaliński, "Civic Humanism", pgs. 156-160, 164-165; Maria Ohla Pryshlak. 1981. "'Forma Mixta' as a Political Idea of a Polish Magnate: Łukasz Opaliński's 'Rozmowa Plebana z Ziemianinem.'" *The Polish Review* 26(3), pg. 27.
[754] Balzer, *ibid*., *passim*.
[755] *Ibid*., pg. 192.

was no king to oppose them. Thus, the *szlachta* only had to find consensus amongst themselves and then convinces the majority of the senators to make reforms. On the other hand, making such reforms in the period without a legitimate, ultimate authority threatened to undermine any reforms that were made, because they may not be accepted when all the dust settled. There was very real danger that if too many changes to the system were made at once then each individual reform would not have had the full attention that it deserved, and any poor reforms made in haste could be worse than the status quo. As Balzer explains, "too much haste in dealing with the matter could have had a detrimental effect on the positive value of the intended work, twisted the fortunes of the new institution and caused harmful consequences in the future."[756] Putting it another way, there was the real risk that the move to divorce the legislative power from judicial power was directed by political motivations of the *szlachta*, rather than any coherent constitutional principle.[757]

At the level of constitutional principles, one result of this process was the clarification and distinction of the interpretation of the law, the creation of the law, and the execution of the law. Under much of the Jagiellonian system, the king performed all three functions to a certain extent, given how strongly linked the king was with the Senat and the king's role in conducting the legislature. While this function is reminiscent of the British monarch opening parliament today, it should be stressed that the king in Poland-Lithuania's role was much stronger, rather than performing a symbolic function. The so-called "propositions from the throne"[758] were never addressed in the Henrician Articles.[759] Despite this, one of the achievements of the executionist movement and 16th century reform was to take away the king's ability to interpret the law. Instead, it was the *szlachta* who had the right to interpret the law in order to determine whether the king was following his commitments and retain the right to rebel if he was not. When there was ambiguity, the king was to follow precedent and narrowly interpret of the law.

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[756] Balzer, *Geneza trybunał koronnego*, pg. 185.

[757] "If the *szlachta* succeeded in acquiring such extensive judicial power, then it could rightly expect to gain no small influence in the field of public administration, having in its hand, on the one hand, disciplinary power over all state officials, and on the other hand, jurisprudence in fiscal matters. As a result, the aim of the *szlachta* was to strictly separate the legislative and judicial functions (because we know that in recent times almost the entire royal judiciary was concentrated in the Sejm). This fundamental consideration was admittedly not a firm one for her; only political motives came into play here," *ibid*., pgs.184-185.

[758] "The proposal from the throne was not only a court, or more precisely a royal, political program, but also an asessment of the current situation of the country, both external and internal, an assessment seen from the perspective of the royal environment, and certainly different from the assessment of this reality by the *szlachta*. It was also a kind of report on the activities of the central governing bodies of the Republic of Poland, showing and emphasizing at the same time the accuracy of the ruler's actions. The chancellor who made this proposal therefore had an extremely important role to play, because he did not act in his own name, but represented the king. Thus, as the person closest to the ruler and presenting his position, he should be aware of the importance of the words he uttered.

"In such a speech, there was no room for presenting one's own position, much less for any, even the most delicate, criticism of the monarch. For the ruler himself and his closest political environment, it was important that the proposal was prepared at the highest possible level, with arguments reaching the participants of the Seym and delivered in such a form as to convince the nobility to the points contained in it. It was especially important to convince the parliamentary opposition, as it was largely dependent on its reaction and position what the course and effect of the session would look like," Korytko, "*Na których opiera się Rzeczpospolita*," pg. 115.

[759] Makiłła, *Artkuły Henrykowskie*, pg. 429.

This tension proves something of a constitutional dilemma: on the one hand the king retained much of his parliamentary powers but on the other he lost much of his ability to interpret law, leaving aside such matters such as management of the Crown lands, taking care of the Jews, foreigners, and other minorities, as well as over some criminal punishments.[760] The question arose: if the personage of the king was necessary as final judge as the only person higher than the *szlachta* who were all nominally equal before the law, then who was to be the executor of justice once the power to interpret the law was removed from the king? This was answered by the practical experience of the interregna and the necessity of courts acting without a king.

A relatively straightforward, intratextualist[761] reading of the Henrician Articles allows us to put these elements together coherently. The First, Third, Fourth, Sixth, Seventh, Tenth, Fifteenth, Seventeenth, Eighteenth, Twentieth, and Twenty-First Articles produce the principle that the king is not the highest authority in the land, but rather the *szlachta* held it collectively. The Second Article acknowledges and legitimizes the Konfederacja Warszawska, which, let us remind ourselves, established the principle that state institutions were distinct from the king and that it was the king's duty to protect the rights of the *szlachta*. Finally, the Konfederacja Warszawska acknowledged the *szlachta*'s rights to defend their privileges. The Sixth and the Thirteenth Articles put customary Polish-Lithuanian law as well as previous rights and privileges held by the *szlachta* beyond the powers of the king. This reinforces the principle that the king is not the final interpreter of the law. The Sixteenth Article produces the last important piece, namely that local provinces have the power to provide justice for themselves, should they choose to do so, which completely takes judicial power away from the king and gives it to the local level.

Thus:

1. If the king is not the final source of authority in the nation, but the *szlachta* collectively
2. Then the local Provinces have the purview of taking judicial power into themselves or returning it to the king at their discretion, with a few notable exceptions of the king's personal jurisdiction.

[760] These special privileges had remained beyond the reach of *Nihil novi* and largely remained so throughout the 16th century. See: Salmonowicz and Grodziski, "Uwagi o Królewskim", pg. 152.

[761] American legal scholar Akhil Reed Amar introduced the concept of intratextualism in a 1999 article. The main gist of the technique is to understand the meaning of a constitutional text by examining words or phrases used throughout and then comparing them together. Items that may be unclear in one section may become clear in another and comparing a text with itself may resolve some controversies in interpretation. While our intention is not to attempt to resolve a specific controversy in constitutional interpretation by examining the contest concept within multiple places within a single text, we do agree with the broad understanding that texts should be treated as if they have some internal logic, one that is ultimately reflective of the specific time and context in which they were written. For an extended discussion, see: Akhil Reed Amar. 1999. "Intratextualism." *Harvard Law Review* 112(4): 747-827; Robert Spoo. 2011. "No Word is an Island: Textualism and Aesthetics in Akhil Reed Amar's The Bill of Rights." *University of Richmond Law* Review 33(2): 537-578; Adrian Vermeule and Ernest A. Young. 2000. "Hercules, Herbert, and Amar: The Trouble with Interatexualism." *Harvard Law Review* 113(3): 730-777; William Michael Treanor. 2007. "Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights." *Michigan Law Review* 106(3): 487-544.

The answer to the question of who judges the law if not the king can only be a court established by the *szlachta* for the *szlachta*. This was presented to Stefan Batory as a condition for his kingship, but was in fact debated over the first few years of his reign.[762] While Henryk had accepted the idea of such courts in exceptional times only, with the courts' scope relatively limited to whatever the particular topic was at the time, Batory's terms had a much stronger court that would have extensive jurisdiction over the clergy, the merchants in the cities, state officials as well as the Crown's estates and income. Another significant contribution was the creation of a new kind of final appellate court (courts of *ultimae instantiae*) that would be independent of the king's power. These were proposed during the reign of the last two Jagiellonians and functioned during the interregnum in the Konfederacji to some extent.[763] Batory accepted the new, appellate court.[764]

After some pushback and negotiation, Batory was finally convinced that more judicial reform was needed. The 1578 Seym presented a radical new idea: a completely independent court and the Trybunał Koronny (Crown Tribunal) was established in Poland. Similar highest court changes in were made in Lithuania (1581).[765] An enumeration of Constitutional Archetypes in the 1578 constitution establishing the Trybunał Koronny are presented in Table 3.18. A discussion will then follow.

[762] Bednaruk, *Trybunał Koronny*, pgs. 58-63.

[763] "There are also attempts to create courts of second instance - courts of appeal, referred to in the sources as *ultimae instantiae* courts. This is a continuation of the discussion begun during the reign of the last two Jagiellons about taking the appellate courts away from the monarch. Courts of first instance, hitherto exercised in the name of the king by representatives of the *szlachta* but by his appointment, operated in the forms adopted by individual provinces and lands under the resolutions of the *konfederacja*. It also came to pass at the confederate conventions that a model for courts of second instance was worked out, ruling out the monarch's previous monopoly on appellate jurisdiction. Discussions held on the appellate judiciary during the first two interregna would bear fruit with the establishment of the Crown Trybunał by Stefan Batory in 1578, a court of second instance, independent of the monarch. The subjectivity of the *szlachta* assuming some of the monarch's powers at the confederate congresses also manifested itself in the form of execution of the verdicts of the (sąd kapturowy). In the event of the impossibility of executing the verdicts by the existing executive body - the town starosty - the *szlachta* undertook to enforce the verdicts in person, by calling up a common movement of a given land. The use of mass mobilization to maintain order and security was already proposed in the first *konfederacje*, before the forms of the judiciary were developed during the interregnum," Dubas-Urwanowicz, "Królestwo bez króla?", pg. 156.

[764] Balzer, *Geneza trybunału koronnego*, pg. 286.

[765] There were Trybunałs in Prussia and Ukraine but they met a few times and then their respective *szlachta* returned to the main Trybunał. For territorial changes see: Bednaruk , *Trybunał Koronny*, pgs. 64, 69-73.

Table 3.18 Enumeration of Constitutional Archetypes in the *Konstytucje* Establishing the Trybunał Koronny, 23 May 1578[766]

Section	Text	Outcome	Constitutional Archetype(s)	Constitutional Archetypes-as-Such
The Order of Appointing Judges	In every Province, in every land, in every place wherein old custom dictate the appointment of judges; we designate *authoritate praesentis Conventus* (by the authority of the present Assembly), the day and time […] for the appointment of judges for the courts *judiciorum generalium ordinariorum Tribunalis Regni* (of the ordinary general judgments of the tribunal of the kingdom).	The Way of Appointing Judges and the Territorial Division for their Appointment Established	Sources of Law	Ontology
			Procedure	
Appointment of Judges	[E]ach Province shall jointly reach a decision to appoint one single person [...] The tenure of these appointees may last no longer than to the other court and subsequent judges shall be *ad hoc idem judicium sive Tribunal generale* (for this same judgment or general tribunal) […] Furthermore, a period of four years must elapse before each judge be allowed to serve the office again, unless a Province governor, *nemine contradicente* [without anyone speaking out against],[767] agrees to grant exception.	Each Province Shall Appoint A Judge	Political Decision-Making	
		Length of Judges' Tenure Established	Hierarchical Organization of Political Institutions	Ontology
How Should They Judge and the	They are to judge fairly in congruence with the register of the province in	Judges make Decisions According to the	Source of Law	Ontology

[766] *Constitution Establishing the Crown Tribunal*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. https://polishfreedom.pl/en/document/constitution-establishing-the-crown-tribunal. [Accessed 26 October 2021].

[767] For more, see: Wojciech Kriegseisen. 1995. *Sejm Rzeczypospolitej szlacheckiej (do 1763 roku): geneza i kryzys władzy ustawodawcze*j. Wydawnictwo Sejmowe: Warszawa, pg. 34.

Matters of Clergy	which they vote while at all times availing themselves of the Common Law of the Land and of the Lord, whose justice shall be their guiding light. Judges are to pass decrees *ex scripto* (in writing), on which two or three judges are to place their respective signatures. Wherever contention occurs, or *paritas votorum* (a tied vote), they are to proceed with one, two, three per vota so as to grant favour to the side with more legal evidence, and subsequently conclude *major pars* (by the majority).	Common Law of the Land	Requirements of Legal Interpretation	Epistemology
		Verdicts are to be Written Down and Signed by Three Judges	Procedure	
		Majority Rule to Break Ties	Decision-Making	Epistemology
What Are They To Judge	Gives a long list of jurisdictions and types of cases to be judged: "*decretorum, judicuj Tribunalis generalis Regni, hujus ultimeae instantiae* (of the decrees of the judgment of the general tribunal of this kingdom, of this last instance).	The decrees of the Trybunał are "of the last instance" (*hujus ultimeae instantiae*), i.e. the highest court without appeal.	Hierarchical Organization of Institutions	Ontology
Places for Courts	Organizes a system of courts according to Greater Poland, Lesser Poland, Prussia, and Lithuania, with Each of Them Subdivided. Lithuanian Courts remain Independent According to the Henrician Articles, Confirmed by Stefan Batory.	Geographical organization of courts	Hierarchical Organization of Institutions	
		Lithuanian Laws and Institutions Independent	Horizontal Organization of Institutions	

As the Henrician Articles before it, the 1578 Constitution both continued as well as improved upon the practices and institutions that had proceeded it. It demonstrated deference to the *szlachta* and their representation in parliament with the Seymiki and Seymy appointing judges, rather than the king. Ultimately, local political leaders had the right to alter the terms of a judge tenure if they so wished. All of these principles are clear fruit resulting from the general processes of devolving political power within 16th century Poland-Lithuania as well as the shifting of sovereignty from the personhood of the king to the *szlachta* as a collective. It also demonstrated a significant failure of the executionists, which was to more closely integrate the Kingdom of Poland and the Grand Duchy, as Lithuania kept its own separate institutions, supported by Henryk and Batory both swearing to accept the Lithuanians rights specifically and separately.

The other main source of sovereignty was the rule of law itself, *rex est lex*. The 1578 Konstytucja similarly established the rule of (customary) law by limiting judges' discretion when making decisions, similar to how the Henrician Articles narrowed the king's ability to interpret she law. When judges could not find a consensus, then it went to a majority vote, which may be the first instance of majoritarianism in Polish-Lithuanian constitutionalism. Decrees were to be written down. This was certainly an objective of the executionists, who to a very real degree were concerned with making sure that the laws that already existed were fully implemented, and stressed making laws more accessible, such as writing them in Polish rather than in Latin.

Finally, the 1578 Konstytucja not only addressed questions of constitutional *substance*, but also legal and constitutional *procedure*. This was immensely significant and again paralleled the importance of political and electoral procedure during the Konfederacja Warszawska and afterward. However, it may be argued that these procedural questions were where the 1578 Trybunał was weakest, at least in terms of appointing the judges themselves and how judges would accept the cases before the Trybunał.[768] The process of appointing and organizing judges, the boundaries of the Trybunał's competence and those of clerical of

[768] It should be noted that the underdetermination of procedural questions for a high court is not a unique problem to Poland-Lithuania. For example, the longest-serving high court that is perhaps best comparable to the Trybunał is the American Supreme Court, wherein Article III of the US Constitution gives no guidelines for how to establish courts, criteria for selecting justices, criteria for which justices should accept cases brought before the Supreme Court, or any kind of judicial procedure. Much of this was solved by the Judiciary Act of 1789, but the number of justices on the Supreme Court as well as how they have been voted for has changed, with many in the past being by acclamation but modern justices requiring a simple majority vote by the Senate, which is also not stipulated in the US Constitution. Indeed, the text of the Constitution only states that the President may appoint justices with the "Advice and Consent" of the Senate "provided two thirds of the Senators present concur", which is not the same as two thirds of the entire Senate body. The modern threshold of only requiring fifty votes plus the tiebreaking vote of the vice president is much lower than the two thirds threshold. Similarly, it is unclear how and when cases may be brought before the Supreme Court in that many cases that do not fall within its original jurisdiction. For example, the Supreme Court has a great deal of discretion in whether to accept or decline to hear cases, and dedicated Supreme Court observers are often puzzled when the justices decide to hear one case but not another. Similarly, the Trybunał did not have an objective, clear list of criteria for the appointment of judges, nor an automatic process that would bring certain cases to the court. For more on the evolution of the American judicial selection process, see: Charles McC. Mathias Jr. 1987. "Advice and Consent: The Role of the United States Senate in the Judicial Selection Process." *The University of Chicago Law Review* 54(1): 200-207.

royal courts were often unclear or left up to the *szlachta* to work out, and the offices of Trybunał Marszałek and Trybunał president—administers who oversaw the court—were not developed in the original statue establishing the Trybunał, but instead arose organically.[769]

> The constitution of 1578 did not determine how the election of Trybunał judges was to be carried out, stating only that [...] each warrant should be chosen, and should be, a worthy person among himself". The *szlachtcic* was to be elected jointly, but what if not everyone liked the candidate for the seat of the Trybunał? The legislator did not indicate the method of selecting deputies, leaving the *szlachta* the freedom to choose the method. We can only guess judging from the context of the provision on the election of Trybunał judges, that the legislator meant a majority election. We are prompted to such a conclusion by the paragraph on repeating the term of office - the law prohibits the exercise of the judicial function in the Trybunał more than once in four years.[770]

We could observe that there was a gradual expansion of the Trybunał in terms of taking on more and more cases in broader and broader categories of law. The Trybunał was exposed to—and very often suffered—potential abuse, corruption, and favoritism toward wealthy *magnaci*. The Trybunał was also notably incredibly slow and inconsistent when handing out its judgments.

> Already a few years after the creation of the Crown Trybunał, we can also observe a tendency to entrust it with an increasing number of cases to be decided in the first instance. Using a variety of arguments, the Seymy handed over to the highest courts a large catalog of cases, most often criminal ones, to be resolved bypassing the lower courts. In addition, wealthier *szlachta* and *magnaci* often bypassed lower courts, referring their cases directly to the supreme court, contrary to explicit statutory prohibitions.[771]

To sum up, we quote again from Balzer, who clearly addresses the shortcomings of the Trybunał:

> If the main defect of the current system of the Polish judiciary lay in the exclusive right of the royal court as the highest instance, it was not the only defect in any event. In its place, we pointed out a whole host of others that demanded imperative repair. Meanwhile, the reform was limited almost solely to the creation of a new highest instance; it removed the major ills but did not remove the others that were associated with it. There were several circumstances that needed to be taken into account. First and foremost, since the number of procedural instances existing so far was too great, it was necessary to reduce them by a clear legislative provision, and at the same time to regulate their course strictly. This was by no means done, and the result was that what was not carried out by statute, the state's rallies collapsed as a result of custom. That the vacillation that prevailed in the realm of justice in this actual process of transformation did not work out in its favor, goes without saying. Next, it was necessary to limit the overly extensive right of appeal, to which almost no boundaries have been drawn so far This consideration was also omitted without any attention being paid to it. Finally, it was necessary to provide for strictly and precisely formulated procedural rules, according to which all disputes should be dealt with before the Trybunał. It follows from the nature of things that the trial before the highest instance must to some extent be abbreviated, summarized, a principle recognized not only by today's codifications, but already consciously carried out in foreign devices. Meanwhile, in our two projects from 1574, only a few loose,

[769] Bednaruk, *Trybunał Koronny*, *passim*.
[770] *Ibid.*, pgs. 207-208.
[771] *Ibid*., pgs. 174-175.

> insufficient and non-exhaustive regulations were devoted to this issue, and these - oddly enough - were later almost completely removed.[772]

Though it had many notable shortcomings, the Constitutional Trybunał endured in much the same form for nearly two hundred years, until the reforms beginning in 1764. With the advent of the Trybunał, the Polish-Lithuanian Commonwealth had achieved a three-fold division of power similar to what would appear in the writings of Montesquieu, later take root in the American Constitution, and continue forward as the most popular paradigm of the last two hundred years. It is critical to note, however, that we cannot import our modern-day conceptions of a fully developed system of checks-and-balances onto it. Rather than the sharp divide between political power and permanent state institutions on the one hand and the private sphere on the other in which the modern threefold conception emerged, 16th century Polish-Lithuanian Constitutionalism was deeply rooted in the classical republican tradition. As such, politics was part of the fabric of society, or perhaps it is better to say that the Rzeczpospolita predated such distinction in the first place. The three ruling groups were expected to work together for the common good, with the problems being understood as the lack of morality or civic mindedness on the part of the citizen-politicians. Thus, in most cases the ability of one group to constrain the other was passive, and only emerged when there was serious conflict such as rebellion (Rokosz) or Konfederacja such as during an interregnum.

The Henrician Articles had accepted the *ius resistendi* by the *szlachta* should their natural rights be removed. The final political questions to be worked out during the period of constitutional construction was how to determine when those rights had been violated, who had the right to determine when they had been violated, and what was the proper course of action to be done about it. It concluded with a spectacular armed uprising by the *szlachta* in 1607-1609, the Rokosz Zebrzydowskiego (Zebrzydowski's Rebellion), also known as the Rokosz Sandomierszki.

IX. Rokosz Zebrzydowskiego and the Consolidation of the Period of Constitutional Construction (1374 – 1609)

Stefan Batory's reign burned brilliantly, but it burned briefly. By 1586 he died without any heirs and Poland-Lithuania was thrown into its third interregnum in fifteen years. Though he had been selected by the *szlachta* due to the supposed similarity between Transylvanian and Polish-Lithuanian political values, Batory had been criticized for trying to strengthen the power of the king. Batory was a skilled military leader, not a domestic reformer, and spent nearly the entirety of his brief reign involved in one campaign or the other. His reign began by putting down an uprising by German burghers in Gdańsk who wanted to elect a Habsburg candidate to the throne, then he spent the majority of it as the Jagiellonians did—wrestling with Muscovy for the fate of the Baltic. Like the Jagiellonians, he too found a *szlachta* who chafed at the idea of war and higher taxes, the Seym often rejecting his demands for more troops and funds. As such, there is little direct legacy he himself had on 16th century Polish-Lithuanian constitutionalism, the 1578 Konstytucja and the Trybunał Koronny not being his ideas.

[772] Bednaruk, *Trybunał Koronny*, pg. 339.

After another heated election, the *szlachta* decided to elect Zygmunt III Waza of Sweden, the last direct member of the Jagiellonian family. The political situation in Swedish was complicated at the time due to the rise of the Protestant Reformation, with King Eric XIV fighting for the throne with his younger brother, John III. Zygmunt III was born to John III and his wife Katarzyna Jagiellonka (Catherine Jagiellon), daughter of Zygmunt I and sister of Zygmunt II August, in a Swedish prison. Overthrowing his brother, John III became King of Sweden in 1569 and himself was a candidate during the Interregnum following Zygmunt II August's death. After Batory's death, Zygmunt III Waza's aunt, the now-widowed Queen Anna Jagiellonka was instrumental in securing the throne for her nephew. After a brief civil war wherein another Habsburg candidate for the throne was actually defeated by Chancellor Jan Zamoyski in battle, Zygmunt III Waza was finally secure as the next king of Poland-Lithuania in 1587,[773] though the *szlachta* brought extensive *egzorbitancje* to the Seym gatherings during the interregna to ensure that their rights were secured and that any damage done by Batory could be repaired. This established the important precedent of addressing *egzorbitancje* as part of future coronation Seymy,[774] as well as attempting to check Zygmunt III's rule from the onset[775] The *szlachta* also continued to improve their parliamentary organization, creating the institution of the *seymiki relacyjny* (Relational Seymiki) where the deputies would report back to their local *seymiki* to account for what had happened at the previous Seym, i.e. why the deputies had voted in the way that they had, if they had followed any *instrukcje*, etc. They also served administrative functions in announcing and implementing new laws and policies.[776]

Zygmunt III's reign immediately began with controversy, as his upbringing at the Swedish court in an ultra-Catholic family gave him some very strong absolutist tendencies.[777] His nature was power hungry and he was willing to flaunt the laws from the beginning.[778] Zygmunt III's main political rival was Zamoyski, who had participated in the executionist movement in his youth and continued to champion its ideas, and had been one of the envoys to convince Henryk to take the throne, probably one of the authors of the Henrician Articles, as well as Chancellor and Hetman.[779] In 1592 Zygmunt III's father, John III died, and with the permission of the Seym he ascended to the Swedish throne, despite much controversy among the *szlachta* who feared he would abandon them just as Henryk did. Thus, while Henryk and Batory had been accepted as foreign kings in the hope that this would allow them to fulfill the role the king as the non-partisan leader of the nation, many were wary of foreign kings.[780] Excepting any character flaws or personal difficulties of the new king coming to Poland-Lithuania, the deck was already stacked against him.

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[773] In reality, much of the success of Zygmunt III Waza's early reign—both in military and civilian affairs alike—is attributable to Zamoyski. See: Anusik, *Studia i szkice staropolskie*, pg. 105.
[774] Kucharski, *Instytucja egzorbitancji*, pgs. 47, 94, 205.
[775] *Ibid*, pg. 282.
[776] Borucki, *Seymy i seymiki szlacheckie*, pg. 67.
[777] Stone, *The Polish-Lithuanian State*, pgs. 131-135.
[778] Henryk Schmitt. 1858. *Rokosz Zebrzydowskiego*. Drukarnia Zakładu Narodowego im. Ossolińskich: Lwów, pgs. 33-47.
[779] Makiłła, *Artykuły henrykowskie*, pgs. 92-93.
[780] Tazbir, "Ze studiów nad ksenofobią," pgs.665-667.

Though a personal union between Sweden and Poland-Lithuania had the potential to gain significant advantage over Muscovy in the contest to control the Baltic Sea, it was also feared that he would make Poland-Lithuania second fiddle within the new compound state. To make matters worse, Zygmunt III was ultra-Catholic and in 1592 married Anna Habsburg (1573-1598), with the marriage occurring without the *szlachta*'s consent. This was in direct violation of the Henrician Articles and angered the *szlachta* who had for years tried to prevent any union between the Jagiellonians and the Habsburgs. Things only became worse when political chaos and a civil war in Sweden broke out in 1597 between Zygmunt III and his Protestant uncle Charles IX, which eventually ended with Zygmunt III losing the crown and fleeing to the Commonwealth. The tension between Poland-Lithuania and Sweden would become explosive throughout the remainder of the mid-17th century, leading to some of the worst wars in the history of the nation.[781]

Mikołaj Zebrzydowski, mentee of Zamoyski, used his powerful joint office as wojewoda and starosta of Kraków[782] to revive the mantle of the executionists once again against Zygmunt III Waza. Zebrzydowski clearly outlined the constitutional dimensions of these complaints in a 1604 script before several local senators. He details how he specifically spoke to the king, informing him of his oath to uphold the Konfederacja Warszawska, as listed in the Henrician Articles. He specifically mentioned that if the king did not uphold these, then *de non praestanda oboedientia* could itself be jeopardized. According to Zebrzydowski the king feigned ignorance of the articles and his violation of them, which gave Zebrzydowski hope that reform was possible. [783]

This hope was clearly misplaced, as in 1605 Zygmunt III angered the *szlachta* again when he announced his intention to marry Constance of Austria, the younger sister of his deceased first wife, again without the consent of the *szlachta*, with critics in political literature at the time referring to this as "incest".[784] He thus violated the 18th Henrician Article

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[781] Stone, *The Polish-Lithuanian State*, pgs. 131-135; Frost, *The Northern Wars*, pgs.44-46.

[782] Anusik, *Studia i szkice staropolskie*, pgs. 110-111.

[P]rosiłem JKMci, aby sobie tych rzeczy powiedać nie dał, gdyż siła jest *in pactis*, co skutku swego nie bierze, i ukazałem zarazże *in pactis* on paragraf ostatni: *iura omnia, libertates etc. et speciatim articulos in coronatione Henrici regis sancitos etc.* O które spytał mię JKM.: »Któreż to artykuły ?« A gdym ich w konstytucyach szukał, rzekł* »One to podobno, co i *confoederatio* w nich; ale wszak na nie zgody niemasz«. Powiedziałem, iż z strony konfederacyej samej był niezgodny, ale insze wszytkie zgodne i przebieżałem te, które są najgruntowniejsze, tym pilniej inkulkując. Zatym mi rzekł JKM.: »Nie wiedziałem tego«; które słowa bardzo mię ruszyły i w nadziejej naprawy tych rzeczy zostawiły. Stądże chcąc tym barziej w tym JKM. utwierdzić, ukazałem, iż to jest *in confirmatione iurium* i z takim warunkiem: *Quod si aliquid contra libertates et immunitates, iura et privilegia Regni fecerimus, non servants (quod absit) aliquid illorum in parte vet in toto, id totum irritum et inane nulliusque wiomenti fore decernimus et pronuntiamus.* Przypomniałem, że toż i w przysiędze JKM. najduje się i ów paragraf *de oboedientia* naraziłem," "Skrypt p. Wojewody krakowskiego, na zjeździe stężyckim niektórym pp. senatorom dany. Na Lanckoronie 19 *Iulii anno* 1604," in: Jan Czubek. 1918. *Pisma polityczne z czasów rokoszu zebrzydowskiego, 1606-1608.* Tom II, Proza. Nakładem Akademji Umiejętności Skład Główny w Księgarni G. Gebethnera I Sp.: Kraków, pg. 268.

[784] "Małżeństwo to plugawe, pełne nieczystości:
Dwie siostrze mieć w łożu swem żydowskie brzydkości.
Tyś królem chrześcijańskim: nie czyń po żydowsku,
Nie mieszkaj z drugą siostrą, żyj po chrześcijańsku!"

twice. He had no real interest in gaining the public support of the *szlachta* for his domestic reform projects, and instead relied on foreigners who were loyal to him.[785] Furthermore, this reliance on foreigners, rather than on Polish-Lithuanian *szlachta* meant that he did not have to attempt to build consensus. This policy violated the 6th and the 11th Articles. In terms of foreign policy and war, his position as king of Sweden meant that he was not entirely dependent on Polish-Lithuanian support, and he had no qualms about violating the 4th Article in seeking out warfare. Finally, the king's staunch Catholicism and support for the Counter-Reformation was a violation of both the 2nd Henrician Article as well as the Konfederacja Warszawska.

The combination of these elements enraged much, if not the majority of the *szlachta*, with Zamoyski strongly and publicly denouncing the king at the 1505 Seym,[786] shortly after which he died unexpectedly. His untimely death prevented the *szlachta* from mounting any real opposition to the marriage and left some of Zygmunt III's absolutist tendencies without a strong opposition, at least temporarily.[787] Zamoyski's fight was quickly taken up by, Mikołaj Zebrzydowski. By 1606 Zebrzydowski had galvanized the *szlachta* against the king to demand a series of reforms.

In a speech given to the Seym he outlined forty-one points of reform. While an entire list would be too large to give, it is worth highlighting some significant ideas in Table 3.19:

"Na Senatory" in Jan Czubek. 1916. *Pisma polityczne z czasów rokoszu zebrzydowskiego, 1606-1608*. Tom I: Poezya Rokoszowa. Nakładem Umiejętności Skład Główny w Księgarni G. Gebethnera: Kraków, pg. 17; "Od P. Marszałka koronnego do. P. Wojewody krakowskiego" in Czubek, *Pisma polityczne,* Tom II, pg. 31.

[785] Sobieski, *Pamiętny Sejm*, pg. 9

[786] Grodziski, *Volumina Constitutionum*, Tom 2, pg.334. A copy of the speech can be found in: Czubek, *Pisma polityczne*, Tom 2, pgs. 471-480.

[787] Sobieski, *Pamiętny Sejm*, pgs. 5-7.

Table 3.19 List of Demands Contained in *Instrukcje* of Seymik Deputies of the Kraków Województwa Influenced by Mikołaj Zebrzydowski[788]

Demand	Outcome
To ask the king to satisfy what is he is rightly called to do according to the duties of his office to calm down the nation and prevent the destruction of the forthcoming Seym	The king should prevent the destruction of the forthcoming Seym
Demand the restriction of the law on the residence of a certain number of senators with the king, and demand a report from the officials at his side counsels contrary to the law.	The Senators Must not Counsel Anything contrary to Law
Warn the senators that while looking for those guilty among themselves, they should still, according to oaths, watch over the security of the Commonwealth and not allow the forthcoming Seym to be torn apart.	Senators to Keep their Oaths of Office to Protect the Rzeczpospolita and Prevent the Forthcoming Seym from being Disrupted
Ask the king to postpone the travel to Sweden until the Rzeczpospolita will be calm.	King Should Put Swedish Affairs Aside Until the Situation in Rzeczpospolita is Resolved
Try to bring about the process of *Konfederacja* , which will serve to bring together both sides of those whom differ in faith	Religious Toleration
To ask the king that, according to the old statute, in the absence of the Grand Marszałek of the Crown, he be replaced in office by the Court Marszałek of the Crown, and only in the absence of both, by Lithuanian marszałki, with the proviso that here in the crown matters of the marszalek's jurisdiction] subject not to Lithuanian but to Crown law are to be tried.	King to Interpret Laws Narrowly
	Independence of Lithuanian and Polish Courts
Demand that the tribunals be ordered to add the reasons (*racije*) for which they are sentencing.	Courts Must Write Down The Reasoning for their Decisions
Demand that the Jews be preserved according to their laws.	Jewish People Should Retain their Own Laws

[788] Schmitt, *Rokosz Zebrzydowskiego*, pgs. 88-94.

Partially inspired by Zebrzydowski's speech, the *instrukcje* given by the *seymiki* clearly demonstrate ideas that had matured over the 16th century, such as the rule of law being above the senators and deputies as well as the personage of the king. Their insistence that even senators had to be observed to ensure that they did not violate the law presented a stronger version of *lex est rex* than was present in the Henrician Articles. It is also noteworthy that this was also compatible with the trend by some to distribute some—in some cases all—of the blame for the king's poor decisions to his advisers, rather than to the king himself.[789] The *instrukcje* also supported the Konfederacja Warszawska and the Second Henrician Article as well as the principle that Jews should keep their own laws. This was significant because Zebrzydowski himself was an extremely religious Catholic,[790] but was able to separate his own views from state policy. Zebrzydowski was somewhat reluctant as a leader; comparatively speaking, his position was actually more moderate than many of the Protestant *szlachta*.[791]

For example, Jan Szczęsny Herburt, another Catholic executionist, and leader of the Rokosz had much harsher words: the king was the latest in the Jagiellonian line who sought to exercise power as dominion and Zygmunt III had violated almost every law in the nation.

> It has long been a thorn in the side of the Polish kingdoms, the freedom of the Polish nobles; for there is none who has not had thoughts of violating our rights and liberties. For every king snared them in two ways: one with domestic and internal arts, making the rich among his own, and without regretting those who are less worthy of it, and destroying others. The second, which he could not overcome at home, therefore he was looking for strength, rescue and sophisticated foreigner art, namely from this Rakuski [Habsburg] house, which appeared first for Kazimierz, Jagiełło's son, and which and came to light in the time of Zygmunt August [...].
>
> If anyone of you would like to ask: "And which laws have this king broken?" - let him show me which one he hasn't broken? Because none that could have been broken were left whole.[792]

Though Zebrzydowski has often been villainized as the leader of the movement, in fact there were many leaders, including Janusz Radziwiłł, who himself in 1606 notably defended the rights of the Arians to practice their religion as fundamental to the rights of all the *szlachta*.[793] They came from all across *szlachta* society, but were disproportionately lesser *szlachta* and Protestant,[794] though Zebrzydowski and Radziwiłł were notable *magnaci*. Over the next several months, there were negotiations between the representatives of the king and opposition. The country generally broke apart into three groups; the supporters of the king, most of the senators, and most of the Roman Catholic clergy; the "legalists" wanted to repair and reform the state without removing the king; while the "rokoszanie" wanted radical,

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[789] Ziętek, *Koncepcja ustrój państwa*, pg. 74.
[790] Czekalska, "Drugi Etap rokoszu Zebrzydowskiego," pg. 32; Tazbir, "Ze studiów na ksenofobią", pgs. 668-669.
[791] Schmitt, *Rokosz Zebrzydowskiego*, pgs. 155-162.
[792] "Przyczyny wypowiedzenia posłuszeństwa Zygmuntowi, królewicowi szwedzkiemu, *anno* 1607 *die nativitats Ioannis Baptistae*", in: Jan Czubek. 1918. *Pisma polityczne z czasów rokoszu zebrzydowskiego, 1606-1608.* Tom III: Proza. Nakładem Akademji Umiejętności Skład Główny w Księgarni G. Gebethnera: Kraków, pgs. 350-351.
[793] Henryk Wisner. 1989. *Rokosz Zebrzydowskiego*. Krajowa Agencja Wydawnicza: Kraków, pg. 9.
[794] Kucharski, *Instytucja egzorbitancji*¸ pg. 59.

republican reforms according to the principles of defending *szlachta* freedoms. Both legalists and rokoszanie believed that the nation was the source of rights, rather than the king, but could not agree on the changes necessary to secure those rights. [795] Generally speaking, members of the latter two groups were disproportionately represented in the *Rokosz* or those that were sympathetic to its cause, though members of all three groups were on both sides. Though they were all significantly displeased with king, the rebels lacked a comprehensive program for reform, with many of them did not want to remove the king, only to improve the Republic, though their position hardened with time.[796]

On the constitutional level, it was undoubtable that the Henrician Articles' wording was unclear, both as to the exact nature of the king's power and its limitations, but also as to the remedy to redress these problems. According to the Henrician Articles, the Konfederacja Warszawska was to be acknowledged so as to prevent further *rokosze* due to religious causes. While religious grievances were certainly part of the complaints against Zygmunt III, was this enough to justify another *konfederacja*. Those who created the Rokosz believed so. There was a precedent of Rokosz throughout Polish-Lithuanian history, with one occurring during Zygmunt I's reign. Of course, they were to be used as a last resort only,[797] as a mechanism with which to restore balance. [798]

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[795] Wisner, *Rokosz Zebrzydowskiego,* pg. 9.

[796] Schmitt, *Rokosz Zebrzydowskiego,* pgs. 264-266, 292-293.

[797] "[F]or that which had long been in an uproar among the people, and which had been gathering long ago at sejmiki and at assemblies in the past, first in Stężyca, then in Lublin, had already come to light, and had already given birth to a rebellion, that is, a dissolution of the whole the order of all things in the Republic and the chaos the order of all things, and almost as *ad sua principia reductionem [*reduction to its basic principles], the last and violent way of accomplishing something in by the lords or in by the Republic. Reparation in such a manner is very dangerous, and for this reason from our ancestors used rarely, so that we read about only one of our own rokosz during the reign of Zygmunt Stary 70 years ago," "Zdanie szlachcica polskiego o rokoszu," in: Czubek, *Pisma polityczne,* Tom II, pg. 414.

[798] "Iż znajdują się tacy, co rokosz nową i niezwykłą rzecz nazywają i mówią, że go nie tylko w prawie pospolitym, ale ani w kronikach nie masz, skąd znać, że nigdy in re, nigdy in effectu nie był, ci tedy ludzie, jacy są, znacznie się wydają, że albo są prostacy, którzy nie widzą, albo się o wokacyej szlacheckiej pytają, albo że są niere źli i Rzpltej praw om i wolnościom pospolitym w głowę nieprzyjaciele. […]

Tam na się i potomki swe obowiązki czynieli, przy swobodach do garł swoich stać, sub fide, honore et conseientia przyrzekali sobie przeciw ko każdemu, ktoby praw a i swobody te łamać i na nie mocą albo praktyką następować albo i kom u tego pomagać chciał, powstać, onego poczciwości, garła i majętności zbawić obiecowali sobie […] Niemasz rokoszu w prawie, mówią; chyba, żeby kto tych związków, tych kapturów przodków naszych nizacz mieć chciał, które daleko więtsze, poważniejsze, daleko sroższe i ogromniejsze są, niżeli wszytkie prawa nasze. Temi związkami, tymi kaptury, potężnością rycerstwa, mocą stanu szlacheckiego przeciw wszelakim insultibus tam externorum, quam internorum prawa nasze, jako murem, otoczone i obwarowane są.

"Bywały konstytucye takowe, które starodawni Polacy i Węgrowie rokoszami nazwali. Mają być za słusznem i przyczynami zaczęte i statecznie poparte i z pilnością taką, a dostatecznym potrzeb wszytkich Rzpltej namówieniem odprawowane, jakoby już, jeśli nie na wieki, tedy jednak na długie czasy poprawy żadnej prawa i wolności nasze nie potrzebowały. Bo rokosz, ostatnia jest prawie kotwica, do której się ludzie czasu gwałtu i w ten czas, kiedy tego extrema necessitas Reipublicae exigit, uciekać mają. Jest rokosz unum ex violentis remediis, antinomium własne, którego jeśli użyjesz i w ten czas, kiedy potrzeba, i tak, jako potrzeba, będzie użyreczne; jeśli i nie w czas i leda jako, twoja to śmieć, twoje to zginienie. Takućkić jest i rokosz. Bo będzieli za potrzebą Rzpltej zaczęty, potym wiarą i statecznością poparty, nakoniec zdrową i dojrzałą radą zapieczętowany, nie może być, jedno z dobrym pospolitym i z naprawą i swobód; a gdzie zaś tego wszytkiego

From the content of theabove speeches and texts, it is quite clear that Zebrzydowski and his reformist allies shared the idea of constitutional reform as we are using in this analysis: architectonic, permanent structuring of the political system and legal system via written law. No one, not the king, the Seym, the *szlachta*, nor the courts could be allowed to violate the law.

Zygmunt III remained defiant—even provocative—until the very eve of the rebellion.[799] The 1606 general Seym at Warszawa completely broke down and concluded without any compromises.[800] By summer of that year an armed rebellion had gathered at Sandomierz near Lublin, which gave the Rokosz Zebrzydowskiego rebellion its alternate name of Rokosz Sandomierskiego. The Rokosz *szlachta* were unable to reach a consensus on whether to overthrow the king or not, though some proposed a new interregnum followed by a new election.[801] A Seym ran from May to June, with the rebels boycotting.

This Seym was much more moderate and conciliarist, and many of the rebels' concerns were actually incorporated:

1. It reaffirmed the free election of kings
2. It reconfirmed the creation of a permanent body (Senatorowie Rezydenci)
3. While it Limited the Rights of Foreigners, it Exempted Swedish Officials Who Staffed the King's Court
4. Reaffirmed Some of the Financial Limitations on the Clergy According to the 1550s Statutes[802]

These changes—and many others not specified here—were not enough for the rebelling *szlachta*. They wrote an official declaration to remove the king, on 24 June, 1607,[803]

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o male, a tumultuarie takowe powstanie i zacznie się i dokończy, tam zachwianie naprzód Rzpltej, a potym zginienie i upadek niepochybny. Niech kto wejrzy w historye tak narodu naszego polskiego, jako i inszych dalszych, a już tych lat w rozruchy inderlanckie, najdzie tam tego, co ja mówię, niezliczone, a zawżdy jednakie przykłady i w których," "Rokosz jaki ma być i co na nim stanowić," Czubek, *Pisma polityczne*, Tom III, pg. 275.

[799] "Divergences also appeared in the approach to the lawmaking process. Even on the eve of the rebellion of his subjects, which, regardless of the intentions and calculations of its leaders or participants led to the Sandomierz rebellion of 1606, King Sigismund III granted himself the right to determine what matters to be taken up in the course of legislating would depend on him. In practice, this was already the case, as there were known cases of discussions on this topic. However, by presenting the matter in this way - despite the apparently subdued content of the instructions - the king was overtly provoking," Makiłła, *Artykuły Henrykowskie*, pgs. 465-467.

[800] *Volumina Constitutionum.* Tom II, Vol 2, pg. 335.

[801] Schmitt, *Rokosz Zebrzydowskiego*, pgs. 292-293.

[802] *Ibid., passim;* Czubek, Jan. 1918. Pisma Polityczne z Czasów Rokoszu Zebrzydowskiego 1606-1608. Volume II. Proza. Kraków: Nakładem Akademii Umiejętności, *passim*; Wisner, *Rokosz Zebrzydowskiego*, *passim*.

[803] A copy of the decision to overthrow the king can be found at: "Akt Rokoszu oryginały przeciw Zygmuntowi III Królowi. Data 24 Czerwca 1607 pod Jeziorną." *Podlaska Digital Library. https://kronikidziejow.pl/porady/rokosz-zebrzydowskiego-sandomierski-data-przyczyny-przebieg-skutki/* (Accessed 28 October, 2021), or alternatively, Krzystof Kossarzecki and Jacek Gancarson. "Dekret rokoszowy 24 juny." https://eurofresh.se/manuskrypty/E8599a/397.htm. Accessed 28 October 2021.

with Zebrzydowski himself changing his mind.[804] Less than two weeks later the Battle of Guzów took place on 5 July 1607, close to Radom. 10,000 infantry and 600 cavalry fought for the side of the rebels, while 9,000 infantry and over 3,000 cavalry fought for the royal forces. Around two hundred persons died in total. The loyalists won easily, with the rebels scattering throughout the country.[805] Despite this, the cause of the rebels went on and continued to spread throughout the entire country. Significant leaders were captured—including Herburt—often without trial, which itself violated *nemimem captivabimus*.[806] Though he tried to execute these dissidents, Zygmunt III realized that the tide of popular sentiment was turning against him.[807] It was not the actual war itself that was so impactful, but rather the *szlachta* realizing that the prosperity of the Commonwealth had been built on generations of internal peace.[808]

Popular songs and public works attest to Zebrzydowski's success in winning the war for hearts and minds, even if he had physical lost the battle.

Wsiadajcież, cni Polacy, o wolność wam idzie;
W siadajcie co naprędzej, nim niewola przyjdzie.
Teraz jeszcze czas macie, gdyż wolno zawołać
Na walny zjazd, a pan a i senat strofować.[809]

Tej rzeczypospolitej, a my po te czasy
O, jakieśmy wytrwali z rozruchów nie wczasy!
Dziś sobie dały ręce, dziś doszła ugoda
Za przybyciem twem do nas, możny wojewoda!
Ta wolność dziś uczciła pana w twej osobie,
A zwierzchność ją przyjęła ojcowsko ku sobie.
I tak ojczyzna miła i rzeczpospolita,
Będąc blizka zginienia, znowu dziś zakwita.[810]

[S]zlachto cnotliwa,
Za wolność czynić zawsze chętliwa,
Przybądź a pomóż Zebrzydowskiemu.[811]

Afraid of continued instability at home and the war with Muscovy, Zygmunt III could not afford to waste more time putting down the rebellion. Stanisław Żółkiewski, one of the king's own commanders at the battle of Guzów, was sympathetic to some of the reforms and refused to continue the bloodshed. Zygmunt III extended an olive branch to the rebels: complete amnesty and moderate reforms. All of the rebel leaders accepted by 1608 and were

[804] Czekalska, "Drugi etap rokoszu Zebrzydowskiego," pgs. 19-22.
[805] Czekalska, "Drugi etap rokoszu Zebrzydowskiego," pg. 34; Opaliński, Edward. 2017. "Rokosz Zebrzydowskiego – Element Antysystemu Ustrojowego czy Nieudana Rewolucja?" *Przegląd Seymowy* 4(141), pg.66. Stone, *The Polish-Lithuanian State*, pg.134.
[806] Czekalska, *ibid*., pg. 37.
[807] Stone, *ibid*., pgs. 134-135; Wisner, *Rokosz Zebrzydowskiego*, pg. 79
[808] Wisner, *loc. Cit.*
[809] "Trąba wolności," in: Czubek, *Pisma polityczne*, Tom I, pg. 357.
[810] "Na dzień piątkowy, który był szósty miesiąca czerwca w roku Pańskim 1608. Do P. Mikołaja Zebrzydowskiego, wojewody krakowskiego, na przybycie J. M. do krakowskiej konwokacyej po burdach rokoszowych," in: Czubek, *Pisma polityczne*, Tom I, pg. 346.
[811] "Na Senatory", in: Czubek, *Pisma polityczne*, Tom I, pg. 36.

granted full amnesty at the 1609 Seym.[812] Herburt and the others were released. For a king with absolutist ambitions, it was clearly a loss.

The Rokosz Zebrzydowskiego is a controversial topic in Polish-Lithuanian history. On the one hand it is reviled for its effect of weakening the king that would plague the Commonwealth throughout the rest of its lifespan. This critique was something of the standard in Polish-Lithuanian historiography for much of the 19th and early 20th centuries:

> "In spite of this peaceable conclusion this first rebellion in Polish history had sinister consequences. Royalty lost, to a great extent, the moral prestige it had enjoyed in the time of the Jagiellos, which alone could compensate for all the constitutional limitations of its power. The insurgents, even though vanquished and compelled to implore pardon from Sigismund III, nevertheless gained their cause; for the Polish constitution was henceforth regarded as sacrosanct and the king had to renounce not only the idea of making far-reaching changes in it, but even an reform which, without touching its principles, would have improved the functioning of parliament and ensured to the Republic the financial and military measures that were necessary to her."[813]

The trouble with Oskar Halecki's analysis is that there are the presumptions that a strong state is inherently good and that the Jagiellonians and Zygmunt III Waza were making reforms. The concepts of "political reform" are normative, and assumes some kind of improvement of the system, whereas a more appropriate term to consider would be "changes". Not all changes within political systems are inherently improvements, especially not ones made by rulers without the political consensus of the ruled. Much of the "reforms" imposed by the Jagiellonians and Zygmunt III were to centralize power or to raise taxes, not only as goods unto themselves, but also to facilitate expansion into Muscovite lands, as well as Zygmunt III's dynastic policy. Whenever any politician in any era proposes higher taxes, less freedoms, and increased warfare these are almost never considered to be political goods for the society, so it is reasonable to conclude that they were not for 16th century Poland-Lithuania either.

Part of the criticism of the Rokosz Zebrzydowskiego undermining attempts at a more powerful state may be attributed to poorly thought out historicism, in that there are several flawed assumptions: if Poland-Lithuania had been stronger or better organized it would not have collapsed in the 18th century; that the Rokosz Zebrzydowskiego was a direct precursor of Sarmatism and "anarchic" behavior of the *szlachta*; that the changes proposed by the Jagiellonians and Zygmunt III were intended reforms, i.e. improvements, on the system. None of the assumptions are justified. As we shall explore later, the reasons for the collapse in the 18th century were multitudinous. Secondly, the Rokosz Zebrzydowskiego was the result of the *szlachta* political culture, 16th century reform movements, and the executionists colliding with the political culture, personality, and ruling style of Zygmunt III. It did not

[812] *Volumina Constitutionum*, Tom II, Vol. 2, pgs. 378-398.
[813] Halecki, *A History of Poland*, pgs. 144-145.

create this political culture but was a result of it, which likely would have endured—and indeed *did* endure—despite the objective failure of the Rokosz Zebrzydowskiego.[814]

The second way to interpret the Rokosz Zebrzydowskiego was that it was a success because it reminded the king that he was not an absolute ruler but was elected. Zygmunt III had flaunted the will of the *szlachta* and the law for 18 years before the outbreak of the Rokosz, so it was not as if the rebellion was sudden or unexpected.

> In our country, Zygmunt was not a hereditary and unlimited king. Having been elevated to the throne under agreed-upon conditions, he could not have the power to remove himself arbitrarily from fulfilling his sworn obligations, and if he failed to perform something contrary to or transgressed his agreement, he should have given a conscientious account of it before the estates to rectify the abuse when he was admonished for it. There were many such admonitions at the assemblies, why did not react to them, why did he not extinguish the fire in the arson without humiliating himself, but waited for the flame to engulf everything? It is true that the assembly spoke to him sharply and firmly, and even threatened him to think about himself and the Commonwealth, thus in other words, dethroning him, if he would not provide redress; true, it sounded like a substantial humiliation; but who is guilty, whether those who for eighteen years patiently waited for the fulfillment of unceasing promises, or the king who, by neglecting the demands of the estates with words or with his silence, himself multiplied the reasons for dislike and distrust in his fruitless promises?[815]

The Rokosz was not the conclusion of the *szlachta* ideals, but rather was their affirmation.

> Far from being a failure, Rokosz ideals were re-legitimised in the Commonwealth power structures, during and years after the event. This rising did not mark the 'beginning of the end' of the Polish-Lithuanian State, hopefully unravelling towards partition; it brought the crown and *szlachta* back in line with each other, enabling them to work together again after the unrest. The rising released tensions, strengthening the Commonwealth for the next decades.[816]

Rather than trying to decide who was the loser and who was the victor, the more important question is what was the *contribution* of the Rokosz Zebrzydowskiego to 16th century Polish-Lithuanian constitutionalism. This entails two further questions: in what ways was it a reflection of its own time and place, and what principles does it elucidate for broader questions about constitutionalism. Inadvertently, this brings us to a third possible answer to the question about whether it was a victory or not, in that it was neither, but rather as a

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[814] There are some who argue that the failure of the Rokosz Zebrzydowskiego ultimately led to the defeat of the executionist movement, the decline of religious toleration, and towards *magnat* rule and absolutism. See: "The control of the entire apparatus of power by the *magnaci*, however, significantly changed the nature of its activities and the mutual relationship between its organs. We assume the end of the sub-period of noble democracy in the years 1606-1607, when in a socially and politically complex movement, appearing as the so-called The Sandomierz rebellion (also known as the Zebrzydowski rebellion), the middle nobility took up the last fight - referring to the law enforcement program - to stop the growth of Jesuit influence in Poland, to break the king's alliance with senators and to annihilate attempts to introduce an *absolutum dominum*. The defeat of the Rococo people became an important stage in consolidating the *magnat* rule," Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pg. 164.

[815] Schmitt, *Rokosz Zebrzydowskiego*, pgs. 155-162.

[816] Wilson, "The Jewel of Liberty Stolen?", pg.2.

culmination of all that had come before it. This interpretation has far deeper implications for Polish historiosophy, in that we must parcel out the problematic interpretations that have plagued it for so long, primarily centered around villainizing Zebrzydowski.

> Every movement is a consequence of certain ideas, and takes place under the leadership of one or a few people who, being the personification of it, thus accept, willingly or unwillingly, all responsibility for everything and everyone on themselves, particularly in the face of history and posterity. And rightly so. For just as honor and fame in the event of success shines upon their name, while the names of secondary associates fade away without a trace and memory, so they all strike again mercilessly and tug at them most severely, if their intended goal is not achieved. In the latter case, centuries of time have been attached to their name ignominious, and even unfamiliar with the course of the case of which they were conductors, heaps on them the gravest insults, and charges them mindlessly with the curse of condemnation when their contemporary opponents, deliberately suggesting to them the worst intentions, aims and intentions, stigmatize them with the stigma of disgrace and crime. Such was the fate of Mikołaj Zebrzydowski, wojewoda of Krakow, who, seeing the utmost resentment and indignation against the king, and morally convinced of the unlawful and inappropriate conduct of him, joined his fellow citizens in defending the laws, liberties and wholeness of the Republic, and stood at their head when they called upon him to do so.[817]

In reality, the focus the Rokosz Zebrzydowskiego as a failure has been a product of historical Polish mythmaking back into antiquity: that Poles and Polonist scholars in subsequent generations have romanticized the kings as guardians of freedom, whereas Zygmunt III was rightly accused of undermining the freedoms of the Commonwealth.[818] The reality was that very often it was the actions of courageous *szlachice* that ensured that the king enforced the law or upheld *szlachta* privileges. Though there had indeed been elections throughout Polish history, much of the succession process had been dynastic. Similarly, the privileges of the *szlachta* were often unclear, as was when to rise against the king.[819] Finally, that they were anti-monarchists has been a historical distortion, as all of their documents express respect for the king.[820] It was in fact the Rokosz Zebrzydowskiego as last piece of the long 16th century period of political and constitutional reforms that established and clarified these norms, so it is unfair to accuse the Rokosz of not been to take into account during their uprising what they themselves were creating through that uprising itself. What were some of these points that the Rokosz clarified?

First, they contributed to the understanding of the Rzeczpospolita. In a Rokosz political pamphlet, *Libera respublica—absolution dominum—Rokosz,* a *free republic* (respublica libera) is established by three estates ruling together, each of them equal to each other, and that they all are ruled by a common law. None of the three estates—monarchy (the king), aristocracy (the Senat), and democracy (the *szlachta*)—could make a decision without

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[817] Schmitt, *Rokosz Zebrzydowskiego*, pgs. 74-75.

[818] "Two main reasons caused this otherwise incomprehensible but almost universal resentment and unfair prejudice of our historians against the Rokosz. For they did not want to take due account of the legal relationship that existed in our country between the king and the people, and did not conscientiously collate all the injuries of the common law and pacts, which Zygmunt was rightly accused of already at the beginning of his reign, and of which there were more and more afterwards," *ibid*., pg. 20.

[819] *Ibid*., pgs. 20-34.

[820] *Ibid*., pgs. 328-330; The speeches, poems, dialogues, etc. written both by the "Rokoszenie" as well as against them nearly universally greet the king in respectful terms. See: Czubkek, *Pisma Polityczne,* Tomy I-III, *passim*.

consensus from the others. Of these, the supreme power (*summam potestatem*) was held by the *szlachta*.[821] They held the right guard the law as well as to punish those who violated it.

> Our forefathers, striving that the poorer should not suffer contempt and harm from the mighty, in trying to establish among them *aqualitatem et statum mutuae reverentiae* [equality and a state of mutual respect], they entrusted to the estate of the knights the foundation [custodiendae libertatis commiserunt], they gave to them *eam facultatem in republica* [the ability in the republic], that they might punish the Sovereign for the violation of their rights and liberties, and quite beautifully they have satisfied Justice by *rationalem reciprocationem* [mutual rationality] in this well-ordered Commonwealth in order to strengthen their rights and freedoms, so that the estate of knights has a king in this Republic as well as senators, whom the knighthood should judge and punish. And for what? - For the rebellion against the common law, when they [the senators and king] do not defend it, do not guard it and do not keep it as they ought to.[822]

As Edward Opaliński confirms:

> An even greater political role was played by the concept 'Commonwealth' in the sense of the nobility as a whole. This formula, which appeared not later than 1587, made a real career during the Zebrzydowski rebellion, (*rokosz*), during which it became the main argument legitimising the actions of the seditious nobles. In 1606–7 Mikołaj Zebrzydowski, *voivode* of Krakow, and his supporters rose up not only against king Sigismund III, but also prevented the Seym from functioning properly. They could not be content with using as a justifying argument the article in the Henrician Articles of 1573 concerning the withdrawal of obedience, called 'De non praestanda oboedientia', which released the nobility from the oath of allegiance in the event of the king's failure to abide by the articles. The theory of *monarchia mixta* did not suffice either, because the nobility opposed the king and the Seym hardly questioned the latter. The rebellious nobles needed something more. This could only be an interpretation of the concept of the Commonwealth that equated it with the entire nobility. The usefulness of the concept derived from the fact that, according to the theory, the assembly of the rebels was supposed to assemble the entire nobility. Thus the ideology of the rebels, which was formulated on the spur of the moment at numerous assemblies of nobles and promulgated in numerous political publications, stressed that the highest authority in the state belonged to the community of the nobility, which, taken as a whole, constituted the Commonwealth. A succinct definition of the legal order of the rebellion was expressed by its leader, Mikołaj Zebrzydowski, *voivode* of Krakow: '. . . there already exists a Commonwealth, which prescribes to the senators, to the kings, to our lords and puts into force what it wants, before which for this time other courts fall silent, indeed from the highest to lowest magistrate; as has been said, the *fasces* have been lowered, before anything whatsoever in this rebellion (*Rokosz*) takes place concerning the highest matter, *de summa rerum*, and makes everything legitimate' (Zebrzydowski 1918: 234). Such a Commonwealth stood above both the king and the Seym. In the proposals of the rebels one can see elements of the sovereignty of the nation of the nobility within the state.[823]

This led to the second main accomplishment of Zebrzydowski's rebellion: treating *de non praestanda oboedientia* more seriously. Though it appeared at least as early as the Articles of Mielnik, it was the Rokosz Zebrzydowskiego that finally led to it becoming a real, political fact, rather than some theoretical threat. Henryk had to be threatened with it to accept

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[821] "Libera respublica—absolution dominum—Rokos. 1) Libera resublica quae sit?" In Czubek, *Pisma polityczne*, Tom II, pg. 403.
[822] Libera respublica—absolution dominum—Rokos. 1) Libera resublica quae sit?" In Czubek, *Pisma polityczne*, Tom II, pg. 406.
[823] Opaliński, "Civic Humanism," pgs. 164-165.

the Crown, but it was Zygmunt III Waza that felt its real application. In a demonstration of how the rokoszenie may have lost the battle, though won the war, the right to rebellion was taken seriously at the 1607 Seym, which the rebels had boycotted. In other words, even at a Seym called by the king and attended by loyalists, a major reform position of the rebels was accepted as constitutional law.

As Makiłła recounts:

> The most important result of the 1607 Seym, however, was the adoption of the article *de non praestanda oboedientia*, originally included in the Henrician Articles of 1573, and then issued additionally in a separate Seym constitution in 1576 during King Stefan Batory's coronation Seym. The separate treatment of the Article on the possibility of denunciation of obedience was evidence of the initial modifications of the articles in relation to their original wording. Whether this was the result of an effective royal intention to weaken the possibility of too loose application of the rule of denouncing obedience, or of a concept aimed at a more meaningful clarification of the general wording, is not entirely clear. The Seym's consent to introduce this regulation stemmed from the progressive need to clean up a provision that was too broadly worded, leading to unclear interpretation, especially when it came to its legal application. There was certainly some concession on the part of the other participants in the whole process. Perhaps, while allowing for a detailed regulation of this provision, they also perceived the awkwardness of the existing wording? The essence of the Article *de non praestanda oboedientia* was to clarify the conditions under which the obedience to the king could be denounced and a procedure was laid down for applying said act of denouncing obedience.[824]

The true impact of this change was felt in the 1609 Seym, the one after the surrender of Radziwiłł, Zebrzydowski, and the others. This was the Seym wherein they were granted full amnesty. Rather than one where a triumphant king could declare victory over the rebels and implement his desired changes, it demonstrated that it was the rebels who had effectively won. The 1607 Seym and the acceptance of the right to rebel was a process of improving the law.[825] Batory had interpreted the right to disobedience as only when the king willfully disobeyed the law, whereas Zygmunt III had raised the standard for *de non praestanda oboedientia* even higher: that the king was tyrannical and abused the law and that the senators had to bring this charge to the primate, who would bring it up to the king. If the king still refused, then the whole Seym would decide what to do.[826] However, the 1609 shifted this by allowing for the *szlachta* to bring the article of *de non praestanda oboedientia* before the Seym, not just one of the senators or officials. Some of the more relevant, constitutional points, are summarized in Table 3.20 below. The Article on the Right to Declare *de non praestanda oboedientia* has been broken up for readability and clarity.

[824] Makiłła, *Artykuły henrykowskie*, pg. 476.
[825] "In the legal and systemic sense, the provisions of the article formulated in this way clarified the articles on renouncing obedience. Thus, the hitherto law on renouncing obedience as lex imperfecta became lex perfecta. It made it possible to not only implement resistance against the monarch, but also to apply sanctions against him.," *Ibid.*, pg. 479.
[826] *Ibid*., pgs. 475-476.

Table 3.20 Summary of 1609 Konstytucje[827]

Konstytucja	Text	Outcome(s)
Amnistya (Amnesty)	—	Amnesty Declared, Excepting those Who Committed Crimes Such as Plundering Churches or Murders
Deklaracya artykułu *de non praestanda oboedientia* (Declaration of the Article *de non praestanda oboedientia*)	Also, the duties of senators in their oath to look out for whatever they see as detrimental to the entire Commonwealth and to freedoms therefore, is to be explicitly kept. So too, this duty does not derogate every *szlachcic* from freely demanding all his freedom as well as his rights at the poviat Seymiki, that properly convoked by the king, and the same right is given a deputy at the Seym, all according to the old custom as described by law. Therefore, if anyone of the *szlachta* estate or any senator should observe any deliberate violation or anything intended to infringe the wholeness of the Commonwealth and its liberties, they may at any time inform and turn the matter over to either to the Archbishop of Gniezno as Primate, or to the senators who are residing with Us [the king] according to the *konstytucje*, or to any other senator from his own or any other województwa. All of whom together, or any one of them, should warn and admonish Us [the king]. And when this warning and admonishment is not satisfied by Us [the king], the *szlachcic* who first brought this warning to the senators, would be permitted just as any of those senators had been, to (if the senators were negligent in this first admonition), turn this matter over to the *szlachta* estate at the privilege Seymik before the subsequent general Seym (Seym Walny), and commission the *szlachta* estate and deputies to admonish Us and our successors.[828]	Every single *szlachcic* has the right to the procedure of admonishing the king if the king disobeys the law or threatens the Rzeczpospolita The procedure for admonishing the king is establishment
	What if it did not go well, neither We and Our successors, after this second admonition would not want to correct it, in which the insult to freedom and liberty would show, they are to put it on all the states that are in that same Seym.	If the King Does not Respond to the Second Reprimand it Goes to the Seym

[827] "Konstytucje Sejmu Walnego Koronnego w Warszawie Roku Pańskiego 1609," 1609, in *Volumina Legum*, Tom II, pgs. 461-475; in *Volumina Constitutionum*, Tom II, Vol. 2, pgs., 379-398.
[828] See also: Anna Grześkowiak-Krwawicz. 1995. "Dyskusje o Wolności Słowa w Czasach Stanisławowskich." *Kwartalnik Historyczny* 1, pg. 54.

	And if We and Our successors, after this third admonition, did not give a just cause in the case that was brought, and did not want to do anything behind these instances, and it would be evident and sufficiently shown that from Us the whole of the Republic and its freedom is being offended, the states are to behave according to the *article de non praestanda oboedientia.* And if anyone bypasses these steps and the solemnities expressed herein, and with the buying of men of war and tumult of the common peace pretext that something detrimental to the whole of the Republic and freedom is happening through Us, they are to be sued at the Seym and judged *per ordines Regni in absentia Nostra* [through the ranks of the Kingdom in Our absence].	Once the Third Reprimand is Ignored, then the article *de non praestanda oboedientia* is invoked. If a person disturbs the process of invoking *de non praestanda oboedientia* then they can be removed and tried by the court.
O mieszkaniu senatorow (About the Resident Senators)	—	Increase the penalty for those who do not participate in the Senatorowie Rezydenci to make the Body More Effective, Make it in Force. How not to make them neglect it, but put it into practice
O Cudzoziemcach (About Foreigners)	—	The Previous Constitutions on Foreigners Upheld

The empowerment of the *szlachta* to determine when *de non praestanda oboedientia* was violated was a significant shift, but not one that was ultimately unexpected, given that most of the 16th century can be thought of as the shift of power away from the king and his small circle of *magnaci* and senators toward the *szlachta* writ-large. Legalized rebellion against a king went from a theoretical idea that had occasionally broke out throughout Polish history to a concrete process of legalized change. While the details of what exactly such a rebellion was were somewhat vague, what became clear was the process by which it could come about—as well as the role of all the players within it. Following the principle of the nominal equality of the *szlachta* before the law and the evolution of the *Nihil Novi* principle, *any* member of the *szlachta* to act on behalf of the good of the whole. Thus, the provision on the Senatorowie Rezydenci combined practical advice for creating the *mixta monarchia*, horizontal organization of institutions, balancing representation throughout the Commonwealth, as well as a regular, written down, well-organized law. To put it simply, the Rokosz Zebrzydowskiego was not a victory for either side, but an opportunity for the consolidation of the long 16th century with all of its changes and achievements.[829]

X. The First Turn of the Hermeneutic Spiral: What can Constitutionalism Learn from the Polish-Lithuanian Experience of Constitutional Construction?

The time has come to ask ourselves the question: what are the achievements of this long period of constitutional construction? What can we learn from 15th and 16th century Polish-Lithuanian Constitutionalism, i.e., how does its institutional, practical, and ideational production—as evidenced and elucidated through texts—reflect upon our understanding of constitutionalism *per se*? It is here our exegetical approach truly demonstrates its merit as an iterative process, as an adaptive, learning fusion of theory and methodology. 16th century Polish-Lithuanian constitutionalism contributes to broader, transhistorical, comparative constitutionalism in two significant ways: the first is a deeper understanding as well as appreciation for polycentric constitutionalism; the second is the necessity of a fourth

[829] "The clash between the king and the opposition, unsuccessful politically, nevertheless made clear the need to reform some of the constitutional norms included in the Henrician Articles, as well as the need to respect and observe them. Thus, the principal effect of the clash between the king and the opposition in 1606-1608 was to bring about changes in the constitutional rules [...] The opposition, centered on the rokosz convention near Jedrzejow, did not take part in the Diet called by the king for May 7, 1607. Meanwhile, the king, taking advantage of the situation by formally not participating in the session, carried out parliamentary resolutions favorable to himself through his supporters. He agreed to incorporate most of the provisions contained in the Wiślickie articles into the Sejm's legislation, adding a few demands of the rokoszenie. The king ostensibly made concessions, but he did not modify the system in accordance with the wishes of the rokoszans, but only confirmed the norms that already existed, thus only clarifying provisions that were too broadly stated (articuli de non praestanda oboedientia) and committing himself to regulations that he simply avoided using - as in the case of resident senators. Gaining the upper hand over the opposition, he provoked them into actions that took on the character of a revolt, with which he gained the support of military commanders loyal to him, who, with the participation of their troops, dispersed the revolt. The retreat of the revolt's leaders took place at the Convocation of the Senate in April 1608. The final chord of this conflict, and in fact its legal aftermath, was the next clarification of the provision on the termination of obedience, which took place at the 1609 Sejm. A further refinement of this provision, in relation to the changes already adopted at the 1607 Sejm, introduced a procedure that, while showing how the termination of obedience could occur and how to carry it out, in fact - departing from the vaguely worded provision - essentially limited its practical application, which, as is well known, was decidedly to the king's advantage," Makiłła, *Artkyuły henrykowskie*, pgs. 482-483.

constitutional archetype-as-such, namely praxis. Both are followed in turn, with a brief reflection upon the spirit of 16th century Polish-Lithuanian constitutionalism.

The Konfederacja Warszawska, the *pacta conventa*, and the Henrician Articles are all fundamental legal texts and to some degree stand independently as they serve a different constitutional function and that these functions were each based within Polish-Lithuanian constitutional history.[830] However, at the same time, they all complement each other in a unified, coherent way. It would be inappropriate to categorize them as either "written" or "unwritten" in today's constitutional understanding. Perhaps the better conception would be *constitutional polycentricity*,[831] the idea that there multiple, independent constitutional sources.

The second major contribution of 16th century Polish-Lithuanian constitutionalism for modern, comparative work in constitutional theory is that it challenges the three-fold division of constitutional archetypes-as-such: ontological, epistemological, and teleological. This division is not based on some contrived, deep theory, but simply from the observation that every action requires knowing who/what is acting/being acted upon (ontology), how that action takes place (epistemology), and why that action should take place (teleology). Throughout the 16th century, however, Polish-Lithuanian constitutionalism placed on immense amount of emphasis on electoral processes and parliamentary procedures, something not cleanly captured in these three prior categories because it is not "constitutional" in the same sense but rather is somehow necessary for constitutionalism to occur. This reveals a fourth kind of knowledge—or perhaps better put, there are multiple dimensions and levels to epistemology—namely the distinction between how to perform an action and the tools with which that action is to be performed. When constructing a piece of furniture, there is the overall knowledge the components and the tools required to make it, as well as the knowledge of how to assemble those components and in which order.

This second understanding is that of realizing the object or the action itself. This distinction is quite familiar in epistemological studies in the differentiation of *praxis* (doing) and *poiesis* (making), which existed in ancient Greek thought.[832] In fact, what may be

[830] Uruszczak, "Species privilegium", pg.33. Uruszczak builds upon Sobociński's argument: that the Henrician Articles and the *pacta conventa* could not originally be considered to be of the same constitutional weight, but Uruszczak further clarifies that with the 1632 election there was a transformation in their relationship, with the *pacta conventa* becoming equal to the Henrician Articles. From this point onward, there is also less specific citation of the Henrician Articles, which more or less had become absorbed into the law, and with many *pacta conventa* reiterating the same, normal that had become universally accepted.

[831] For a more complete survey on polycentricity, see: Paul D. Aligica and Vlad Tarko. 2012. "Polycentricity: From Polanyi to Ostrom, and Beyond." *Governance* 25(2): 237-262; Karry Catá Backer. 2012. "The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity." *Tilburg Law Review* 17(2): 177-199; Jeff King. 2008. "The Pervasiveness of Polycentricity." *Public Law* 1: 101-124; Michal D. McGinnis, ed. 1999. *Polycentricity and Local Public Economies: Readings from the Workshop in Political Theory and Policy Analysis*. The University of Michigan Press: Ann Arbor.

[832] For a fuller discussion, see: Jacques Taminaux. 1987. "Poiesis and Praxis in Fundamental Ontology." *Research in Phenomenology*. 17: 137-169; Lawrence E. Cahoone. 1995. "The Plurality of Philosophical Ends: 'Episteme, Praxis, Poiesis." *Metaphilosophy* 26(3): 220-229; Anna Nilsson Hammar. 2018. *Theoria, praxis, and poiesis: Theoretical Considerations on the Circulation of Knowledge in Everyday Life.* Nordic Academic

oversimplified as "epistemic" in the modern sense of political science and practical philosophy is in reality three separate approaches to knowledge: epistemic, praxical, and *poietic*.[833] Upon further appreciation for this distinction, it appears that the archetype of epistemology is better understood as praxis with the addition of a new category, *poiesis*.

While such a distinction may appear trivial coming from a deeper appreciation of epistemology, it should be noted that the constitutionalist tradition in which the author was raised does not put much emphasis on these questions of parliamentary procedures. For example, in the United States Constitution there is very little said about how to actually conduct parliamentary procedures. There are comments about how to form quorums and stipulations about recording votes, but little about how bills are introduced, how they are brough to debates on the floor, how those debates are to be conducted, and so forth. In fact, much of the parliamentary procedure within the United Sates is governed by *Robert's Rules of Order*, which was created by Henry M. Robert, a private citizen in 1876.[834] Ironically, the United States Constitution, generally revered as the first modern, written constitution, is reliant upon an extra-constitutional text written 100 years after the Declaration of Independence, to organize its parliamentary affairs. The first 100 years before *Robert's Rules* was actually a period of parliamentary chaos, which inspired Robert in the first place. As such, both assumptions of writtenness as well as the peculiarities of American constitutional procedure both may prove to be something of blind spots for contemporary constitutionalist theorists, the author himself the example in point. As such, one of the contributions of 16th century Polish-Lithuanian constitutionalism is to highlight how questions of parliamentary procedure emerge and are resolved that may otherwise be invisible for contemporary scholars living in an age where parliamentary procedure is very bureaucratized, standardized, and stylized.

These revelations demand some recalibration of the constitutional archetypes, with the newer categories bolded, as expressed in Table 3.21.

Press: Lund; Bernard E. Harcourt. 2020. *Critique and Praxis: A Critical Philosophy of Illusions, Values, and Action*. Columbia University Press: Columbia.

[833] "These activities have corresponding virtues of thought. Theoria is associated with episteme— that is, theoretical/epistemic knowledge of the kind that has already been discussed, and that tends to be the centre of attention in histories of knowledge. Praxis is in turn connected to the virtue of phronesis, or the practical wisdom related to social and political interaction. Poiesis is linked to techne, or practical/productive knowledge, a knowledge of how to make something. For Aristotle this was the artisan's knowledge, a certain kind of creative skill. Practical knowledge is thus divided into two distinct categories," Anna Nilsson Hamar. 2018. *Theoria, praxis, and poiesis*: *Theoretical considerations on the circulation of knowledge in everyday life*. In Johan Östling, Erling Sandmo, David Larsson Heidenblad, Anna Nilsson Hammar and Kari H. Nordberg, eds. *Circulation of Knowledge: Explorations in the History of Knowledge*. Nordic Academic Press: Lund, Pg.114.

[834] Henry M. Robert III, Daniel H. Honemann, Tomas J. Balch, Daniel E. Seabold, and Shmuel Gerber. 2020. *Robert's Rules of Order Newly Revised, 12th edition*. PublicAffairs: New York.

Table 3.21 Elucidation of Constitutional Archetypes 2.0

Constitutional Archetype-as-Such	Constitutional Archetype(s)	Phenomena (Examples)
Ontology (What and Who?)	Representation, Participation, and Citizenship	Naturalization
		Role/Rights of Foreigners
		Defining Political Estates
	Sources of Law	Constitutional Continuity with Proceeding Legal Systems
		Engagement with Other Legal Systems
		Religious or Other Legal Doctrines
		Supremacy of a Central Constitutional Text
	Horizontal Organization of Institutions	Separation of Powers
		Personal Union of Kingdoms
		Confederation
	Hierarchical Organization of Institutions	Federalism
		Devolution
	Individual Rights	Enumerated Rights (Positive Freedom)
		Limiting State Power (Negative Freedom)
	Consent and Legitimacy	Will of the People
		Transparency
		Rule of Law
Praxis (In what way?)	**Decision-Making**	**Majoritarian Voting**
		Supermajoritarian Voting
		Veto Processes
	Requirements of Legal Interpretation	**Narrow vs Loose Constructivism**
	Legitimate Processes of Constitutional Change	**Amendment Processes**
		Constitutional Convention
Poiesis (By which means?)	**Parliamentary Procedure**	**Rules of Parliamentary Debate**
		Rules of Counting Votes

Teleology (Why?)	The Purpose of the State	National Defense
		Justice
		Facilitate Community
		Equality

XI. Conclusion

Poland-Lithuania witnessed a long, turbulent period of constitutional construction, full of opportunities for reform and development as well as chaos. It began with the uncertain, personal union between the Grand Duchy and the Kingdom of Poland, saw the investiture of the political power in the person of the king in the Jagiellonian times, but then the rising political power of the *szlachta* was attained through the privileges, unions, and konstytucje at Koszyce (1374), Krewo (1385), Horodło (1413), Czerwińsk (1422), Jedlnia and Kraków (1425-1433), Nieszawa (1454), Piotrków (1496), Mielnik (1501), *Nihil Novi* (1505) and the executionists Seymy (1560s). It ultimately ended with the *szlachta* expressing their power either directly during *virtim elections* or through their agents, e.g., the *depuaci* [deputies] at the Trybunał as well as at the Izba Poselska.[835]

The Commonwealth witnessed the end of the Jagiellonian dynasty, three interregna, a brief civil war, and the rise of the Wazas. All throughout, a diverse mix of practices, ideas, and institutions wove together in a complex, constitutional continuity that combined classical republicanism, the Reformation, and Humanism, filtering them through the unique experiences of Polish-Lithuanian citizens. The executionist movement's rallying cry that *lex est rex in Polonia* inspired the *szlachta* uniting together into an increasingly coherent political and social class, exercised through the Izba Poselska. Andrzej Frycz Modrzewski preached the glories of the executionist movement, the need for public morality in service of the common good, the importance of toleration, and the need to restrain the Church, whilst the more conservative and cautious Stanisław Orzechowski warned about the dangerous of excessive reform and change and decried the executionists as too radical and self-interested to promote the good of the nation. The executionist movement ultimately triumphed in spirit, if not always in letter: its final contributions were the strengthening of Poland-Lithuania and centralizing its institutions, but in a manner that provided an alternative to absolutism. Instead, it was the *szlachta*'s institutions—including the Trybunał—that became the central

[835] "Initially, the monarch possessed a monopoly for legislative initiative and even for introducing all questions to be debated by the Sejm. Legislative initiative belonged also to the senators, but they rarely made use of it. Initially, the deputies did not enjoy this privilege. Nonetheless, the victory of the reform movement of the nobility, known as execution of the laws, hence the Executionist Movement, during the 1560s became the reason why no one any longer opposed the deputies' legislative initiative. Just like all estate representations in Europe the Sejm enjoyed the prerogative to express consent to taxes. From the time of Stefan Batory, Parliament also decided about ennoblement and peerage as well as summoning a mass levy; earlier, these were royal privileges. Moreover, Parliament had a decisive voice regarding war and peace as well as alliances. It also resolved numerous minor issues, such as river regulations and the erection of water mills, i.e. it controlled the navigability of waterways. Furthermore, it participated in ceremonial hearings of deputies. From the time of passing the Henrician Articles Parliament also decided about a possible prolongation of debates. In practice this depended on the Chamber of Deputies," Edward Opaliński. 2021. "Sejm of the Commonwealth of Two Nations 1572-1668." *Przegląd Sejmowy* 6, pg 104.

organs of power. [836] It weakened the king, secularized the state, produced the constitutional documents of the Konfederacja Warszawska, the Henrician Articles, and the *pacta conventa*, each of which were clarified and refined through interregna. The Rokosz Zebrzydowskiego also contributed to the development of institutions contained within the Henrician Articles, such as establishing a permanent body of senators to advise and restrain the king [Senatorowie Rezydenci] as well as specifying the right of resistance [*de non praestanda oboedientia*], *inter alia*.

Though kings with varying degrees of absolutist ambitions and expansionist policies would come and go over the next century and a half, the contours through which they would act were established by these documents. The system, as imperfect as it was, stood until 1764 when the chaos of internal dissent and external pressure again forced a series of difficult reforms. This is not to say that the next 150 years were a period of decline, as some biographers of the Commonwealth have proclaimed, looking back at the 17th and 18th centuries with 19th or even 20th century eyes. To the outside observer the 17th and 18th century may appear to be a period of ossification, of cancerously slow decay, while to those who lived within that context—within that time and place—it may merely have meant stability and continuity.

Such a judgment lies beyond the historiosophy we are willing to put forward here. No more—and no less—can be said then that constitutional texts' meaning, and the continuity of a constitutional system are better understood from within than from without. If one is to understand comparative, transhistorical constitutionalism each "past" cannot be treated as "the past", with all its attendant burdens and baggages. Rather each place is to be understood—reconstructed, if need be—as a present, a present working out its own flaws and tensions, its accomplishments and failures. To recreate this "present" of the 17th century (1609-1696) —this period of constitutional maintenance—is our next task.

[836] Adam Lityński. 1978. "O Trybunałe Koronnym i palestrze Trybunałskiej." *Palestra* 22/10(250), pg. 19.

CHAPTER FOUR
The Period of Constitutional Maintenance

Weathering Internal and External Crises (1609-1717)

> Like a ship on the water, each nation stands either by the wind or the fortune and skill of her crew and by two things she perishes: the silence of the sea or by storm.[837]

I. Zygmunt III Waza and the End of the "Golden Age"—or Consolidation—of Polish-Lithuanian Constitutionalism (1609-1632)

The exact period of the Polish-Lithuanian Commonwealth's "Golden Age" is still debated among historians, with some considering it to cover the reigns of Zygmunt I Stary and Zygmunt II August,[838] whereas others consider it to cover the 16th century more generally.[839] McKenna suggests that it should be narrowed to the second half of the sixteenth century, while the first half of the seventeenth century is the silver age.[840] Stone suggests that the long reign of Zygmunt III Waza (1587-1632) was paradoxically both the apogee of Poland-Lithuanian military, economic, and cultural influence as well as setting it on its inevitable path of decline.[841] Davies suggests that it occurred in the first half of the 17th century during the Waza period, with Zygmunt III Waza and his sons Władysław IV Waza and Jan II Kazimierz Waza, noting that they were "managers" rather than "innovators" and that they were moderates rather than "latent despots." While Davies is correct in pointing out that the nation achieved its greatest geographical size as well as great peace and prosperity during the reigns,[842] we take strong issue with Davies sidestepping the major undercurrents

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[837] "Prędka rada przed upadkiem," anonymous. Quoted in:Włodzimierz Stanisław Broel-Plater. 1858. Zbiór Ppamiętników Do Ddziejów Ppolskich. Tom 2. Drukarnia Gazety Codzinnéj: Warszawa, pg.46.

[838] "The Golden age of the Sigismunds." *Encyclopedia Britannica*. https://www.britannica.com/place/Poland/The-golden-age-of-the-Sigismunds (Accessed 1 Jan 2022); Jacek Jędruch. 1998. *Constitutions, Elections and Legislatures of Poland, 1493-1993: A Guide to Their History*. Hippocrene Books: New York, pg. 73.

[839] "The Golden Age of the Sixteenth Century." In: Glen E. Curtis, ed. 1992. *Poland: A Country Study.* GPO for the Library of Congress: Washington. http://countrystudies.us/poland/7.htm (Accessed 1 Jan. 2022); Jędrzej Moraczewski. 1851. *Polska w Złotym Wieku.* Nakładem in drukiem N. Kamieńskiego: Poznań.

[840] Catherine Jean Morse McKenna. 2012. *The Curious Evolution of the* Liberum Veto*: Republican Theory and Practice in the Polish-Lithuanian Commonwealth (1639-1705).* "A Dissertation submitted to the Faculty of the Graduate School of Arts and Sciences of Georgetown University," pg. 277 f 600.

[841] Daniel Stone. 2001. *The Polish Lithuanian State, 1386-1795.* University of Washington Press: Seattle and London.

[842] "In effect, both Zygmunt and his sons proved to be competent managers. They were not allowed to be innovators. But neither were they fanatics, nor latent despots. Of course, they made mistakes. But most of the troubles which shook the Republic in their time can be attributed less to poor leadership than to the inflexibility of a system whose arteries were visibly hardening. What is more, in the three or four decades which preceded the shattering rebellion of Chmielnicki in 1648, in an era when the rest of Central Europe was rent by disasters of every sort, the Republic of Poland-Lithuania reached its greatest territorial extent and enjoyed prosperity and

of absolutism within Zygmunt III and Jan II Kazimierz. Throughout his reign Zygmunt III made multiple attempts at violating the stipulation against *vivente rege* elections present in his *pacta conventa* as well as the Henrician articles.[843] Zygmunt III was so obsessed with regaining his Swedish crown that he even entered secret negotiations with the Habsburgs to trade his Polish Crown for their assistance in returning to rule in Sweden.[844] In fact Stefania Ochmann-Staniszewska acknowledges that undermining the process of free elections was in fact a hallmark of the entire Waza dynasty, though she argues that the kings did so with the purpose of attempting to strengthen the state.[845] Along a similar line of reasoning to Ochmann-Staniszewska, Marek Wrede puts the whole Waza era as the silver age." [846] Similarly, Dankowski argues that Zygmunt I and Zygmunt II were the Golden age and suggests that the reigns of Zygmunt III Waza and Władysław IV Waza saw the breakdown of the system and the shift toward oligarchy, which really consolidated in 1652.[847]

We profoundly and generally disagree with such rosy interpretations that *strengthening* of the king should be equated with *reform.* Indeed, such a view is itself a reflection similar to the flawed historiosophy discussed throughout this study, for if one conceives of a polity as anarchic, backward, self-interested, i.e. that it has "hit rock bottom", so to speak, then any and all changes are presumed to be improvements, including installation of an absolute king. We take the opposite opinion, noting that absolutist states have a tendency to centralize power often as part of their desire to expand militarily, so that such "reforms" would also lead to more political turmoil and undermining of political rights. Indeed, the development of *szlachta* political identity and privileges was part of a balancing act where the king was granted military or financial support for his agenda—usually an expansionist foreign policy—but in exchange for more constitutional protections and limitations of the king's power domestically. As we shall see later, a more neutral assessment of the *liberum veto* was that it was a reasonable response to check the ambitions of Jan II Kazimierz and later the Wettins.

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security to a degree which was never repeated," Norman Davies. 2005. *God's Playground: A History of Poland*. Volume I: The Origins to 1795. Cambridge University Press: Cambridge, pg. 330.

[843] Stefania Ochmann-Staniszewska. 2006. *Dynastia Wazów w Polsc*e. Wydawnictwo Naukowe PWN: Warszawa, pgs. 95-96.

[844] Sybilla Hołdys. 1985. "A General Comparison of Procedure in the English Parliament and Polish Sejm." In: Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pgs. 197-198.

[845] "In the case of the Wazsas, however, we observe a constant desire to modify or abolish the law on free elections. These efforts focused on: 1) the designation of his successor by the king; 2) *vivente rege* election; 3) *vivente election*, but *non regnante rege* [not by a reigning king]. If these plans could be implemented, it would probably be the first step to convert the elected throne into a hereditary one. For the benefit of the *szlachta*, these aspirations were motivated primarily by concern for the Commonwealth, i.e., the desire to ensure the safety of elections, to avoid riots and dangers during the interregnum. In his speech at the Sejm of 1661, Jan Kazimierz specified these dangers as a vision of the threat of the partition of Poland," Ochmann-Staniszewska, *ibid*., pg. 95.

[846] Marek Wrede. 2005. *Sejm i dawna Rzeczpospolita: Momenty Dziejowe*. Wydawnictwo Sejmowe: Warszawa, pgs. 121-131.

[847] Michał Zbigniew Dankowski. 2019. *Liberum veto: chluba czy przekleństwo? Zrywanie sejmów w ocenach społeczeństwa drugiej połowy XVII wieku*. Jagiellońskie Wydawnictwo Naukowe: Toruń, pg. 50.

Whatever the precise dates that are given for the "Golden Age" of the Commonwealth, in terms of constitutionalism the period was one of the emergence of principles tempered with the consolidation of those same principles by the creation of constitutional texts, *konfederacje*, and sometimes *rokosze*. The second period—what might perhaps be termed "the silver age" of Polish-Lithuanian Constitutionalism—was a period of continuity, whereas the final period may be thought of as (attempted) reforms. For us, the end of this consolidation period was the Rokosz Zebrzydowskiego, with the remainder of Zygmunt III's reign producing almost nothing of constitutional value, in that he was chiefly concerned with external affairs. At this time, the constitutional system had also generally stabilized into something of a regular cycle of Seymy. Often, Polish historiography has treated the Rokosz Zebrzydowskiego as the end of the golden age because its failure supposedly facilitated the collapse of the *szlachta*'s position in favor of "magnat oligarchy", allowed Zygmunt III to fulfill his aspirations as a "Counter Reformation Prince", and allowed a shift away from liberty of conscience for the *szlachta* of all Christian confessions to a dominant Catholic Church.[848] Zygmunt III retained a lifelong desire for regaining his throne in Sweden, wars against Sweden for control of the Baltic, wars against Muscovy, support for the Catholic side in the Thirty Years' War, and clashes with the Ottoman Turks in the south. Though the Seym would not permit the king from engaging in the 30 Years' War directly, his support for the Catholic cause both in word and deed—sending financial and political support when possible—were widely known.

The 1598 death of the heirless Feodor I extinguished the Rurik dynasty and created a constitutional crisis in the Russian Tsardom that lasted for some fifteen years. Taking advantage of the situation, Zygmunt III invaded Russia and briefly conquered Moscow, electing his son Władysław IV Waza as Tsar in 1610 though he never finalized his control. This was ultimately an over-extension in a difficult and complex period and the Polish-Lithuanian forces were driven out of Russia with the Romanov dynasty ascending. Either a personal reunion of Poland-Lithuania with Sweden or the permanence of a Polish-Lithuanian-Muscovite Commonwealth, alternatively known as the Triple Union (*unia troista*), would have meant substantial constitutional changes. However, instead of the relatively easy task of continuing the consolidation of Prussia, he wasted his time and energy on these ambitious projects.[849]

There are grounds to not be quite so pessimistic. Though a powerful defendant of Catholicism, Zygmunt III allowed his Lutheran sister to hold Protestant church services at the Wawel castle.[850] There were some attempts at reforms by Jakub Sobieski, who was in the unique position of being an ally of the king, an active member of the Seym, a wojewoda as well as someone who inherited many of the Executionists' ideas. Essentially, the Senat took up the task of attempting to create a more efficient central administration and gave the Senat a more active role in promoting cooperation between the Crown and the Izba Poselska. He also advocated for a three-quarters majority to elect the king and proposed ways to slightly limit the ability of the *szlachta* to protest against legislation before the Seym, something that

[848] Katherine Alina Wilson. 2005. *The Politics of Toleration: Dissenters in Great Poland (1587-1648)*. "PhD Thesis, School of Slavonic and East European Studies, University College London," pg. 183.
[849] Wilson, *The Politics of Toleration*, pg. 143.
[850] Zbigniew Anusik. 2011. *Studia i szkice staropolskie*. Wydawnictwo Uniwersytetu Łódzkiego: Łódź, pg. 269.

was critical given that votes were by consensus, if not outright unanimity. He also attempted to give parliament power over the royal mint and to adopt other economic reforms of the Executionists such as free trade within the Commonwealth.[851]

Thus, the Rokosz Zebrzydowskiego serves as something of an end-point for the long period of the development and consolidation of Polish-Lithuanian constitutionalist principles. The right to Rokosz was reconfirmed as an unshakeable part of the republic, there was a specific, "three strikes" system where the *szlachta* would reprimand the king before *de non praestanda oboedientia* could be invoked, a council of resident advising senators with a rotating membership [the Senatorowie Rezydenci] was finally established, and there were severe limitations on the political offices that could be held by foreigners. This all but ensured that the king was dependent on the Seym. The *szlachta* had won the battle for the heart and mind of the country, with much of the political, economic, and constitutional system shaped according to their will. The major players and institutions had been established: the Church, the *magnaci*, the *szlachta*, the king, the Senatorowie Rezydenci, the Izba Poselska, the Senat, and the Crown Trybunał, which would remain in place for the next 150 years.

Whether one is optimistic or pessimistic is the key question of historiosophy, and demonstrates the importance of historical reference points as well as the dangers of rushing to compare: if a period of political, social, economic, or military disturbance is our point of reference for the 17th century—such as the 1650s-1660s—then the whole period appears to be chaotic. Similarly, if we briefly examine that chaotic period and then immediately make comparisons across Europe, then it becomes easy to stereotype the whole Polish-Lithuanian constitutional system. Brief, disruptive periods are magnified and become an "anarchic political system". However, if we examine these brief periods more slowly, placing them carefully within their context, then it unfolds that they are first of all brief periods of deviation or disruption, and secondly, that the choices made before and after them by political actors become coherent. It is required of us to follow McKenna and ask the pertinent question: if it was so clear and obvious that the 17th century witnessed a decline of the Polish-Lithuanian political and constitutional system, then why did no one do anything about it? Why did institutions such as the *liberum veto* last for nearly 150 years?[852] The simplest solution is to merely assert that the *szlachta* were selfish, self-interested, or lazy, but this is an unsatisfying answer, which is an ahistorical moral judgment from those who have the advantage of understanding the full consequences of historical actions that would have been unknown—and in many ways not even imaginable—for those actors, rather than an attempt at a comprehensive reconstruction of the constitutional and political system. In other words, before we simply and easily dismiss the *szlachta*'s actions, it is first important to attempt to make a positive case for them, i.e. to see the world through their eyes at the time and try to understand their actions respective to their own context.

In traditionalist historiosophy, the *liberum veto* is not interpreted as a constitutional development, but rather as something that got in the way of constitutional development—perhaps even go so far as to say as it was *anti*-constitutional. Thus, we must instead try to

[851] Stone, *The Polish-Lithuanian State*, pgs. 135-136.
[852] McKenna, *The Curious Evolution of the* Liberum Veto, pgs. 7-8.

interpret the *liberum veto* as *itself* a development of Polish-Lithuanian constitutionalism and as something that was born from the very specific political and social understandings of mid-17th century Poland-Lithuania. In other words, we must avoid the temptation to "take the easy way out" and simply—and lazily—say "there was no real constitutional development between 1652 and 1764" and thus simply smooth over a century of Polish-Lithuanian constitutional historiography. Just because these phenomena were not constitutional in the same way or to the same degree as in the preceding century does not mean that they were not *constitutional at all*. To appreciate these events as *constitutional in their own way*, it is necessary to reconstruct them in the time and place in which they occurred, to—rather than dismiss them—ask why and how each of them developed in the way in which they did, that is to make the positive case for them inscribed within their specific constitutional and political languages.

This latter attempt opens up further questions: were there reform attempts that were defeated? If there were, why and how were they defeated? Or, perhaps, is the understanding that it was disorderly or dysfunctional merely the evaluation of historians and political scientists living centuries later, after the collapse of the state? Perhaps the reason why the system remained as it was because the status quo was understood as the *least bad* alternative or perhaps because the *szlachta* valued political and individual freedom more than political and social order? One man's stagnation may be another's stability. We must keep these tensions and questions in mind as we proceed to understand seventeenth century Polish-Lithuanian constitutionalism on its own ground, that is an internal history of its own development.

II. A New Understanding of Constitutionalism

The distinction between *praxis* and *poiesis* will become a critical conceptual tool for evaluating not only 17th century Polish-Lithuanian constitutionalist development, but also how that development has been subsequently evaluated by historians and theorists. Regrettably, doing so will require some minor departures from our hermeneutic, text-driven investigative methodology, if only to highlight the flaws within much of the secondary literature on the seventeenth century, which is noticeably much more critical and pessimistic than the secondary literature of the sixth century. Indeed, as one progresses forward through Polish history, there is a tendency for its historiosophy to become a more overt reflection of contemporary political values and needs, rather than Polish history as a phenomenon to be understood *qua* Polish history. Much of the problems that occurred within 17th century Polish-Lithuanian constitutionalism resulted from the insufficient clarity between praxis and poiesis in *unplanned* application and misapplication of parliamentary procedures. More precisely, there was not much questioning of the existence of the *liberum veto*, the voting rights of the *szlachta* or of the need for Seymy. Rather the crux of constitutionalist debate concerned under which circumstance was it appropriate to have varying forms of these principles or institutions, e.g., one situation may have allowed for completely unanimous voting—i.e. that the *liberum veto* was permissible—whereas another situation may have allowed for simple majority. Or, alternatively, there may have been certain conditions under which one form of the Seym was most appropriate, whereas other conditions would require another form of the Seym. These substantive complexities and nuances are often absent from

the literature and must be painstakingly recreated to truly understand 17th century Polish-Lithuanian constitutionalism.

The achievements, tensions, and crises that emerged within seventeenth century Polish-Lithuanian constitutionalism are necessarily reflections and consequences of this inward pattern of development. As we shall see, seventeenth century Polish-Lithuanian constitutionalism differed from the prior period because it proceeded in a less linear manner, with simultaneous overlapping crises. These crises can be thought of as points of convergence around various constitutionalist themes, such as natural tensions within the constitutional system whereas others were consequent from the various wars as well as expansionist or dynastic ambitions of the Waza and later Wettin (Saxon) dynasties. The first theme can be thought of as endemic, while the second has a stronger external component, perhaps being the main factor such as invasions into Poland-Lithuania, whereas the complex dynastic ambitions of the Wazas to reclaim Sweden is obviously a mix of exogenous and endogenous political components.

Combining these two constitutionalist threads in a broad brushstroke, there were cases where external pressures exposed the internal weaknesses of the constitutional system, such as the Catholic branch of the Waza family's fight to reclaim the throne of Sweden from their Protestant cousins leading to decreasing religious toleration within Poland-Lithuania. Part of the difficulty of the *liberum veto* was that it not only transected many of the important political and constitutional events throughout the 17th century, but that it also transected across these constitutionalist categories, being an outgrowth of the *szlachta*'s desire to defend their rights, the continual evolution of as well as the lack of clarity concerning parliamentary procedure and the concept of "voting", and as a reaction to the dynastic ambitions of the Waza and Wettin dynasties. Thus, while the 14th through 16th centuries may be characterized as a more linear and gradual evolution with many similar themes emerging and reemerging—e.g., the balance of power between the Senat and the Izba Poselska, the role of the Church, the management of the royal lands, etc.—the seventeenth century was a punctuated equilibrium resultant from political shocks that in many ways has to be deciphered *thematically*, rather than in a more straightforward *chronological* sense.

Given that our method is highly responsive to the historical evidence and textual material, it is necessary for our method to change to reflect these subtle shifts. To briefly illustrate the difference in *thematic* versus *chronological* approaches to historiography—and to demonstrate why one may be more appropriate to understand the 17th century as it unfolded—we briefly take the *liberum veto* as our point of departure. The *liberum veto* was first exercised in 1652 and became a powerful parliamentary practice for the next 139 years until it was removed by reforms in the 18th century. Indeed, its exercise—or the threat of its *potential* exercise—intersected almost every major political event. However, a broad examination of the *liberum veto*—say, over a period of 100 years—and then abruptly returning to another topic in the 1660s is a chaotic and disjointed approach to studying political phenomena. Thus, a methodological compromise of sorts is proposed, wherein the analysis will be approached thematically, but in a limited way, such as an examination of the *liberum veto* over a truncated historical period before returning to another theme. This compromise will still ground our exploration in a systematic, context and text-driven manner,

but in a way to build continuity of localized clusters of constitutional development, rather than an assemblage of parallel "histories" of each phenomena within the umbrella of 17th century Polish-Lithuanian constitutionalism. To put it more concretely, though the *liberum veto* was a far-reaching phenomenon in practice, in terms of its development it more or less crystallized by the end of Jan II Kazimierz's reign and its usage during the Wettin period was largely an echo of this early understanding. Secondly, throughout the 17th and 18th centuries there were numerous *konfederacje* against the Waza and later Wettin dynasty, not all of which had constitutionally significant contributions. As much as possible, these phenomena will be grouped together in a loose chronology, so that there may be some movement within a broader period as necessary, but not jumping across centuries.

The tone of the investigation must significantly depart from traditional historical emphasis on and understanding of what the author considers to be the three main crises of the 17th century: the wars between Sweden and Muscovy culminating in the Deluge, declining religious tolerance, Cossack wars, and multiple parliamentary and political crises culminating in the *liberum veto*. The Deluge was an existential crisis for the Commonwealth, killing an estimated 25% of its population,[853] and in the sense that the nation nearly disappeared from the map of Europe, but despite this the Seymy and Seymiki attempted to continue as normal as possible—though there was a notable gap between 1654 until 1658 due to the Deluge. Despite the severity of the Deluge, the *szlachta* still refused to grant the king *cart blanche* in his ability to raise taxes or control the military—even occasionally denying the king funds for his military efforts despite the numerous wars throughout the period. The Deluge thus poses no constitutional questions itself, though it produced multiple consequences that *did pose* significant constitutional questions. In many ways, the Deluge was what pushed the fraying institutions of the Commonwealth to their breaking point; internal conflicts that could have perhaps been dealt with in times of peace via compromise instead turned into transformatively intractable problems. The Cossack question is generally understood in terms of politics or religion, rather than as leading to constitutional reforms of the Commonwealth itself. This traditional historical perspective largely glosses over the Treaty of Hadziach and of proposals to form a Polish-Lithuanian-Ruthenian Commonwealth, which would have had significant constitutional ramifications.

These events are not the sum total of 17th century Polish-Lithuanian constitutionalism, but they are significant lodestones to keep in mind in our examination of it. However, we must be cautious as to not allow the traditional historiographic emphasis on these events obscure some of the more subtle changes that were occurring at this time, such as the recurring problem of religious diversity and toleration in an era where a Catholic crown had to fight both Orthodox (Muscovy) and Protestant (Swedish) invaders simultaneously. Despite the existential crisis of the Polish-Lithuanian Commonwealth, due to foreign invasion and civil war, the *szlachta* still retained their concerns with restraining the powers of the king. This leads to the primary question to guide us on our journey in the 17th century: were the ideas, institutions, and practices of the king and the *szlachta* responsible for producing stability or stagnation in this era of turbulence?

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[853] Richard Butterwick-Pawlikowski. 1998. *Poland last king and English culture: Stanisław August Poniatowski, 1732-1798.* Clarendon Press: Oxford, pg. 24.

We must begin our understanding with 17th century constitutionalism along this main theme: the *szlachta* would suffer neither any reduction of their hard-won privileges nor a monarch who ignored their demands. Tensions would still remain between ambitious kings and the generally republican political culture of the Crown, Lithuania, Prussia, and Ruthenia, but the "Polonization"—perhaps better to consider it the "*szlachtization"*—of the noble class throughout the Commonwealth had begun and would continue. The *szlachta* now had the political organization to act as one voice, the legal precedent of *rokosz*, and the ideological consensus of what "the Rzeczpospolita" meant necessary to prevent any major structural changes. In a very real sense, the major contours of the constitutionalist system were finished, both the *ontological* work establishing the structure of the political system as well as the *teleological* work establishing the civic identity as a Rzeczpospolita. However, this did not mean that the process of constitutionalist evolution simply halted, but rather there was a qualitative shift in development away from ontological and teleological to praxical and poietic concerns—perhaps better thought of as a shift away from hewing out the structure to more fine-tuning within it. Most significantly, there was increasing attention paid to questions of *parliamentary procedure*, including the infamous *liberum veto*. This shift toward parliamentary proceduralism, toward *poetic* and *praxical* concerns is to be now explored in greater depth.

Further clarification to parliamentary procedure and constitutional structure was given at the 1613 Konstytucje. It introduced the important procedural principle of the Marszałek of the Seym, Senators, and potentially other deputies sending *konstytucje* to a publishing house the next day after a Seym has concluded.[854] While seemingly a minor point, it was in fact significant because at this time it was the king who was responsible for providing the final version of laws to be published. Understandably, this opened up potential for abuse in that the king and his representatives were not supposed to write the text, but with an unclear period of time between a Seym and the publication of the law there was great opportunity for the king's party to slightly alter the wording of the law.[855] This would have allowed for the finding loopholes or other ambiguities that could benefit them rather than the Seym, should the Seym have adopted a point opposed to the king's agenda. Now that this has been taken away from the king and given to a group whose members were drawn from both houses of the Seym, the possibility of collusion between the branches or the king intervening was greatly reduced. A more sophisticated break down is presented in Table 4.1 below.

[854] "The deliberations ended with the speech of the Marszałek of the Chamber and an audience at which the deputies had the opportunity to kiss the royal right once more. The members of the chamber were leaving, but this was not the end of the marszałek's duties, he had to ensure that the resolutions were validated and published. Together with the "constitutional deputies" assigned to him from among the deputies, he edited the texts, and then made sure that they were entered in the books of the Warsaw castle and published in print. At this stage, there were numerous abuses; while editing, rights were entered that were not approved. There were also accidental or deliberate errors in printing," Kriegseisen, *Sejm Rzeczypospolitej szlacheckiej*, pg. 28.

[855] This was not merely a theoretical concern. Zygmunt II August made at least two changes to *konstytucje* after the Sejm had passed them – that we know of. See: Anna Sucheni-Grabowska. 1997. "The Origin and Development of the Polish Parliamentary System," pg. 35

Table 4.1 Enumeration of Constitutional Archetype of the Konstytucye Seymu Walnego Koronnego w Warszawie, 12 February 1613[856]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
In an effort to prevent such a situation from occurring in constitutions, we have brought to fruition a *konstytucja* (*anni 1588*) [the year 1588]: that *konstytucje* with the signature of the Speaker of the Seym, and other persons appointed for that purpose from the Seym and Senator circles, be published in the Warsaw Castle books (*ad acticandum*) [to activate] the day after the Seym.[857]	Necessity of sending konstytucje to publisher the day after the Seym finished	Parliamentary Procedure	Poiesis

[856] *Volumina Legum*, Tom. III, pgs. 80-102; in *Volumina Constitutionum*, Tom III, Vol. I, pgs. 118-140.
[857] "O konstytucyach," in: *Volumina Legum*, Tom. III, pg. 83; in *Volumina Constitutionum*, Tom III, Vol. I, pg. 122.

The next two decades is replete with similar examples, where much of the constitutionally significant reforms refer to specific procedural questions, or where the rights and privileges of various provinces within the Polish-Lithuanian Commonwealth are acknowledged. Overall, neither Zygmunt III nor the *szlachta* had any significant desire to change the overall status quo. The end of Zygmunt III's reign provided the next opportunity for the *szlachta* to enact changes, this time addressing the question of how to correct legal documents whenever an error had been found.

Throughout the last six years of his life (1626-1632), Zygmunt III tried to force the *szlachta* to hold a *vivente rege* election for his eldest son, Władysław IV Waza. As the 12 March 1631 *Konstytucja* illustrates, this attempt ended in total failure: the king could only accept "formal and legal definitions of free elections" demanded by the *szlachta*, and the best he could hope for was a *de facto vivente rege* election of his successor by maintaining strong bonds with both the *szlachta* and *magnaci* at the end of his life.[858] A more sophisticated break down of the 1631 Konstytucye is presented in Table 4.2 below.

[858] "In total, attempts by Sigismund III in the years 1626-1632 to ensure succession for one of the sons ended in a fiasco. The king's political realism made Sigismund III withdraw from the further-reaching postulates of the designation or vivente rege election of his successor in order to guarantee his descendant succession to the throne - without violating the principles of free election, while striving to normalize them. The king was only proposing the formal-legal determination of the free election that the *szlachta* had itself given, without suggesting any ideas of his own.," Ochmann-Staniszewska, *Dynastia Wazów w Polsce*, pg. 97.

Table 4.2 Enumeration of Constitutional Archetypes of the Konstytucye Seymu Walnego Koronnego Warszawskiego, 12 March, 1631[859]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
The constitution under the title *de evectis et inductis* [of those raised and brought in], of the past Seym, some *errorem* [error], was not published in the same way, as for the files of the Grodzki Warszawskie and to our Chancellery with the signature of the Speaker of the past Seym, it was stated that the word *praeteritis* [of the past] was a small variation of a few letters, *praesentibus* [of the present] was inserted, much to the detriment of the treasury: because the merchants therefore avoided customs duties on many goods. Therefore *authoritate praesentis Conventus* [by the authority of the present Assembly], we annihilate all such constituencies which would be found under this title *de evectis et inductis* [of those raised and brought in], this word *praesentibus* [present]; and by following the *ad mentem* [the mind] of the past Seym, we wish that those who have not paid the past years of the duties under the title *auctio subidiorum* [auction of supplies], do enough for the treasury *de praeteritis* [to the present].[860]	Correction of a Previous Law by Directly Changing the Text	Legal Writing	Poiesis
That under the pretext of the Catholic religion, various tumults and violets take place in our States, whereby the common peace is shattered, and great inconveniences arise therefrom: We, therefore, wishing to preserve *publicam securitatem et pactem* [public security and peace] in our States, and to curb such vagrancy; against those who would dare to violate *publicam securitatem* [public security] by tumults and insolence, we appoint a forum at the Trybunał, inter *causas recentis criminis* [recent criminal case]: and that *poenis contra violators pacis publicae sancitis* [punishments against violators of public peace], we wish to have them punished.[861]	The Trybunał is to Keep the Religious and Public Peace	Purpose of the State	Teleology

[859] *Volumina Legum*, Tom III, pgs. 318-338; *Volumina Constitutionum*, Tom III, Vol. II, pgs. 98-126.
[860] "Poprawa konstytucji *de evectis et inductis* Z Seymu przeszłego," in: *Volumina Legum*, Tom III, pg. 325; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 108.
[861] "Zatrzymanie pokoiu pospolitego," in: *Volumina Legum*, Tom III, pg. 326; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 109.

The last Konstytucja of Zygmunt III's life was completed April 1st, 1632, right before his death on April 30 not even a month later. The Konstytucja was relatively briefly, mostly concerned with the *kwarta*, taxes, and questions of natural security, but nothing of real constitutional significance. The next two kings were the sons of Zygmunt III, Władysław IV (ruled 1632-1648) and Jan II Kazimierz (ruled 1648-1668). Though Poland-Lithuania was to enter one of the greatest and tragic periods of constant war and civil strife during the reign of the last two Waza, much of the constitutional groundwork had been laid by Zygmunt III's reign. This is the subject of our next line of inquiry.

III. The 1632 and 1648 Elections: Return to Tentative Dynastic (and Constitutional) Normalcy (1632-1652)

When Zygmunt III long reign came to an end in 1632, there was little doubt that his successor would be his eldest son, Władysław IV Waza. Though the practice of *vivente rege* had been banned despite Zygmunt III's many attempts to change the constitution, in practical terms it might as well have been a carried out within Zygmunt III's lifetime: the old king had left many nominations to powerful posts within the country unfulfilled, which he left for his son to use as an effective bargaining chip to bring many *magnaci* to smoothly accept his election.[862] This all but assured that Władysław IV Waza would smoothly sail to his election.

Fortunately, Władysław IV Waza was immensely popular with the *szlachta*, having participated in the campaigns against Muscovy as well as the Ottomans.[863] He was also well-liked by both Catholics as well as dissenters and had many friends among both, as he himself was not an extremely pious man, at least in the beginning of his reign.[864] As Czapliński notes, this occasionally put him at odds with even the Pope, though ultimately did not prevent the return of Catholicism as the main religion in the Commonwealth:

> Characteristic of Władysław's internal policy was his tolerance of the Dissenters and good will towards the Disuniats, who had been somewhat oppressed during the previous reign. Władysław allowed the restoration of the Metropolitan See in Kiev, thought of establishing a Patriarchate and returned many churches taken by the Uniates from the Greek Orthodox. The complete tolerance of Protestants by the King, and the goodwill that he showed individual Dissenters, leading even to a dispute with the Pope, did not prevent the gradual retrogression of Protestantism and the victory of Catholicism.[865]

The result of his personal amiability and the ease of his ambitions as king produced a remarkably quick ascendance to the throne: the 1532 election was unanimous and resolved in less than an hour.[866] Thus, there is some truth to the characterization of Zygmunt III's reign as both the nadir and apex of 16th century Polish-Lithuanian constitutionalism, in that while

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[862] Andrzej Korytko. 2017. *"Na których opiera się Rzeczpospolita": senatorowie koronni za Władysława IV Wazy.* Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego: Olsztyn, pg. 25.
[863] Stone, *The Polish-Lithuanian State*, pg. 149.
[864] Władysław Czapliński, "The Reign of Władysław IV, 1632-48". In: W.F. Reddaway, J.H. Penson, O.Halecki, and R. Dyboski, eds. 1978. *The Cambridge History of Poland: From the Origins to Sobieski (To 1696).* Octagon Books: New York, pg. 489.
[865] *Ibid*., pg. 497.
[866] Ochmann-Staniszewska, *Dynastia Wazów w Polsce*, pg. 25.

he did engage in costly wars that threatened the very existence of the Commonwealth and his policies facilitated a major *rokosz* against him, he ultimately compromised with the *szlachta* to produce *vivente rege* election *de facto*. Thus, the same combination of dynastic conception of politics—though in a much more limited capacity than in the absolutist states elsewhere in Europe—couched in classical republic rhetoric that and political self-understanding that had existed under the Jagiellonians had been reconstituted by the Waza dynasty. Thus, the reigns of Henryk Walezy and Stefan Batory can perhaps be thought of as interregna in both a dynastic as well as constitutional sense. This combination of *vivente rege* hopes for dynastic succession and the political reality of *virtum* elections have often been characterized as a kind of "quasi-private contract between the king and the szlachta" ("(quasi)-prywatnego kontrakt szlachcica z królem"),[867] but it should again be reiterated that allegories to any kind of social contract theoretic approach should not be overstated. Put another way, we should be cautious about equating the terms "pacta conventa" and "social contract."

Even though the process of election Władysław IV Waza was relatively painless by Polish-Lithuanian standards, it was not automatic. Nearly six months after his father's death, Władysław IV Waza was presented with a new Pacta Conventa on 27 September, 1632. While there was increasing convergence between the Konfederacja Warszawska, the Henrician Articles, and the Pacta Conventa, all three of them remained distinct documents that the Władysław IV Waza upheld.[868] Władysław IV Waza's Pacta Conventa had specific requirements given by the *szlachta* They demanded the recognition and confirmation of the privileges of 1607, 1609, and 1631. They demanded a reconfirmation of the Konfederacja Warszawska and the Freedom of Religion. They demanded confirmation that foreigners would be restricted from holding important state offices and positions.. Taking these demands into consideration, the Konfederacya did not demand anything particularly new, but perhaps wanted to demonstrate to Władysław IV Waza from the onset that the *szlachta* would not be tolerant of any attempts to go down a similar path that his father did, given that they specifically asked him to reconfirm the privileges that his father had confirmed after the Rokosz Zebrzydowskiego. A summary of this *Konfederacja* is given in Table 4.3.

[867] "On the other hand, in the elections (*virtim*) in force under the Vasa, in which every noble was theoretically entitled to participate, the personal involvement of the nobility in the act of election increased unabashedly. Moreover, allowing each participant to individually confirm the act of election with their own signature (*suffragia*) further gave this social arrangement the character of a (quasi)-private contract between the *szlachcic* and the king, and with this, the personal interest in the matter of keeping the terms of the contract also grew," Ochmann-Staniszewska, *Dynastia Wazów w Polsce*, pg. 18.

[868] "The Henrician articles functioned as a separate law in the form of a parliamentary konstytucja in later practice. They increased the number of rights to be approved at each coronation. The confirmation of the articles, which was itself an important parliamentary konstytucja, was dependent on the content of the pacta conventa, understood as the elect's agreement with the nation, which was subject to change in every interregnum. The rule, however, was that each electing ascending the throne undertook to confirm the applicable laws, including a separate law called the Henrician Articles. The nature and significance of the law was not changed by the inclusion of some articles from this law in the convention pacts made in 1632. King Władysław IV swore the Henrician Articles as a separate act containing systemic provisions from the time of the election of King Henry," Dariusz Makiłła. 2012. *Artykuły henrykowskie (1573-1576): geneza, obowiązywanie, stosowanie: studium historyczno-prawne*. Vizji Press & IT: Warszawa, pgs. 87-88.

Table 4.3 Enumeration of Constitutional Archetypes of the Pacta Conventa, 27 September 1632[869]

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
According to the rights and privileges, and the *konstytucje* of all *de libra Election* [of the Free Election] made, both old and new, 1607, 1609, 1631, and according to the special privilege of anni 1607, and then at the Seym of 1631, for the memory of King Zygmunt the Third, given and ingrossed in the *konstytucja*, remained; for which we do not use the title Haeredis [Heirs], nor our successors, the Polish Kings. [870]	Confirmation of Previous Privileges Confirmation of Privileges of Free Election	Legitimate Sources of Constitutional Change	Praxis
And that in this noble Crown of the Polish and Russian nations and the States belonging to them, there are many *dissidentes in religione christiana* [dissenters in the Christian religion]: observing, *exemplo Antecessorum nostrum* [the example of our Ancestors], against is the General Konfederacja Warszawska, it has almost passed that in this respect *in causa religionis christianae* [in the case of the Christian religion], peace *inter dissidentes de religione christiana* [among the dissidents of the Christian religion] is to be preserved, which we promise to keep at all times, *non obstantibus quibuscunque protestationibus* [despite any protests], against this *Konfederacya*, after the same Convocation made: *salvis iuribus Ecclesiae Catholicae Romanae* (without prejudice to the rights of the Roman Catholic Church]; integra, however, in everything *dissidentium de religione christiana pace et Securitate* [peace and security of the dissidents on the Christian religion], just as in the Convocation near the past Warsaw in the General *Konfederacja*, it is described and refused.[871]	Reconfirmation of the Konfederacja Warszawska and Freedom of Religion	Enumerated, Individual Rights	Ontology
We will not give foreigners of any condition, *ad Consilia nostra* [to our Council], nor *dignitates* [positions] *starosty*, leases, and offices, *juxta praescriptum constitutionis* 1607 [according to	Limitations on Foreigner's Ability to Hold Office		

[869] "Artykuły Pactorum Conventorum," Akta Seymu Walnego Elekcyi Nowego Krola, 27 September, 1632, in: *Volumina Legum*, Tom III, pgs. 358-368; in: *Volumina Constitutionum*, Tom III, Vol. II.pgs. 179-186.
[870] "Artykuły Pactorum Conventorum," Akta Seymu Walnego Elekcyi Nowego Krola, 27 September, 1632, in: *Volumina Legum*, Tom III, pg. 362.; in: *Volumina Constitutionum*, Tom III, Vol. II, pg.179.
[871] "Artykuły Pactorum Conventorum," Akta Seymu Walnego Elekcyi Nowego Krola, 27 September, 1632, in: *Volumina Legum*, Tom III, pgs. 362-363; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 179.

the provisions of the constitution] to which I shall behave in everything.[872]			

[872] "Artykuły Pactorum Conventorum," Akta Seymu Walnego Elekcyi Nowego Krola, 27 September, 1632, in: *Volumina Legum*, Tom III, pg. 364; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 181.

There was also the introduction of extraordinary Seymy of variable lengths that would be precursors to the main Seym.[873] In the past the Commonwealth had always had the possibility of having limited, shorter length Seymy for various emergencies, and to some extend the creation of the extraordinary Seymy was something of regularizing the irregular within Polish-Lithuanian parliamentary practice. Both extraordinary and shorter Seymy were recognized, and direct continuation was made between previous Seym business with those of later Seymy. This established parliamentary continuity and severely limited the power of the king to alter parliamentary discourse: given that some Seymy were continuation of previous ones, the king had less ability to set the parliamentary agenda or to outright ignore the work of previous Seymy. For example, the king was unable to call for an extraordinary Seym without a prior resolution of an ordinary Seym. In fact, under the reign of Jan II Kazimierz the mechanism of calling for extraordinary Seymy became more institutionalized, with the king often proposing for a special, shortened Seym that was approved at the current Seym. A common feature of these special Seymy was that they were called for specific emergencies, especially to deal with a particular military threat.[874] Some brief textual examples of such extraordinary Seymy are given in Table 4.4 below.

The second opportunity for constitutional normalization occurred with Władysław IV Waza's early death and the subsequent election of his younger brother Jan II Kazimierz in 1648. His *pacta conventa* of that same year is summarized in Table 4.5.

[873] For a fuller discussion of the evolution of extraordinary vs regular Seymy, see: Izabela Lewandowska-Malec. 2016. "Ewolucja sejmów walnych okresu *regum* w latach 1587-1668." In: Marcin Głuszak and Dorota Wiśniewska-Jóźwiak, eds., *Nil nisi veritas: księga dedykowana Profesorowi Jackowi Matuszewskiemu*, Wydawnictwo Uniwersytetu Łódzkiego: Łódź, pgs. 217-230.
[874] *Ibid, passim*.

Table 4.4 Enumeration of Constitutional Archetypes of Miscellaneous Seymy (Chronological Order) (1641-1652)

Text	Outcome	Constitutional Archetype(s)	Constitutional Archetype-as-Such
Seym Extraordynaryiny[875]	Calls for Seymiki to Prepare for an Extraordinary Seym to deal with current crises of the Commonwealth	Organizing Parliamentary Bodies	Praxis
Since at the present Seym, for difficult matters, not all the desiderijs of the Republic have been satisfied: and to this time, lest some imminent danger should appear on the Republic: therefore, by the solemnity of this Seym we submit a three-week extraordinarily coordinated Seym *sine solennitatibu* [without formalities].[876]	A Special Three Week Seym Will be Called to Follow Up on Questions that Could not be Solved	Parliamentary Procedure	Poesis

[875] "Seym extraordynaryiny," Konstytucye Seymu Walnego Koronnego Warszawskiego, Sześćniedzielnego 5 December, 1646, in *Volumina Legum,* Tom IV, pg.46; in *Volumina Constitutionum,* Tom IV, Vol. I, pg. 80.
[876] "Seym extraordynaryiny," Konstytucye Seymu Walnego Koronnego Warszawskiego, Sześćniedzielnego 5 December 1646, in *Volumina Legum,* Tom IV, pg. 46; in *Volumina Constitutionum,* Tom IV, Vol. I, pg. 80.

Table 4.5 Pacta Conventa, Konstytucye Seymu Walnego, 1648[877]

<table>
<tr><th>Text</th><th>Outcome</th><th>Constitutional Archetype(s)</th><th>Constitutional Archetype-as-Such</th></tr>
<tr><td>We promise, and we will have an eternal right. That, as with the free and unanimous votes of the entire States of this Republic of Both nations, Poland and Lithuanian, and all other States belonging to them, we are elected to this State, and we are accepted: so also has for our life, the Kings following after us ... no we are to appoint, nor to choose, nor what to make, by any means or form, a King on our successor State. And this is to ensure that, after our sewing, always eternal times, the free election of the King to all Crown States, and the Grand Duchy of Lithuania according to the laws and privileges, and the constitutions of all de libra Electione [free elections] made, both ancient and fresh, 1607, 1609, 1631, and according to the special privilege of anni 1607 and then at the Seym of 1631 in memory of His Majesty King Sigismund III, the Republic of Poland: given and ingrossed in the constitution, remained; for which we do not use the title haeredis, nor our successors, Polish kings.[878]</td><td>Right of Free Election Guaranteed</td><td>Legitimacy, Political Decision-Making</td><td rowspan="3">Ontology</td></tr>
<tr><td rowspan="2">And that in this noble Crown, the Polish, Lithuanian and Russian nations and the States belonging to them, there is a lot of dissidentes in religione christiana [dissidents in the Christian religion], observing, exemplo Antecessorum nostrorum, [the example of our ancestors] after which sedition and tumult with the goal of causing disruption, where the Konfederacja Warszawska of the recent past crushed religious disagreements, that in causa religionis christianae peace [Christian religious peace] is to be preserved inter dissidentes in religione christiana [in the cause of the Christian religion peace is to be preserved between the dissidents in the Christian religion], which we promise to hold for all eternity, non obstantibus quibuscunque protestationibus [notwithstanding any protests] against this konfederacja after this Convocation was made; salvis iuribus Eccelsiae Catholicae Romanae, integra [saving the rights of the Roman Catholic Eminence, intact], however, in all dissidentium de religione christiana pace, et Securitate [of dissent concerning the Christian religion, peace, and</td><td rowspan="2">Religious Toleration and Konfederacja Warszawska Confirmed</td><td>Legal Sources</td></tr>
<tr><td>Enumeration of Individual Rights</td></tr>
</table>

[877] *Volumina Legum* , Tom IV, pgs. 93-97; in *Volumina Constitutionum*, Tom IV, Vol. I, pgs. 159-166.
[878] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pg. 93; in: *Volumina Constitutionum*, Tom IV, Tom I, pg. 159.

<table>
<tr><td>security], as in the Convocation close to the past Warsaw in the General *Konfederacja*, it is described, and it has been denied.[879]</td><td></td><td rowspan="3"></td><td rowspan="3"></td></tr>
<tr><td>As for the people of the Greek religion distinguished, according to the memory of His Majesty Władysław IV our brother, we should reassure them immediately of the affection of the Republic, according to the King's Election through by the Deputies *ex utroque Ordine* [of both orders].[880]</td><td>Respect for the Greek religion</td></tr>
<tr><td>We will not give foreigners of any condition *ad Consilia nostra* [to our plans], nor will we give them dignitates, starosts, leases, and offices, juxta *praescriptum constitutionis* 1607 [according to the provisions of the constitution] according to which we should behave in everything.[881]</td><td>Foreigners not Allowed to Hold Office</td></tr>
<tr><td>Personal seals and a signet ring for any Commonwealth: we will not use it, according to the old laws.[882]</td><td>Royal Seal to Only be Used In Accordance with the Law</td><td colspan="2">Separation of King from the State</td></tr>
<tr><td rowspan="2">Finally, all rights, liberties, freedoms, privileges, and statutes of the Crown and the Grand Duchy of Lithuania to all clerical and secular states, *et incorporatis Provincijs* [and incorporated provinces], also to all cities belonging to all, and *juste et legitime* [justly and legitimately] given to all, and to each and to every person, and all articles at the Coronations of Their Majesty's Kings Henryk, Stefan, Zygmunt III, Władysław IV, decided at the Election Seym as we were told and for which we obtain consent; also those which, at the coming to Coronation, and at the follow up Seymy, with the common consent of the States, will be strengthened and decided to keep, and completely maintain, *in omnibus eorum punctis et clausulis* [in all their points and clauses] and also *literas confirmationis iurium et pactorum* [letters confirming rights and contracts] to give *exemplo Divorum Praedecessorum nostrum* [by the example of our divine predecessors], and an</td><td>Acknowledgement of all the previous Articles, Including: Henryk Walezy, Stefan Batory, Zygmunt III, and Władysław IV</td><td>Legal Sources</td><td rowspan="2">Ontology</td></tr>
<tr><td>Ius Resistendi</td><td>Individual Rights</td></tr>
</table>

[879] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pgs. 93-94; in: *Volumina Constitutionum*, Tom IV, Tom I, pgs. 93-94.
[880] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pg. 94; in: *Volumina Constitutionum*, Tom IV, Vol. II, pg. 160.
[881] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pg. 94; in: *Volumina Constitutionum*, Tom IV, Vol. II, pg. 161.
[882] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pg. 95; in: *Volumina Constitutionum*, Tom IV, Vol. II, pg. 161.

example of the memory of the King of His Majesty the Lord our Father, we promise. And if we transgress or fail to fulfill (what God has forbidden) what against laws, freedoms, articles and conditions: then the citizens of the Crown of both nations ought to be free from obedience and faith to us, according to the *konstytucja* of 1609.[883]		Limitation of the King's Power	

[883] "Artykuły Pactorum Conventum," *Volumina Legum*, Tom IV, pg. 95; in: *Volumina Constitutionum*, Tom IV, Vol. II, pg. 162.

While the reign of Władysław IV was a period of internal peace and stability, there were storm clouds forming on the horizon. At the beginning of the 1640s, however, the trend of *szlachta* continuing to improve their political situation continued. At the 1641 Seym the *szlachta* were able to organize themselves enough to accomplish several political reforms that many *seymiki* had demanded:

> 1) The lessees of royal lands (*economia*) pay their due taxes, 2) the Chancellery turn over complete records of Senat council proceedings, signed by each senator who approved measures passed there; 3) the king not leave the Commonwealth without the express permission of the estates; 4) titles among the *szlachta* not be allowed; 5) a committee to correct the laws be formed; 6) nobility and citizenship be granted only by the estates at the *seym*; and 7) pardons and reductions of sentences passed by the *szlachta*'s Tribunal court not be granted by the king's chancellery. In exchange for these concessions, the king's younger half-brothers, Jan II Kazimierz and Karol Ferdinand, received lucrative land grants and the *seym* promised to work out an equitable plan to pay the army during a special two-week parliament held in February 1642. At this time the *seym* also agreed to pay off Władysław IV Waza's sizable debts, but not without first prohibiting him and future kings from ever again borrowing money in the Commonwealth's name." The 1641 law *De reddenda senatus consulatorum* also reconfirmed the 1573 and 1609 requirement for permanent senators to advise and restrain the king.[884]

Unfortunately for the *szlachta*, Jan II Kazimierz proved to be a poorer ruler than either his father or his elder brother had been. Władysław IV had been willing to work with and even compromise with the Seym to work out financial reforms and financing the army throughout the 1640s, Jan II Kazimierz attempted to manipulate both the seymiki as well as the Seymy into accept his will. He married the now-widowed Queen, a French noblewoman named Louise Marise of Gonzaga, who only encouraged his pro-absolutist sympathies. In fact, the *pacta conventa* of both Władysław IV and Jan II Kazimierz as well as multiple *konstytucje* reconfirmed the legal acts passed in the 1607-1609 period. If Zebrzydowski thought of himself as the heir to the executionist movement, then the first half of the seventeenth century can be thought of as its grandchildren. Though the *szlachta* resisted any systematic, transformative changes, there was much constitutional development, though it was often muted.

Historians have not always been kind or appreciative toward this subtlety. Davies remarked that:

> Constitutional development ground to a halt. The extreme libertarian position of the nobility was not redressed. The great *Rokosz* of 1606-9 ended in a stalemate. The King could do nothing to enlarge his powers. The problem of the succession was not resolved. Although Zamoyski failed to limit the succession to certain named candidates, so, too, did all subsequent attempts to arrange it *vivente rege.* The elections of 1632 and 1648 were unmemorable. The great officers of state were awarded lifelong tenure. Finance remained firmly in the purview of the nobility.[885]

Wilson's judgement of the period is markedly different from that of Davies:

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[884] McKenna, *The Curious Evolution of the* Liberum Veto, pg. 72.
[885] Davies, *God's Playground*, pg. 336.

> In part, the campaign for parliamentary reform withered on the vine due to the genuinely irreconcilable nature of reformist ideas advanced by the szlachta and those advanced by the court. The szlachta was willing to consider reform so long as reform meant procedural changes that would have made the seym, particularly the House of Delegates, more orderly and more capable of expressing their concerns and defending their freedoms. The court, on the other hand, wanted to introduce majority rule as way to increase the powers of the king and his ministers and to transform the House of Delegates into a body that would efficiently approve court policies and necessary taxes. [C]ontrary to the usual historiography, the szlachta did not reject all reform efforts out of hand due to an irrational attachment to their traditional liberties. In fact, after the Deluge the szlachta suggested a variety of reforms intended to make the government more efficient and only rejected those "reforms" that would have undermined their position in the republic.[886]

We agree with Wilson, "contrary to the usual historiography" that the szlachta were indeed interested in making continuous improvements to their country's constitutional and political system. The *szlachta*'s position was no "extreme libertarianism" but a sophisticated series of clarifications about the nature of royal power and parliamentary procedure introduced over the last half century. From the *szlachta*'s point of view, there was no "succession problem" because the election of the king was the foundation of the entire system. Rather, it existed for the Wazas—and later the Wettins—because they could not accept limitations put on them, both in their individual reigns as kings as well as for the dynasty. Historiographically speaking, a "succession problem" is a historical fiction that necessarily follows if one presumes that monarchies with strong dynasties are the preferred form of government. It is historicist in taking the claims of kings as "reformers" at face value and assuming that if Poland-Lithuania had a stronger government, than all of its problems could have been simply resolved. That "[t]he elections of 1632 and 1648 were unmemorable" was the whole point of the conservative constitutional jurisprudence, political and legal culture, and parliamentary practice. Not all constitutional events need be transformative or dynamic to be successful. That the administrators of the state had lifelong tenure presented the problem of multiple power centers against the king, but it also preserved their independence and ability to persist through the reign of any one king, and was in line with the separation of the royal personage from the state apparatus that developed in the 16th century. Finally, that finances remained within the power of the *szlachta* was a major achievement of the executionist movement.

Despite these achievements, the ugly pattern of Polish-Lithuanian constitutionalism reared itself under Jan Kazimierz's reign: a king with an over-ambitious and aggressive foreign policy with a court occupied by foreigners pushing toward absolutist "reforms", personal distaste for both the lesser and greater *szlachta* alike, and close association with the Catholic Church. In the past this over-extension of royal ambition and straining of finances had led to humiliating defeats on the world stage, followed by the *szlachta* either receiving new privileges or otherwise receiving further guarantees of the privileges that they already had in exchange for bailing out the king. This time, however, would be different, not qualitatively, but in terms of the sheer quantity of the calamity that was to fall upon the Commonwealth in the 1650s: a series of interlocking and overlapping wars that would threaten its very existence, not merely check its expansion or lead to the exchanging of minor

[886] Wilson, *The Politics of Toleration*, pg. 100.

territory. Three simultaneous constitutional crises broke out, which would shape the constitutional system until its collapse in 1795. To this we now turn.

A Triarchy of Constitutional Crises (1632-1668)

Historical Background of the Deluge

The political, economic, and military crises of the 1650s did not create the three constitutional crises in their own right, but instead proved to be the straws that broke the camel's back that either brought these deeper fissures to the surface or otherwise turned them from underlying tensions into full-fledged constitutional crises. To detail the crises specifically, they were: the decline of religious toleration and the abrogation of the Konfederacja Warszawska in *spirit* if not in letter (1638-1658), the emergence of the *liberum veto* due to ambiguity of poetic vs praxical concerns (1639-1668), and the failed attempt at elevating what was then considered to be "Ukraine" and the transformation of the Republic of Two Nations into a Republic of Three Nations (1658-1667).

The question of tolerance and the freedom of religion had always been a tension throughout the history of the Polish-Lithuanian Commonwealth, but it was only the pressure of the invading Protestant Swedes who were temperamentally and theologically close to many of the dissenters throughout the realm as well as the Protestants in Prussia and Lithuania, with many Protestant nobilities joining with the invaders. As we shall see, the question of religious toleration was brewing even before the 1650s, but it was the 1650s that brought this to a climax.

The second crisis is undoubtedly the most famous of the three, and to pessimists represents the death knell of the Polish-Lithuanian constitutional and political system with the advent of the *liberum veto*. Essentially, the *liberum veto* took the principle of *Nihil Novi* to an individualistic entelechy where instead of legislation requiring the consent of the *szlachta* in general. To put it another way, in the shift away from consensus to unanimity, each individual member of parliament exercised an absolute veto to shut down any Seym at any point, which made legislation virtually impossible after the infamous 1652 Seym when it was first exercised. Or so the standard historical narrative claims. However, this conveniently omits that Seymy had broken up before due to objections from significant minorities or when the Senat and the Izba Poselska reached an impasse. It also ignores the fact that Seymy continued to pass legislation after 1652, with the parliamentary machinery only really breaking down under the Wettin era. As we shall see, the *liberum veto* itself was in fact an outgrowth of the fundamental ambiguity of voting and decision-making within the Commonwealth, and only progressed from an unclear tension until culminating into a significant institution in reaction Jan II Kazimierz's policies.

The final crisis was the failed attempt to elevate Ukraine to create a Polish-Lithuanian-Ukrainian union, despite the 1658 Union of Hadziach that attempted to codify this new union. This was a major constitutional failure that—had it succeeded—would have completely changed the constitutional system, just as the Union of Lublin had done before it. The Commonwealth is historically unique as a union that was largely created peacefully

through merging of dynasties and absorption of client territories rather than outright and brutal conquest.[887] Understanding how this attempted reform is made—and why it ultimately failed—gives some vital clues to both the Cossack question as well as insights into 17th century Polish-Lithuanian constitutionalism.

Before a proper discussion can begin, it is first necessary to understand some brief historical context of the disastrous serious of events that precipitated these crises. By the mid-1650s, a complex series of wars began that entangled the Cossacks, Tartars, Polish-Lithuanians and Muscovy with territory, treasure, and alliances shifting easily. By 1653 Khmelnytsky had completed his alliance with the Muscovites and swore fealty to the Tsar, attempting to incorporate the Ukrainian lands into Muscovy so long as Khmelnytsky remained *de facto* ruler of much of Ukraine. By all accounts, however, the Tsar and Khmelnytsky knew that this was a marriage of convenience that the Ukrainians were unlikely to uphold after Poland-Lithuania was defeated. In 1655 Sweden launched a full invasion from the north. The majority of the Commonwealth's major cities were captured, including Warszawa, and the Lithuanians had to accept the Swedish King Karl X Gustav as king in Lithuania. Many Polish and Lithuanian *szlachta* switched to the Swedish or the Muscovite cause in exchange for the guarantee that the freedoms they had as citizens of the Commonwealth would continue. The House of Brandenburg, rulers of Königsberg and Ducal Prussia fully allied with the Swedes. Jan II Kazimierz fled to Silesia.

By the fall of 1655, it became clear to the Polish-Lithuanian *szlachta* that Sweden had no intention of actually recognizing the rights of Catholics and dissenters, with Churches and estates being looted or destroyed. Eventually, the peasantry and the *szlachta* rose up together against the Lutheran Swedes and their Protestant allies within the Commonwealth, in a year of bitter and destructive partisan warfare against the occupiers. When it became clear the tide was turning, in 1656 Karl Gustav made an alliance with György II Rákoczy (George II Rákoczy), prince of Transylvania, to attack from the south with the promises that they could split the country, with the Baltic lands and Lithuania becoming part of Sweden. Rákoczy was defeated in 1657 and forced to retreat back to Transylvania. Eventually, Austrian Habsburg troops and Danish armies arrived in the Commonwealth to drive off their common enemy. Fredrich Wilhelm of Brandenburg switched sides.[888] By 1658 Sweden had only retained a few cities along the Baltic coast, but by 1659 Sweden was suing for peace. Poland-Lithuanian had to forfeit Swedish Livonia (in present day Latvia) and Jan II Kazimierz formerly renounced all claims to the Swedish throne. By 1667 Poland-Lithuania and Muscovy agreed to split Ukraine between them.

The wars in the 1650s-1660s brought about great social upheaval and misery. A horrible plague also struck the Commonwealth in 1659. Loss of life among the civilian

[887] That the Commonwealth was a territory as large and powerful as most empires of its time but that it had emerged relatively peacefully is a unique and severely understudied phenomenon. This is precisely the argument made by Frost in the preference to his book. See: Robert Frost. 2015. *The Oxford History of Poland-Lithuania*: *Volume IL The Making of the Polish-Lithuanian Union, 1385-1569.* Oxford University Press: Oxford.

[888] For more, see: Dariusz Makiłła. 1998. *Między Welawą a Królewcem 1657-1701: geneza królestwa w Prusach (Königtum in Preußen): studium historyczno-prawne*. ELVA: Toruń.

population due to war, famine, and disease was catastrophic, with the Commonwealth losing an estimated 1/3 of its entire population, with some provinces losses estimated at close to 60%.[889] Despite these difficulties, the seymiki and the Seymy tried to meet whenever it was possible, so the strength of Polish-Lithuanian constitutionalism ultimately endured, though it was severely damaged by the three crises that befell it.

The Decline of Religious Toleration, the Collapse of the Union of Brześć, and the Abrogation of the Konfederacja Warszawska (1638-1658)

In order to determine a system's strength, endurance, and capacity to resist external changes, one often employs a process known as stress testing. Indeed, some specializations in the fields of medicine, economics, software testing, or engineering—i.e. reliability engineering—particularly focus on the qualitative distortions and quantitative thresholds that systems are able to bear.[890] A commonsense summary of such approaches would be the old idiom that a chain is only as strong as its weakest link, given that any system under stress will undoubtedly shift that stress to its weakest link. To properly understood the 17th century Polish-Lithuanian constitutional system, it is necessary to employ a similar technique to locate potential weak points and, by examining said weak points, evaluate how well the overall system was able to bear crises and changes. In the case of Poland-Lithuania, its long history of relative toleration has often been touted as one of its strengths.[891] However, even Tazbir recognized that the 17th century was a period of sharp decline in religious freedom, as Wilson summarizes:

> How long could toleration last? Ironically, the very conditions that allowed confessional difference to thrive have also been blamed for its decline. Tazbir describes the Reformation as a 'great intellectual adventure' for the Polish nobility, who soon rejected it when it was no longer compatible with their advantage as an estate; he argues that the political influence of dissenters declined in the seventeenth century. He sees szlachta interest in the Reformation as political, not religious, and therefore brief, allowing the Counter Reformation to gain ground easily. This century saw increasing tumults (confessional unrest and riots). Though

[889] Marcin Zawadzki. 21 August 2007. "Durham University Polish Society." https://web.archive.org/web/20070821060613/http://www.dur.ac.uk/polish.society/about_poland.htm (Accessed 11 March, 2022); Benedykt Zientara, et al. 1988. *Dzieje gospodarcze Polski do roku 1939*. Państwowe Wydawnictwo Wiedza Powszechna: Warszawa, pg. 233.

[890] For a very brief survey of various applications of stress test throughout various fields of research, see: Jon Coaffee. 2019. *Futureproof: How to Build Resilience in an Uncertain World.* Yale University Press: New Haven; Joseph L. Breeden and Lyn Thomas. 2016. "Solutions to specification errors in stress testing models." *The Journal of Operational Research Society* 67(6): 830-840; Donald P. Morgan, Stavros Peristiania, and Vanessa Savino. 2014. "The Information Value of the Stress Test." *Journal of Money, Credit and Banking* 16(7): 1479-1500; Daniel Fiott. 2008. "STRESS TESTS: An insight into crisis scenarios, simulations and exercises." *European Union Institute for Security Studies*."; George Bodnar. 1975. "Reliability Modeling of Internal Control Systems." *The Accounting Review* 50(4): 474-757. For a brief literature on reliability engineering, see: Tim Bedford, John Quigley, and Lesley Walls. 2006. "Expert Elicitation for Reliable System Design." *Statistical Science* 21(4): 428-450; Gary Wang, Liqun Wang and Songquing Shan. 2005. "Reliability Assessment Using Discriminative Sampling and Metamodeling." *SAE Transactions* 114(6): 291-300.

[891] For its most articulate and well-known defender, see: Janusz Tazbir. 1973. *A State without Stakes: Polish Religious Toleration in the Sixteenth and the Seventeenth Centuries.* The Library of Polish Studies, the Kosciuszko Foundation: New York.

> these focused on attacking church property rather than people, they still mark a change from the initial religious peace.[892]

However, those with a more cynical view of history—perhaps more accurate would be to say those who are inclined to belief in the theory that the successful transition from late feudalism to modernity was through an absolutist union of church and state—have argued that toleration was an indication of indecision and weakness of the Commonwealth, rather than of strength. Such an example is Parker:

> The Commonwealth's principal weakness lay in its religious pluralism. Catholicism predominated in Poland, but in both Lithuania and Ukraine it competed with a powerful Orthodox Church and, after 1596, with a distinct 'Uniate Church', created specifically to reconcile an important group of Orthodox Christians with Rome. In addition, the Commonwealth was home to numerous other religious groups. Each landlord had the right to determine the faith of his subjects, and major cities had the right to grant toleration to whomever they pleased. Thus the city of Lwów (Lviv) contained 30 Catholic churches (and 15 monasteries), 15 Orthodox churches (and 3 monasteries), 3 Armenian churches (one of them a cathedral) and 3 synagogues. Nevertheless the Roman Catholic hierarchy, strongly supported by the crown, used a wide range of economic, social and political inducements to win converts. Their success can be measured by the fact that although the federal Diet in 1570 included 59 non-Catholic lay senators, that of 1630 included only 6; while over the same period the number of Protestant communities in Poland fell from over 500 to scarcely 250. In addition, especially in the 1630s, large numbers of Orthodox clerics and laity deserted either to the Catholic or the Uniate Church.[893]

What is universally acknowledged is that even though the Commonwealth did not engage in the 30 Years' War directly, it can be said that the conflict between the Catholic branch of the Waza dynasty in Poland-Lithuania and the Protestant branch of the Waza dynasty was an over spillage of it on the periphery of northern Catholic Europe. On the other hand, Poland-Lithuania was beset by the strength of Eastern Orthodox Muscovy. Indeed, Poland-Lithuania were not exempt from what Trevor-Roper referred to as the "General Crisis of the Seventeenth Century."[894] To understand how these two geopolitical, religiously tinged forces had repercussions within the 17th century Polish-Lithuanian constitutional system, it is necessary to look at the internal texts developed at this period. That is, Poland-Lithuania's degree of relative toleration—or its absence—when compared with the general context of 17th century Europe is only marginally useful: to understand an internal phenomenon such as constitutionalism, it is necessary to make an internal analysis, that is to look at how Poland-Lithuania held up to its own standards and how the political class would have understand the issues *relative to the Commonwealth*. That such and such place was more or less oppressive than Poland-Lithuania may be interesting in an anecdotal, historical sense, but one that we shall avoid as much as possible for precisely the reasons outlined above.

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[892] Wilson, *The Politics of Toleration*, pg. 15.
[893] Geoffrey Parker. 2017. "'The great shaking': Russia and the Polish-Lithuanian Commonwealth, 1618-86." In: Geoffrey Parker. *Global Crisis: War, Climate Change and Catastrophe in the Seventeenth Century*. Yale University Press: New Haven and London, pg. 154.
[894] Hugh Trevor-Roper. 1999. *The Crisis of the Seventeenth Century: Religion, The Reformation, and Social Change*. Liberty Fund: Indiannapolis.

Seventeenth century Poland-Lithuania witnessed the rising pressure of the Counter-Reformation sweeping across Europe. Zygmunt III was not willing to address the question of the Eastern Orthodox religion, instead leaving it for his son. The Commonwealth saw two major political theories concerning the question of toleration. The first, by Justus Lipsius, was that strong royal authority and religious intolerance were necessary for a strong political union.[895] The second was the continuation of the Konfederacja Warszawska and that an individual *szlachcic*'s private faith had nothing to do with state power. However, the *szlachta*'s freedom of toleration did not extend to the peasantry. While the first of these theories was supported by some of the Catholic clergy, the majority of the *szlachta* supported religious toleration well into the first half of the 17th century, but dissenters were not afraid to protest or attempt to break up a Seym if they felt their rights were threatened. They attempted to break up the Seym in 1593 and successfully did so in 1615 as well as in 1618.[896] Nor was this unique to the dissenters, for in Protestant Prussia it was the Catholic minority who fought for religious freedom.[897]

The suppression of religious minorities and the establishment of a *de facto* national religion were both reflections of the principle *cuius regio eius religio* ("whose realm, their religion") and would open the door to absolutism. Throughout the 16th century, the Protestants and moderate Catholics were disproportionately supporters of the executionist movement and other projects that were critical of the king, such as the Rokosz Zebrzydowskiego or filing *egzorbitancje*. Despite this, they ultimately never became the dominant political faction, but served as a counterbalance to centralizing tendencies—both of the executionist movement itself as well as the aspirations of the kings.[898] All speculative history is dangerous, but there seems sufficient anecdotal evidence that Protestantism and its

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[895] For a brief overview on Justus Lipsius's political thought and influence, see: Salvador Bartera. 2015. "Tacitus in Italy: between language and politics." *Hermathena* 199: 159-196; Halyard Leira. 2008. "Justus Lipsius, Political Humanism and the Disciplining of 17th Century Statecraft." *Review of International Studies* 34(4) 669-692; Gerrit Voogt. 1997. "Primacy of Individual Conscience or Primacy of the State? The Clash between Dirck Volckersz, Coornhert and Justus Lipsius." *The Sixteenth Century Journal* 28(4): 1231-1249; C.O. Brink. 1951. "Justus Lipsius and the Text of Tacitus." *The Journal of Roman Studies* 41: 32-51.

[896] Wilson, *The Politics of Toleration*, pg. 56.

[897] *Ibid.*, pgs. 46-48, 61.

[898] "Protestant circles were too weak to force through political means the return of the principle of equality according to the law as well as tolerance, but too strong to be intimidated and suppressed. So, they chose the destructive role of permanent opposition, wishing to practice their religion in peace, but also fearing the rise of the king's constitutional position. For a strong administration could easily have turned into a repressive apparatus fighting against religious minorities, as happened in Spain, France, England or the German states after the Peace of Augsburg. The constitutional principle, defined succinctly by the slogan: *cuius regio eius religio* [whose realm, their religion], meaning the elimination of religious pluralism, opened the way for monarchical absolutism, meaning the rule of the king and those strictly subordinate to him: an extensive, bureaucratic administration and army, as well as the judiciary. Polish Protestants undoubtedly constituted the intellectual and political elite, so they used their position, often playing the role of parliamentary leaders, representing the *szlachta*, and often even provoking actions by the Seymy to sabotage the throne's initiatives. They most often did it through *egzorbitancje* submitted during the Seymy. During the rule of the first elected rulers in the Commonwealth, who fought to strengthen the monarchy, the opposition of Polish Protestantism played a significant role in weakening the tendency to centralize power and, as a consequence, developing the institution of *egzorbitancje*, the aim of which was, after all, to strictly control the power of the rulers," Tomasz Kucharski. 2014. *Instytucja egzorbitancji w systemie prawnoustrojowym Rzeczypospolitej Obojga Narodów.* Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika: Toruń, pgs. 59-60.

moderate Catholic allies did much to prevent the Commonwealth from changing into absolutism.

One of the most important guarantors of this religious toleration was a limitation upon the decisions of the Trybunał Koronny itself, in that its decisions could be invalided if they went against the common peace.[899] Here, we should recall that "common peace" is a direct reference to Article 3 of the Konfederacja Warszawska.[900] In today's terms, the limitation on the Trybunał's judicial power in reference to some more fundamental principle would be associated with *judicial review*[901] and with the limitation *judicial activism*.[902] Władysław IV's 1632 *pacta conventa* was very straightforward about accepting religious rights of all parties, and the Eastern Orthodox had their rights guaranteed. Władysław IV also and supported the passage of the 1635 the *Composito inter status* (1635), which separated clerical courts from the s*zlachta*'s courts. It also created a mechanism whereby the *szlachta* and the Church could solve their disputes through the national courts, keeping Rome out of all internal legal matters.[903] Indeed, for much of this period there was constitutional stability, as Wilson describes:

> Dissenters' legal status remained almost unchanged from 1573 to 1648. The Konfederacja Warszawska gained support, particularly among Catholic szlachta, with 60 more signatories at the 1632 Sejm. This toleration was easier to grant when the Socinians were excluded from it and much church property had been returned to Catholicism. Yet tumults were limited, running their course by 1620, with little impact beyond regional capitals such as Poznań. Setbacks were offset by gains; greater recognition for the Orthodox, Sejm constitutions on tumults from 1593 to 1631, the Crown Tribunal in 1627 and *composito* in 1635 all gave the Confederation a stronger legal basis. This was the "process" of the toleration settlement with Catholics and non-Catholics sought, as sejmik instructions show. Dissenters were protected

[899] "The Trybunał, which does not have *potestantem condendarum legum* [the power to make laws], but only according to the law created by the whole Commonwealth, it [the Trybunał] should judge, such cases that are not described in the law should not be brought before the Trybunał neither *poenas irrogare* [to impose penalties] nor *aggravare* [to oppress] anyone with them [the penalties], only as they [the penalties] are prescribed by the common law. And where such decrees, or clauses thereof, are found, where the Trybunał would *vim legis saperent* [they would assume the force of the law] or to disrupt the common peace, as some such *additamenta* [addition] in certain decrees made by the previous Lublin Trybunał, no one who has been subject to these decrees will be executed according them, as they have *nullitati subesse* [nullified]," "O dekretach Trybunałskich," Konstytucye Seymu Walnego Koronnego Warszawskiego, 23 November 1627, in *Volumina Legum*, Tom III, pg. 263; in *Volumina Constitutionum*, Tom III, Vol. II, pg.16.

[900] *Supra*, Table 3.10.

[901] For some brief literature on the history of judicial review, see: William M. Treanor. 2005. "Judicial Review before Marbury." *Standard Law Review* 58(2): 455-562; Saikrishna B. Prakash and John C. Yoo. 2003. "The Origins of Judicial Review." *The University of Chicago Law Review* 70(3): 887-982; William R. Bishin. 1978. "Judicial Review in Judicial Theory." *Southern California Law Review* 50(6): 1099-1138; David Deener. 1952. "Judicial Review in Modern Constitutional Systems." *The American Political Science Review* 46(4): 1079-1099; Egbert Ray Nichols, ed., 1935, *Congress or Supreme Court: Which Shall Rule America?* Noble and Noble: New York.

[902] For a brief overview of judicial activism, see: Joanna Lampe. 2023. "Congressional Control over the Supreme Court." *Congressional Research Service*. R47382. 11 January, 2023; Trishla Dwivedi. 2021. "Judicial Activism." *International Journal of Law Management & Humanities* 4: 530-546; Chales B. Blackmar. 1998. "Judicial Activism." *Saint Louis University Law Journal* 42(3): 753-788; Clifford Brown. 1986. "Judicial Activism." *Ohio Northern University Law Review* 13(2): 157-164; Bernard S. Meyer. 1969. "Judicial Activism." *Nassau Lawyer* 17(3): 83-88.

[903] Wilson, *The Politics of Toleration*, pgs. 25, 67, 100.

> by the nature of the Commonwealth, in which royal rule was balanced by noble liberty, allowing szlachta patronage of dissenter churches. Support for toleration continued when the number of non-Catholics was decreasing; were dissenters so weakened that they were simply no longer a threat?[904]

The ability for the Commonwealth to solve its internal religious disputes through the courts and largely without interference from Rome was both unique and significant, in that it demonstrated—at least for a time—a functional alternative to the theocratic states of Calvin's Geneva, or the adoption of a state religion—either Protestant, Catholic, or Orthodox. That the courts were able to resolve religious issues without reliance upon Rome also helped establish the political independence of the country. Poland-Lithuania may have been a predominantly Catholic country with a Catholic monarch, but the *szlachta*, guarded their religious and political freedoms jealously. This was explicitly spelled out in the 1631 Konstytucya establishing religious peace, presented in Table 4.6 below.

[904] Wilson, *The Politics of Toleration.*, pg. 67.

Table 4.6 Establishment of Religious Peace, 12 March, 1631 Seym

Text	Outcome
That, under the pretext of the Catholic religion, various tumults and violences have been made by the licentious people in our States, the common peace has been disrupteds, and hence great *inconvenientia rostą* [inconveniences have appeared], We, therefore, wanting to keep *publicam securitatem et pactem* [public security and peace] in our States, and to stop such actions; We mark the jurisdiction m of the Court, *inter causas recentis criminis* [among the causes of recent crime], against those who would dare with such tumult and audacity of *publicam securitatem violare* [to violate public security] -and we also want to punish *poenis contra violators pacis publicae sancitis* [by the punishments that are established for those who violators of the public peace][905]	The Trybunał is to Keep the Religious and Public Peace

[905] "Zatrzymanie pokoiu pospolitego," Konstytucye Seymu Walnego Koronnego Warszawskiego, 12 March, 1631, *Volumina Legum*, Tom III, pg. 326; in *Volumina Constitutionum*, Tom IV, Vol. II, pg. 109.

By the early 17th century, it had become quite clear that the tolerance of Poland-Lithuania did not always extend toward two main religious groups, which will be addressed in turn: the Eastern Orthodox and the anti-Trinitarians.[906] Questions about religious toleration and the reconfirmation of religious rights were addressed time and time again, not only for the *pacta conventa* at the beginning of each reign, but within the Seymy themselves. Dissenters published a common statement in the interregnum of 1632, putting their rights at the center of the debate on reform, covering issues from holding office to court judgements. The statement called for Trybunał rulings against dissenter liberties to be repealed, free worship for all confessions, the right to build and keep their own churches, and promises of security against discrimination from the clergy and *Hetman* (army commander).[907] The Catholic clergy response conceded that the Trybunał rulings should be reviewed, and dissenters should never be discriminated against in office or treated violently, but denied the right to public worship as a threat to public order.[908]

However, in other corners there was movement to revive the Edict of Wieluń, a 1424 document that declared that the Hussite religion was not only heretical, but that practice of Hussitism would be paramount to *lese-majesty*. There were some conservative Catholic theorists such as Szymon Starowolski, who argued that the Konfederacja Warszawska was itself illegal and that the Edict remained in place.[909] Ogonowski illustrates the importance of the debate between anti-Trinitarian social theorist and leading advocate of toleration Samuel Przypkowski and Szymon Starowolski as having clear implications for both constitutionalism and legal interpretation.

> Dealing with the thesis about the validity of the Wieluń Edict was probably the most important issue in this polemic. Because if the edict of Wieluń were still binding law, the Konfederacja Warszawska would be an illegal act. Let us then look at how Przypkowski tries to counter this thesis.
>
> In the opinion of Podłkowski, Starowolski putting forward such a thesis [i.e. that the Konfederacja Warszawska is contrary to "common law," because it is contrary to the edict of Wieluń] commits a glaring mistake, namely it seems to believe that the older the laws, the better; the older the more important [...], therefore, these laws, once enacted, change or cancel or correct. Hence, among laws and *konstytucje*, the later law is always more important. It is a shame that the adversary needs to be instructed about this.
>
> Therefore, when Starowolski says that those who passed the Konfederacja Warszawska could not abolish the law against heretics, just as a thief cannot erase "the statute so that thieves are not hung (p. 60)," he says at this point not only unworthily and offensively (uncivilly), but also in a way that proves lack of competence. For those who passed the Konfederacja were legislators (*legum conditores)*, had the *ius Maiestatis* [right of majesty], stood above the law and had full authority to pass or abolish laws by common consent [...]
>
> Furthermore, it is nonsense to argue that the Konfederacja is invalid because it was enacted when there was no king. If that were to be the case, the Henrician Articles guaranteeing free election and other *szlachta* freedoms would also be illegal, since they were

[906] Norman Davies. 1997. "The Third of May 1791." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 179*1. Indiana University Press: Bloomington, pg. 8.
[907] Wilson has discovered this debate in a manuscript at the Biblioteka Polskiej Akademii Nauk w Kórniku, titled: *Puncta dissidentuum de religione nates Convocatia podane interregnum*. See: Wilson, *The Politics of Toleration*, pg. 58f.
[908] *Ibid*, pg.58.
[909] Zbigniew Ogonowski. 2015. *Socynianizm: dzieje, poglądy, oddziaływanie*. Towarzystwo Naukowe Warszawie: Warszawa, pgs. 366-372.

written and enacted in the king's absence. Besides, who was this king who opposed the law of peace among dissidents? What coronation parliament has not approved this law?

Finally, it is utterly absurd to say that kings Henry and Stephen, when they agreed by swearing an article about peace between dissidents, did not understand what the term "dissidents" really meant in Poland; that they supposedly thought that it was only about the followers of the Augsburg (Lutheran) religion, to whom the emperor himself, forced by the situation, agreed to tolerate them. Well, our two kings had an excellent understanding of the theological disputes of the time: Henry had had much to do with France before, not with Lutherans, but with Huguenots, i.e. Calvinists, and Stefan - not only with Lutherans and Calvinists, but - horror of horrors - with Unitarians, who in his country, i.e. in Transylvania, had full civil rights at that time. [910]

To accept the logic that the Konfederacja Warszawska was somehow invalid by the continuation of an existing law was detrimental to the constitutional system for several reasons. Most simply, it would invalidate the entire conception of constitutional evolution, in that more recent constitutional achievements take precedence over earlier ones; indeed, to not have some vague sense of progression over time would introduce instability as any old legal act at any point in time could be brought up to invalidate current legislation. Secondly, the mechanism of *konfederacja* was fundamental to the creation of law and political order, especially given that the Polish and later the Polish-Lithuanian system had a system of electing kings rather than dynastic or *vivente rege* succession. A *konfederacj*a was necessary to allow for continuity of political institutions in between the reigns of kings, to select the Konfederacja Warszawska as somehow invalid would undermine the entire constitutional system and provide the grounds for arbitrarily rejecting any of the *konfederacje*. In fact, that the Konfederacja Warszawska was instead a testament to its status as a widely accepted and vital legal act.[911]

A third point is that both Henryk Walezy and Stefan Batory were from countries with significant Protestant populations and that the protestant dominations within France and Transylvania were distinct. This gave an understanding of "dissidents" as "non-Catholics" rather than any particular religious sects, though whether or not Eastern Orthodox was considered to be "dissidents" or its own separate legal category is not always clear. IAs we shall explore in greater depth later, Starowolski's desire to invalidate the Konfederacja Warszawska was rejected and it remained the law of the land, but in some sense his ideas of undermining it were successful. There was growing intolerance[912] and a revival of legal precedent to exile dissenters, but it was claimed in the name of the common good rather than in the name of the king. So while the legal sources and institutions of 16th century constitutionalism indeed continued over into 17th century constitutionalism, in many ways

[910] Ogonowski, 2015. *Socynianizm*, pgs. 371-372, 374.

[911] "Although the defenders of the Konfederacja Warszawska admitted that this law was adopted during the interregnum, this fact was considered to be one of its positive features, because this law is the most durable and the most powerful, which the free Republic enacts without any obstacles during the interregnum, obliging the king to confirm and swear in the decisions of the Seym. The royal oath, containing a clause on religious peace, made by three successive elected rulers, is therefore the most important guarantee of the validity of the Konfederacja Warszawska," Mirosław Korolko. 1974. *Klejnot swobodnego sumienie: Polemika wokół konfederacji warszawskiej w latach 1573-1658*. Instytut Wydawniczy Pax: Warszawska, pg. 119.

[912]Zbigniew Ogonowski. 1979. *Filozofia i myśl społeczna XVII wieku*. Państwowe Wydawnictwo Naukowe, pgs. 55-57.

they were undermined or destabilized due to the political particularities and the overall difficult situations created by the several crises throughout the 17th century. This is a theme that we shall return to over and over again.

As a final reminder, when discussing the constitutionalism of the Polish-Lithuanian Commonwealth, it is important to appreciate that both constitutionalism as well as the constitution were in flux, just as the understanding of the "state" vs the personage of the king vs the Church was in flux. Hence, there was continual need to reconfirm the rights and privileges possessed by the *szlachta*, with each king and potentially each Seym having to reassure that these rights were continuous. It is also important to remember the specific historical context, wherein the 17th century saw a continuous decline of republics throughout Europe and the rise of absolutism and concomitant strengthening of empire—and most crucially, practically speaking—empire's relatively lower administrative costs to manage and modernize vast militaries.

One attempted solution to the tension with the Greek religion was the creation of the Uniate Church. Though the dream of many executionists for a Polish Church headed by the King of Poland that would be institutionally independent from Rome but keep much of the doctrine and the liturgy failed, many of its ideas were recycled and metamorphosized into the Uniate Church, which united the Eastern Orthodox and Roman Catholic Churches within parts of the Commonwealth. Much of the contention blurred political and religious concerns, given that with the fall of Constantinople to the Ottoman Turks, the most powerful Eastern Orthodox Patriarchy had shifted to Muscovy, which started to apply pressure to the Eastern Orthodox Church in Ruthenia.[913] The struggles of the Catholic Church in Poland-Lithuania and the Eastern Orthodox Church in Ruthenia—significant parts of modern day Belarus and Ukraine—was thus in many ways a proxy war between Rome and Muscovy.[914] In 1596 a gathering of prominent members of the Roman Catholic and Eastern Orthodox clergy gathered in Brześć—located in today's Belarus—to establish the Union of Brześć wherein Eastern Orthodox Churches in Ruthenia acknowledged the superiority of the Pope as well joining communion with the Roman Catholic Church.[915] In exchange, they were allowed to

[913] Davies, *God's Playground*, pgs. 135-136; Stone, *The Polish-Lithuanian State*, pg. 138.
[914] Friedrich, "Poland-Lithuania," pg. 230.
[915] "[W]e, the undersigned metropolitan and bishops of the Greek Rite, hereby announce that – caring for the foundation of the Holy Church of our Lord Jesus Christ – we believe that for the sake of its strength the Christian Church should be based on one Peter as its rock and ruler so that there is one head on one body, one host in one house and one dispenser of the graces of God who can rule the people for their good and guarantee that the Church, established in the times of the apostles, lives forever and that there continues to be one authority, the descendant of Saint Peter, the Pope in Rome, to whom all patriarchs can resort with their doubts in faith and spiritual strength and in ecclesiastical court cases and appeals […] Guided by our conscience and noticing the threatened salvation of the flock God has entrusted us with and convinced that we do not want to participate in the grave sin of the Byzantine patriarchs and the resulting pagan slavery, support them in rejecting the unity of the Church nor let churches be ravaged and men's souls be doomed because of the heresy, we sent the following reverend envoys to Pope Clement VIII at the Holy See last year: Bishop of Lodomeria and Brest Hipaty and Bishop of Lutsk and Ostroh Cyryl Terlecki, with a message and permission from His Majesty King Sigismund III, our pious ruler – may God grant him long and fortunate reign – asking him to accept our pledge of obedience to him, the highest Shepherd of the Catholic Church, free us from the authority of the Byzantine patriarchs, absolve us, allow us to keep the rite and ceremonies of the Eastern Greek Church and refrain from making any

keep the Eastern Orthodox liturgy, continuing their practices such as allowing the clergy to marry, and also positions on the royal Senat council just as the Roman Catholic bishops did. In this sense, it was a betrayal of the executionist movement's ideals in that it politicized religion and increased the tendency away from republicanism by empowering a new class of *magnaci*.[916]

To put it simply, the Union of Brześć enraged many Ruthenian clergy, creating a split between those who had stronger and closer ties to Poland-Lithuania and those who saw their Eastern Orthodox religion as key to their social and political identity.[917] Political and social divisions were also important, with many powerful *magnat* families siding with Poland-Lithuania, many of whom had acquired their wealth from abusing the lesser Ruthenian *szlachta* to begin with.[918] Much of the anger of the lesser Ruthenian *szlachta* and the Cossacks towards of the new Union was understandable, in which they saw members of their clergy trading their religious independence for more social status and political power. While many of the supporters of the Union had been bishops or *magnaci*, it was overwhelmingly rejected by the laity as well as the *szlachta*.[919]

The church was always recognized as the key to political power in Ruthenia.[920] This fracturing of political and social cleavages left membership in the Eastern Orthodox Church

changes to our churches. He indeed accepted our request, granted his charters and wrote a document ordering us to come to a synod and proclaim our faith and obedience to the Holy See and Pope Clement VIII and his successor," *The Union of Brześć*. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. https://polishfreedom.pl/en/union-of-brzesc/ [Accessed 24 July 2022].

[916] "From the end of the 16th century there was a shift towards the re-strengthening of the position of the *magnaci*. [...] In this country, the Polish *magnaci* gained an influential ally in the form of the powerful Lithuanian-Ruthenian nobility. Undergoing cultural polonization, by ties with family ties with Polish *magnaci*, purchasing goods in the Crown, Lithuanian and Ruthenian lords strengthened with Polish *magnaci*. At the same time, the Catholic Church, which acted as an offensive force against the Reformation, grew stronger, and by implementing the Union of Brest (1596), it fought against that part of the followers of the Orthodox Church in the Polish-Lithuanian Commonwealth, which defended its religious - and thus national – independence. The progress of the Counter-Reformation foreshadowed further changes in the system of binding social and legal values,"Juliusz Bardach, Bogusław Leśnodorski, and Michał Pietrzak. 1987. *Historia państwa i prawa polskiego*. Państwowe Wydawnictwo Naukowe: Warszawa, pgs. 163-164.

[917] "The Union of Brest was a political agreement where the Eastern Orthodox bishops agreed to be under the hierarchy of the Catholic Church as long as they kept their rights, their liturgy in Slavic languages, and the marriage of priests, in exchange they would receive equal social and political position to Catholic bishops. This does not happen in practice, since Catholic bishops blocked them from the senate. This Union angered much of the Ruthenian nobility (Ukrainian and Belarusians), Cossacks, and a large part of the rank and file of the clergy, Orthodox monasteries, and many townspeople and peasants. Some *magnaci* opposed it. This effectively led to a split among social, religious, and ethical lines in Ukraine, Belarus, and Cossack lands," *ibid*, pg. 192.

[918] "As a result of generous royal grants, huge *magnat* estates grew in Ukraine, enlarged by unlawful appropriations of land of small Ruthenian *szlachta*, taking land from townspeople, and seizing royal lands. The weak state apparatus of the Republic of Poland in the borderlands was not able to prevent numerous acts of lawlessness on the part of the "mini-kings", which grew stronger each year. There were frequent cases of taking land from small *szlachta*, and even attempts to treat it as peasants' subjects," [918] Leszek Podhorodecki. 2015. *Dzieje Ukrainy*. Bellona: Warszawa, pg. 88.

[919] Stone, *The Polish-Lithuanian State*, pg. 138.

[920] "The church was a mainstay of Ruthenian culture. The brotherhoods she led managed Ruthenian schools and printing houses, and published books in their mother tongue, and defended national interests. So, in order

as one of the few unifying factors for the Ruthenians, and could be reasonably argued to be more important than either Catholicism or Protestantism was throughout the Commonwealth in terms of social identity.[921] Thus, the Union of Brześć actually reinforced many of the divisions within the lands of today's Ukraine.[922] Ironically, the Cossacks and the majority of the Eastern Orthodox clergy who rejected the Union of Brześć employed arguments inspired by the *szlachta*'s own golden liberty against what they viewed as oppressive *magnaci*.[923] In this sense, both the Union of Brześć as well as those who opposed it were influenced by the executionist movement: on the one hand, the Union could be seen as attempt at religious toleration by levelling the playing field between the Catholic Church and the Eastern Orthodox Church,[924] while on the other hand the rights of the *szlachta* for self-rule and the protection of individual privileges was antithetical to attempts at centralization.

After his humbling post-Rokosz Zebrzydowskiego, Zygmunt III chose the more pragmatic route of the last two Jagiellonians—his uncle and grandfather—and did not enact political retaliation against the Eastern Orthodox who refused to join the Uniate Church,[925] though in terms of legal status they were considered to be "dissenters" just like the Protestants.[926] However, many Catholic bishops refused to recognize Uniate bishops in the Senat,[927] and to his discredit Zygmunt III made no effort to seat Uniate bishops over the objections of the Catholic bishops. Though this middle-of-the-road approach was ostensibly to avoid angering either the Catholic bishops or the Eastern Orthodox laity,[928] it had the long-term effect of undermining the Uniate church and the tenuous support that it enjoyed. The first half of the 17th century saw the "disuniates" who rejected the Uniate Church removed from all official recognition or social status, though the Orthodox Church began to revive itself, even without the king's permission.[929] This would have serious consequences, wherein many of the powerful leaders among the Ruthenians and the Cossacks turned their allegiance to the Eastern Orthodox Church, rather than to the Commonwealth or the king.[930] After thirty years of this impasse, in 1632 Władysław IV re-recognized the Eastern Orthodox Church, [931]

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to subdue Ruthenia, it was necessary first of all to subdue the Church, to liquidate the independence of brotherhoods and the Orthodox Church," Podhorodecki, *Dzieje Ukrainy*, pg. 92.

[921] Friedrich, Karin. 2007. "Poland-Lithuania." In: Howell A. Lloyd, Glenn Burgess, and Simon Hodgson, eds, *European Political Thought, 1450-1700: Religion, Law and Philosophy.* Yale University Press: New Haven and London, pg. 233.

[922] Stone, *The Polish-Lithuanian State*, pg. 226.

[923] Fredrich, "Poland-Lithuania", pgs. 230-231.

[924]Wacław Uruszczak. 2021. *Historia państwa i prawa polskiego. Tom I (966-1795)*. Fourth Edition. Lex a Wolters Kluwer business: Warszawa, pg. 218.

[925] Stone, *ibid.*, pg. 139.

[926] Davies, *God's Playground*, pg. 136.

[927] Stone, *ibid.*, pg. 138; Uruszczak, *ibid*., pg. 220.

[928] Stone, *ibid.*, pg. 139.

[929] *Ibid*., pg. 227.

[930] Teresa Chynczewska-Hennel 1993. "Do praw i przywilejów swoich dawnych" Prawo jako argument w polemice prawosławnych w pierwszej połowie XVII w." In: Wójcik, Zbigniew and Teresa Chynczewska-Hennel, eds. 1993. Między Wschodem a Zachodem: Rzeczpospolita XVI-XVIII w.: studia ofiarowane Zbigniewowi Wójcikowi w siedemdziesiątą rocznicę urodzin. Wydawnictwa Fundacji "Historia pro Futuro: Warszawa, pg. 56.

[931] Davies, *God's Playground,* pg. 137; Stone, *ibid*., pgs. 148, 227.

given that some Eastern Orthodox sought support from Muscovy to create a civil war.[932] However, much of the damage had already been done.

It is worth examining the complex relationship between the Eastern Orthodox Church—or "the Greek religion"—and the constitutional superstructure of the Polish-Lithuanian Commonwealth in greater detail. While in some sense, they were treated as dissidents in that they were generally granted the same freedom of religion as Protestants were, but they were also a separate legal category with significant time devoted to them by the Seymy. Numerous constitutions dealt with the status of the Eastern Orthodox Church, its adherents, and the rights of its clergy. Over the period 1616-1647 there were several *konstytucje* concerning the "Greek Religion" that dealt with a variety of topics. Generally, *konstyutucje* took on two forms: either renewing religious peace according to a previous *konstytucja* or the clarification of said *konstytucja* or to postpone the discussion of religious questions until a future Seym. For example, religious peace was renewed according to the *konstytucje* of 1607[933], 1609[934], or 1635[935]. The Seym postponed the discussion of religious rights several times, usually because of other "urgent" matters such as wars [936] but also more general unrest, i.e. "for the sake of the general affairs" of the nation.[937] Similarly, there were times when the Seym did not have enough time to complete the debate to the satisfaction of the Greek Orthodox *szlachta* and debate was postponed. [938] Full rights were granted "to the Greek Religion" in 1647.[939] It is quite clear that addressing the question of the "Greek religion" was quite an important issue for the development of 17th century constitutionalism within the Commonwealth. This again supports the overall theses that 17th century Polish-Lithuanian constitutionalism was more concerned with continuation and clarification of previous constitutional achievements, rather than innovation or reform, as well as enshrining the period of the Rokosz Zebrzydowskiego as a major constitutional moment within Polish-Lithuanian constitutional development. Indeed, the decisions from that time period emerged as something akin to precedent for future Seymy.

While the period from 1611 to 1632 saw increasing tensions between the Rzeczpospolita and the Eastern Orthodox, the situation vastly improved in 1632 when the Eastern Orthodox Church was fully recognized, receiving the same rights and privileges as

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[932] Uruszczak, *Historia państwa i prawa polskiego*, pg. 220.

[933] "Religia Grecka", Konstytucye Seymu Walnego Koronnego Warszawskiego, 1620, in *Volumina Legum*, Tom III, pg. 184; in *Volumina Constitutionum*, Tom III, Vol. I, pg. 276.

[934] "Religia Grecka," Konstytucye Seymu Walnego Koronnego Warszawskiego, Sześćniedzielnego, 14 March, 1635, in *Volumina Legum*, Tom III, pg.407; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 260.

[935] "Religia Grecka," Konstytucya Seymu Koronnego Warszawskiego Sześćniedzielnego, 1638, in *Volumina Legum*, Tom III, pg.443; in: *Volumina Constitutionum*, Tom III, Vol. II, pg. 317; "Religia Grecka," Konstytucye Seymu Walnego Koronnego Sześćniedzielnego Warszawskiego, 20 August, 1641, in *Volumina Legum* Tom IV, pgs. 7-8; in: *Volumina Constitutionum*, Tom IV, Vol. I, pgs. 15-16.

[936] "Relgia Grecka," Konstytucye Seymu Walnego Generalnego Warszawskiego, 1623; in *Volumina Legum*, Tom III, pg. 217; in *Volumina Constitutionaum*,Tom III, Vol. I, pg. 276.

[937] "Religia Grecka," Konstytucye Seymu Walnego Koronnego Warszawskiego, 12 March 1631, in *Volumina Legum*, Tom III, pg. 320; in *Volumina Constitutionum*, Tom III, Vol. II, pg. 101.

[938] "Religia Grecka," Konstytucye Seymu Walnego Koronnego Warszawskiego, 23 November, 1627, in *Volumina Legum*, Tom III, pg. 263; in *Volumina Constitutionum*, Tom III, Vol. II, pg. 17.

[939] "Relgia Grecka," Konstytucye Seymu Walnego Koronnego Warszawskiego, Trzyniedzielnego," 2 May, 1647, in *Volumina Legum*, Tom IV, pgs. 52-53; in: *Volumina Constitutionum*, Tom IV, Vol. I, pg. 91.

the Catholic Church. We agree with Wilson's suggestion that the dominant orthodox historical view that "political and religious narrowing began under Zygmunt III"[940] is overly simplistic, not only in terms of real political practice, but also the constitutional and cultural institutions. Constitutionally speaking, the Seymy under Zygmunt III were largely neutral or proved to be indecisive on the issue, irrespective and perhaps in spite of whatever policies Zygmunt III would have wanted adopted.

We must recall that one of the important characteristics of 17th century Poland-Lithuania was the amount of freedom that the *szlachta* had in governing the religion of their own estates, with many able to to disproportionately support minor, dissenting sects, even though the overall policy of the nation was nominally neutral.

As Wilson explains:

> Toleration would have failed when dissenters were excluded from decision-making; this was not yet the case in Great Poland under Zygmunt and Władysław. Under the father, reconversions to Catholicism did gather pace, affecting representation in the Senate, though this trend was reserved under the son. Yet dissenters had a regional alternative to royal patronage; the found tolerant Catholic sponsors among the highest palatines and general starostas. Dissenters made up a quarter of castellans and remained a consistent one third of envoys in the key palatinates of Poznań and Kalisz, making them a force to be reckoned with in both chambers of the Seym on two sides of the triangle of mixed government. Though the crown favoured Catholics at court, this was balanced by regional szlachta who still knew that liberty of conscience was central to their liberties and that religious peace was needed to preserve political peace; mixed confessions were part of a mixed government. Thus toleration was fostered by the devolved structure of the Commonwealth, sustaining confessional diversity despite a Catholic royal court and more Catholic senators. The success of Zygmunt's Counter Reformation was limited; state confessionalisation was resisted by a tolerant szlachta at the heart of the Polish Kingdom.[941]

Despite these positives and the clear interest in continuing the principles of the Konfederacja Warszawska, the *konstytucye* concerning Eastern Orthodoxy also reveal a troubling trend: at least half of the time the status quo was not preserved because of faith in the principle of toleration, but because the Seym was occupied by other concerns. Troublingly, this revealed cracks in the system, wherein the *szlachta* and the king were willing to set aside settling debates of individuals' rights for political—or in other cases, military—expediency. While the tension between pragmatism and idealism is a universal characteristic to all social systems, it reared its head at a particularly ugly time in Polish-Lithuanian history.

There were other ominous signs as well, particularly against the more extreme group of dissenters who embraced anti-Trinitarianism, pacifism, irenicism, personal religious freedom, separation of Church and state, improving social and economic conditions for the serfs, and in some cases even the liberation of serfdom altogether. This group, alternatively known as Arians, Socinians, anti-Trinitarians, the Minor Reformed Church, or—as they preferred—the Polish Brethren, had ben outcasts ever since the group emerged in 1565 and were certainly so when Faustus Socinus (Fausto Paolo Sozzini) arrived in 1579, for whom

[940] Wilson, *The Politics of Toleration*, pg. 16.
[941] Wilson, *The Politics of Toleration*, pg. 124.

they were named. Though the "Socinians" was the name by which they became more popular in the English-speaking world,[942] Socinus was not their leader, nor did he ever officially become a member due to his rejection of baptism, leading to other disputes with radicals, though many of his ideas were adopted. In truth, the radical dissenting movement throughout Central-Eastern Europe was highly complex, with numerous branches and sub-branches, such as the Czech Brethren in Bohemia, the Unitarians in Transylvania—which remains the oldest surviving Unitarian congregation in the world—and the branches in the Crown and Grand Duchy of Lithuania. To simplify, we shall simply use the term anti-Trinitarian to describe all of these groups.[943] Given this wide geographical range and their lack of loyalty to both kings and major churches, the anti-Trinitarian movement was extremely porous, with many of their leaders being foreigners, such as Socinus was.[944]

As many churches at the time, the Socinian brotherhood received its support from the patronage of powerful local lords. In the case of the Polish brethren, one of their main sponsors was the Sienieński family, with Jakub Sienieński being a powerful Calvinist *wojewoda* in Podolia as well as a member of the Rokosz Zebrzydowskiego.[945] Jakub Sienieński supported the building of a religious community in Raków and an academy there in 1602 that became known as "Sarmatian Athens", and had over 1000 students, many of

[942] For a brief survey of how Socinianism was received abroad, particularly the English-speaking world, see: Earl Morse Wilbur. 1946. *A History of Unitarianism, Socinianism, and Its Antecedents.* Harvard University Press: Cambridge, Massachusetts; Nicholas Hans. 1958. "Polish Protestants and Their Connections with England and Holland in the 17th and 18th Centuries." *The Slavonic and East European Review* 37(88): 196-220; Gerard Reedy. 1977. "Socinians, John Toland, and the Anglican Rationalists." *The Harvard Theological Review* 70(3/4): 285-304; Wallace Jr., Dewey D. 1984. "Socinianism, Justification by Faith, and The Sources of John Locke's The Reasonableness of Christianity." *Journal of the History of Ideas* 45(1): 49-66; Gerard Reedy. 1985. "The Socinians and Locke." In Gerard Reedy: *The Bible and Reason: Anglicans and Scripture in Late Seventeenth-Century England*, 119-141. University of Pennsylvania Press: Pennsylvania**;** C.A.J. Coady. 1986. "The Socinian Connection: Further Thoughts on the Religion of Hobbes." *Religious Studies* 22(2): 277-280; Sarah Mortimer. 2010. *Reason and Religion in the English Revolution: the Challenge of Socinianism.* Cambridge University Press: Cambridge.

[943] The precise nomenclature is shifting and unclear. Ogonowski and many English-language scholars—notably Wilbur, Hillar, and Mortimer— prefer the term Socinian, whereas in the official records of the Seym they are referred to as "Arians." Other theological historians refer to them as Unitarians, Dissenters, or the Reformed Church. They themselves preferred the term Polish Brethren. However, as noted, not all of these individuals formally joined the Polish minor Reformed Church or Polish Brethren, including Socinus himself. Thus, the term we shall use is anti-Trinitarian, because it is somewhat of a neutral term and was shared by all of these subsects, even though the term "anti-Trinitarian" itself is problematic, because while it means opposed to the orthodox view of the Trinitary shared by Protestants, Catholics, and the Eastern Orthodox, in fact there are many different and subtle definitions of the "Trinity" within anti-Trinitiarianism, given that none of the members of the Trinity are dismissed outright, but rather there are varying interpretations on the role of Christ as more or less human vs more or less divine, as well as the precise nature and role of the Holy Spirit.

[944] For general histories of the anti-Trinitarian movement within Central-Eastern Europe, see: Wilbur. *A History of Unitarianisms*; Tazbir, *A State Without Stake*; Janusz Tazbir. 1973. *Bracia Polscy na wygnaniu: studia z dziejów emigracji ariańskiej*. Państwowe Wydawnictwo Naukowe: Warszawa; Ogonowski, *Socynianizm*; Marian Hillar. 2019. *Radical Reformation and the Struggle for Freedom of Conscience: From Servetus's Sacrifice to the Modern Social Moral Paradigm and the American Constitution*. Outskirts Press: Denver. Mortimer, *ibid*.

[945] Janusz Byliński. 2016. *Sejm z 1611 roku. W nowym opracowaniu*. Wydział Prawa, Administracja i Ekonomia Uniwersytet Wroclawskiego: Wrocław, pg. 219.

whom were foreigners.[946] It was this community that produced what became known as the "Racovian Catechism" in the English-speaking world, spreading the ideas of the Polish Brethren abroad.[947] However, their beliefs soon proved to be too radical, even for tolerant Poland-Lithuania. There was an agreement of sorts between mainline—Lutheran and Calvinist—Protestant churches and Catholics that excluded the anti-Trinitarians from the legal category of dissidents, which meant that religious toleration in Poland-Lithuania no longer applied to them.[948]

In 1638 things came to a head when there was an incident where some anti-Trinitarian students supposedly defaced a Christian cross that was bordering the property of the academy grounds, which enraged the local Catholic population. Several Catholic members of the Seym demand an official inquiry into the event, and Władysław IV himself was eventually drawn into the case. The king and Jerzy Ossoliński proposed the invocation of a summary process (*proces suymaryczny*)[949] against the Polish Brethren, breaking legal tradition. This outraged many *szlachta* —both Catholics and dissenters—but Władysław IV and his Catholic allies convinced them that this was not the creation of a new precedent, but rather a one-of exception to the rules. Ultimately assured that their own privileges were not in danger, the *szlachta* essentially abandoned the anti-Trinitarians and a special sentence was passed by the Senat. Jakub Siemieński was ordered to deliver up the two academy teachers who had assisted the students that had attacked the cross for exile, and the students only escaped punishment by converting to Catholicism.[950] Though they were expelled from Raków, many of the anti-Trinitarians found shelter with sympathetic *magnaci* —particularly among Calvinist congregations, so while it suffered a serious blow, religious toleration was not outright defeated in 1638. Ogonowski noted how out of character it was for Władysław

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[946]Fore more on the academy at Raków, see: George H. Williams. 1976. "Socinianism and Deism: From Eschatological Elitism to Universal Immortality?" *Historical Reflections 2(2)*, pgs. 272-276; Marian Hillar. 1993. "Poland's Contribution to the Reformation: Socinians and their Ideas on Religious Freedom." *The Polish Review* 38(4): 447-468; Sarah Mortimer, *Reason and Religion in the English Revolution*. Cambridge University Press: Cambridge, *passim*.

[947] For the original translation, see: Thomas Reese, (trans. and ed.), *The Racovian Catechism, with notes and Illustrations, Translated from the Latin: To Which is Prefixed A Sketch of the History of Unitarianism in Poland and the Adjacent Countries (London, 1818)*. Copyright by Forgottenbooks.com, 2016, p. xcvii, 325-30.

[948] "The most fateful, however, was the project of some rebels concerning the exclusion of the Arians from the "process" of the Konfederacja [Warszawska], proposed with the participation of a part of the Catholic nobility. The project of the exclusion of the Polish Brothers, being a fatal blow to the greatest conquest of the Konfederacja for peace between faiths distinguished between different faiths, provoked—the first in the history of the Sejm polemics around the Konfederacja Warszawska—a public speech by Arian envoys in defense of the act of 1573. Hieronim Moskorzewski spoke fiery speeches in apology for the Konfederacja. Moskorzowski and Paweł Orzechowski, refuting the view that the religious confederation of 1573 did not refer to their religion. Speeches by Moskorzewski and Orzechowski, indicating, inter alia, the danger of introducing the inquisition into Poland as a result of the deprivation of the rights to freedom of faith guaranteed to the Polish Brethren, included threatening warnings of the limitations of the significant achievements of the Polish tolerance of the golden age. The immediate future has unfortunately confirmed the predictions of the Arian leaders, formulated in a polemic with the Rokoszites' postulates," Korolko, *Klejnot swobodnego sumienie*, pg.104; See also: Wilson, *The Politics of Toleration*, pg. 51.

[949] Ludwik Kubala. 1924, *Jerzy Ossoliński*. Księgarnia Zakładu Narodowego im. Ossolińskich: Warszawa, pg. 117.

[950] For a more detailed account, see Ogonowski, *Socynianizm*, pgs. 145-147; Stone, *The Polish-Lithuanian State*, pg. 146, 217; Davies, *God's Playground*, pg. 136.

IV, the man who had stood up to the pope before, would give in to the demands of his Catholic szlachta.

> However, if the king willingly listened to the nuncio's suggestions, it was not because he was particularly helpful to the initiatives of the Holy See. On the contrary, it is known that Władysław IV was able, if it was convenient for him, to vigorously resist the pressure of Rome. Well, this time Władysław strangely complied with the demands of the Catholic side, because he promised himself that by settling the matter in this way, he would obtain some of his own political benefits, for which he was going to strive in the Izba Poselska.[951]

During this period, many of the anti-Trinitarian's loyalties clearly shifted toward the invaders, though others remained loyal. Nor were they alone, in that both Catholics and mainstream Protestant *szlachta* also had split loyalties. Jan II Kazimierz officially broke the centuries-long policy of religious toleration by placing all the blame of the Commonwealth's misfortunes on the unfortunate anti-Trinitarians:

> On April 1, 1656, in the cathedral of Lwów, King John Casimir, distressed by the wars, solemnly committed his kingdom and himself to the special protection of the Holy Virgin, vowing in exchange to protect her from the insults of the "heretics," to the Holy Trinity and divinity of the Son of God, and to remove the grievances of the lower classes. The King repeated the vow under pressure from the Jesuits a second time at the camp near Warsaw on June 15, 1656, promising this time to expel the Arians from Poland. The King did nothing for the lower classes but was most successful in exterminating the scapegoats among the Protestants, the Socinians. [952]

Jan Kazimierz's oath, occasionally known as the Lwów Oath, is reproduced in full below:

> Great Mother of the God-man, Most Holy Virgin. I, Jan II Kazimierz, king by the grace of Thy Son, King of kings and my Lord, and by Your mercy, having fallen to Your Most Holy feet, do choose you on this day as my Patroness and Queen of my countries. I recommend to Your special care and protection both myself and my Kingdom of Poland, Duchy of Lithuania, Ruthenia, Prussia, Masovia, Samogitia, Livonia, Smolensk and Czernichów, and the armies of both nations and all my peoples, I humbly summon Your help and clemency in the defeated and deplorable condition of my Kingdom against the enemies of the Roman Catholic Church.
>
> And since, bound by the graces you have accorded [me], I burn, along with my nation, with a new and zealous desire to devote myself to Thy service, I therefore vow to Thee and Thy Son, our Lord Jesus Christ, on my own behalf and on behalf of my senators and my peoples, to spread your glory and worship across all the lands of my Kingdom.
>
> Finally, I vow and promise that once I have achieved victory over [my] enemies, particularly over the Swede, through Thy almighty mediation and Thy Son's great mercy, I shall beseech the Apostolic See to make this day holy by annual celebration for all time to come in gratitude to Thee and to Thy Son, and I shall make all effort, along with the bishops of [my] Kingdom, to have my peoples keep what I have promised.
>
> But since to my heart's great sorrow I clearly see that the groans and oppression of the peasants have brought plagues of air, war and other misfortunes upon my Kingdom in these seven years by the hand of Thy Son, the Righteous Judge, I furthermore promise and vow that once peace comes, I and all my estates shall use measures to free the people of my Kingdom from unfair burdens and oppressions.

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[951] Ogonowski, *Socynianizm*, pgs. 146-147.
[952] Hillar, "Poland's Contribution to the Reformation," pg. 458.

> And Thou, most merciful Queen and Lady, as Thou hast inspired in me, my senators and the estates of my Kingdom the idea of these vows, so make me obtain from Your Son the grace of fulfilling them.[953]

Though not an act of the Seym, Jan Kazimierz's oath was of exceptional constitutional importance, in several senses. The first was that after the majority of the Commonwealth had been captured by Sweden, Lwów became something of a temporary capital and the place where the army and the *szlachta* were gathering; thus, the oath was made before the whole public of the city. In the chaotic times where neither the seymiki nor the Seymy could meet regularly, it became something of formal policy as well as a rallying point for the beleaguered nation. Given this, it is important to consider its contributions to the Commonwealth. The first is that it firmly aligned the kingdom and the *szlachta* with the Catholic church both *de jure* and *de facto*; despite a long history of the Catholic church existing as the national church *de facto*.[954] Another critical point is that it discusses the importance of ordinary people's sufferings, the peasantry's sufferings. This was mostly symbolic theatre, however, given that no real political faction—except ironically some of the anti-Trinitarian szlachta who liberated their own serfs—was really interested in the well-being of the serfs.[955] Troublingly, given that the Oath was made "against the enemies of the Roman Catholic Church" and not against the enemies of the Commonwealth, which extended to Protestants and Orthodox, many of whom remained loyal to the country. After the war concluded, Jan II Kazimierz set about fulfilling his vow with the anti-Trinitarian minorities again proving to be a convenient scape goat. As Marian Hillar explains:

> The King proceeded after the victories to fulfill his vow. At his request and in order to express in deeds his gratitude to God, the Sejm on July 20, 1658, expelled the Socinians from Poland. The liberum veto exercised by the Socinian deputy, a privilege already in effect since 1652, was conveniently disregarded in this case. The Sejm also enacted a law prohibiting profession of propagation of Socinianism in the Polish dominion, and everyone who did so was to be punished immediately by death. But the Sejm granted a period of grace of three years to Socinians who retained their beliefs to allow them to sell their property and emigrate. Security

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[953] *Lwów vows of Jan Kazimierz*, 1 April 1656. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. https://polishfreedom.pl/en/document/sluby-lwowskie-jana-kazimierza [Accessed 1 January 2022].

[954] *Supra*, Table 3.10.

[955] There was something of a contradiction regarding the antitrinitarians and serfs, in that nominally antitrinitarian was opposed to serfdom, but if a *szlachcic* freed his serfs he could not work his lands and had to give up much power. As such, powerful "antitrinitarians" *szlachcice* or *magnaci* were not really true believers. For a brief review of some of the literaturę on the question of serfdom and antitritinarianism in the Polish-Lithuanian Commonwealth, see: Ryszard Paradowski and Wiera Paradowska. 2023. "The Hermeneutics of the Socinian Atheology of the Polish Brethren. Introduction of a Democratic Political Philosophy." *Hybris* 59(5), pg. 15; Hillar, "Poland's Contribution to the Reformation," pg.460; Peter Brock. 1998. "Slave and Master in the Congregation of God: A Debate Over Serfdom Among Antitrinitarians in the Grand Duchy of Lithuania, 1568." *The Polish Review* 43(1): 79-100; Maria Ferensowicz. 1986. "Knights with wooden swords: the Polish Brethren." (Unpublished master's thesis.) University of Calgary, *passim*; *George* H. Williams. 1976. "Socinianism and Deism: From Eschatologial Elitism to Universal Immortality?" *Historical Reflections / Réflexions Historiques* 2(2), pg. 271; Kazimierz Drzymała. 1963. "Bracia polscy zwani arianami." *Studia Theologica Varsaviensia* 1/2, pg. 257; Stanisław Kot. 1957. *Socinianism in Poland, the social and political ideas of the Polish antitrinitarians.* Earl Morse Wilbur, trans. Starr King Press: Boston; Zbigniew Ogonowski. 1956. "Racjonalizm w polskiej myśli ariańskiej I jego oddziaływanie na Zachodzie." *Odrodzenie i Reformacja w Polsce* 1, pg. 144.

> was promised to them during this time but the exercise of religion was forbidden and they could not hold office. On March 22, 1659, the term was reduced to two years declaring that all the Socinians who did not embrace Roman Catholicism by June 10, 1660, must leave the country under penalty of death. They were not allowed to join any other confession except Roman Catholicism.[956]

The multiphase process of expelling the anti-Trinitarians across multiple *konstytucye* is outlined in Table 4.7 below:

[956] Hillar, Hillar, "Poland's Contribution to the Reformation," pg.458.

Table 4.7 *Konstytucye* Concerning the Sekta Aryańska (1658-1662)

Name of Konstytucya	Outcome
Sekta Aryańska [957]	The Reassumption of Władysław Jagiełło's Laws Against Heresy; Members of the "Arian" Sect are Declared Heretics: They Forbidden to Proselytize and Worship, and They have Three Years to Convert to Sell their Property and End their Business or They will be Exiled
Deklaracya konstytucyi o Aryanach [958]	The Time Period is Decreased from Three Years to Two Years; This Restriction does not Effect those Who Converted to Catholicism
O Aryanach, abo Nowokrzczeńcach [959]	The Call to Properly Execute the Previous *Konstucje* against the Arians
O Aryanach [960]	The Law Against Arians is Extended to Arian Women; The Law is Extended to those who have Arian Wives or Teach the Arian Faith to Children
	The Execution of the Previous *Kosntytucje* against Arians for those who Remain in the Commonwealth
	There is a Financial Punishment for the Arians who Remain within the Commonwealth or Support Arian Ministers

[957] "Sekta Aryańska," Konstytucye Seymu Walnego Ordynaryinego Sześćniedzielnego Warszawskiego, 10 June, 1658, in *Volumina Legum*, Tom IV, pgs. 238-239; in *Volumina Constitutionum*, Tom IV, Vol. I, pgs. 377-378.

[958] "Deklaracya konstytucyi o Aryanach," Konstytucye Seymu Walnego Sześćniedzielnego Extraordynaryiengo, 17 March 1659, in *Volumina Legum*, Tom IV, pg. 272; in *Volumina Constitutionum*, Tom IV, Vol. II., pg. 12.

[959] "O Aryanach, abo Nowokrzczeńcach," Uchwała Seymu Walnego Koronnego, Sześćniedzielnego, 2 May, 1661, in *Volumina Legum*, Tom IV, pg. 323.

[960] "O Aryanach," Konstytucye Seymu Walnego Koronnego Warszawskiego Extraordynaryinego, 20 February, 1662, in *Volumina Legum*, Tom IV, pgs. 389-390; in *Volumina Constitutionum*, Tom IV, Vol. II, pgs. 189-190.

The 1658 expulsion of the Arians from the Commonwealth was a continuation of the ruthless, pragmatic approach began under Władysław IV. Most troubling is the fact that it was argued that the existence of a minor religious sect threatened the stability of the legal order when a universally acknowledged pillar of that order—the principles of toleration outlined in the Konfederacja Warszawska—not only established religious freedom but was subsequently confirmed by the *pacta conventa* of Zygmunt III, Władysław IV, and Jan II Kazimierz. In reality, during the 1658 Seym a *liberum veto* was attempted by an anti-Trinitarian noble, but this was simply ignored,[961] which itself was again an illegal act, the significance of which will be addressed later.

Thus, by all reasonable measures, it has to be objectively admitted that it the 1638 and 1658 expulsions were completely *unconstitutional*, according to the internal standards that the Commonwealth had established for itself. To add insult to injury, with the second *konstytucja* it was further specified that the anti-Trinitarians had to choose between conversion, exile, or death, but the only religion that they were allowed to convert to was the Roman Catholic one.[962] Thus, the Konfederacja Warszawska was violated in that the individual freedom of religion was abrogated.

The sheer utter unconstitutionality of both these series of decisions as well as their overall repercussions is something that is underappreciated in the historical or political literature, and again demonstrates why a constitutional level of analysis differs in perspective. Ogonowski points out that the expulsion of the anti-Trinitarians was not a "political crime" because in fact Jan II Kazimierz created a universal amnesty for all those who had fought against him, Protestant and Catholic alike. Because at that time the anti-Trinitarians were excluded from the legal status as "dissenters" to receive the amnesty they simply had to convert to either Protestant or Catholic under the first act, and under the second act they were only able to convert to Catholicism and they would not be persecuted.

> In addition, all Catholics, as well as Protestants, who had established cooperation with the Swedes, could soon abandon this cooperation without harm to themselves and move to the camp of Jan II Kazimierz Casimir. Such retreat was closed to Arians early on: behold, as early as the end of 1655, Arian plots began in Podgórze (in which the inspiration of the Catholic

[961] Jędruch gives the name of the dissenting deputy as Tobiasz Wiszowaty, though no source is given and the author has not been able to independently verify this name, though the Wiszowaty was a real family of nobles that strongly participated in the anti-Trinitarian moveemnt. See: Jędruch, *Constitutions, Elections and Legislatures of Poland*, pgs 118-119; Hillar does not give a name," "Poland's Contribution to the Reformation," pg. 458.

[962] As Ogonowski notes: "The year 1658 finally put an end to the existence of the Unitarian Church in Poland: On July 20, the Sejm of the Republic passed a resolution declaring that the preaching and adherence to Arian views was prohibited in Poland under penalty of death. Protestants (who had been assured beforehand that the resolution would in no way violate their rights) also voted in favor of the resolution. The resolution was preceded by an earlier resolution, which stated that Arians could not be weighed as dissidents. However, the resolution, with all its harshness (death penalty for professing views!), opened a gateway for those of the Arians who decided to stand by their views: they had the right to remain in the country undisturbed for 3 years. After this time, they were to leave the countries of the Republic unconditionally, under threat of the said penalty. The following year, the Sejm tightened this decision: the time left for Arians to settle property and other matters was shortened by a year (until July 10, 1660), and in addition, those who decided to abandon their religion were forbidden to adopt a religion other than Roman Catholicism (conversion to one of the Protestant denominations was permitted under the previous resolution)," Ogonowski, *Socynianizm*: pgs. 148-149.

> clergy played a huge role); if Arians wanted to preserve their lives and those of their loved ones, there was nothing left for them but to take refuge in the protection of the Swedish army; secondly: on July 27, 1656. near Warsaw, Jan II Kazimierz made a solemn vow (from the instigation of Jesuit Father Cichowski) that after a victorious war he would expel from the country Arians who blaspheme the Virgin Mary by not recognizing the divinity of her Son. Finally, the very course of the 1658 Sejm testifies eloquently that what determined the expulsion of Arians was not an act of political offense. After all, the same Sejm simultaneously passed an amnesty for all former collaborators: both Catholics and Protestants, and within the meaning of this resolution, this amnesty could also be extended to those among Arians who decide to change their profession of faith. It should also be realized that the number of Catholic *szlachta* who went over to the Swedish side in the initial phase of the war was probably much larger than the number of all Arians in general living in the Republic at that time (emphasis added).[963]

Elsewhere, Ogonowski essentially argues that while the *de jure* exile of the anti-Trinitarians was quite severe, the *de facto* situation was not as severe because the laws against the anti-Trinitarians were not always zealously or fully implemented, and that many anti-Trinitarians in fact stayed within Poland-Lithuania and continued their work under the protection of sympathetic or even other tolerant *szlachta*; he also notes that the punishments against the anti-Trinitarians were not as severe as in other places in Europe at the time,[964] that there were the decrees created in parliament with time for the anti-Trinitarians to react, rather than outright attacks or purges, etc. With respect to Ogonowski, this is a completely wrong way to look at the situation. That the anti-Trinitarians were already removed away from legal protected status as either Protestant or Catholic—or, more accurate to say would be that the creation of those two statuses in the first place—was itself a great political and legal injustice and a clear violation of the law. The application of unjust legal categories in a relatively mechanical legalistic process does not detract away from their unjust or illegal character.

Furthermore, Ogonowski's thinking demonstrates the downsides of a contextualist historiosophy in that it may allow for excusing away of certain actions with such modifiers as "not so bad", "could have been worse," "better than", etc. Here we refrain from making any moral judgement about the expulsion of the anti-Trinitarian groups and the problematic ambiguity with regard to the rights of the Orthodox Church, but it is sufficient to say that in times of great uncertainty and war, *nevertheless Poland-Lithuania's political elites failed to uphold their own constitutional values and undermined their own institutions*. Their failures is not meant to be interpreted in a historical or objective sense, but in a constitutional and internal sense, that centuries of constitutional progression, compromise, and struggle by Protestant and moderate Catholic *szlachta* were undermined in the 17th century. There was a complete abrogation of the Konfederacja Warszawska and aspects of the Henrician Articles.[965] Despite all this done in the name of political expediency and convenience, the

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[963] Ogonowski, *Socynianizm*, pgs. 149-150.

[964] *Ibid*, *passim*.

[965] "The fourth phase of the polemic (1632-1658) [against the Arians] was characterized by the gradual finishing off of the opponent. The agony of the 1573 religious confederation was not saved by the tolerant Władysław IV. A major breakthrough took place in 1632, during the interregnum, in the form of reducing the confederation only to Christian denominations, from which, as we know, Catholics and Protestants residing in Sandomierz

gathering of the hardline Catholics and some accommodationist Protestants around the throne was a complete failure. When the dust ultimately settled in the 1660s, Poland-Lithuania had lost about half of Ukraine and Ducal Prussia made a significant step toward its independence. Thus, even if the expulsion of the anti-Trinitarians and the ambiguity of Orthodox rights on 17th century Poland-Lithuanian's constitutional system is understood under utilitarian, "ends-justify-the-means" criteria, it is still a failure.

Wilson recounts how rapidly and remarkably this decline had happened, and why it was so tragic, because, despite what Catholic political theorists or Jan II Kazimierz may have thought, religious pluralism was actually a source of strength for the Republic, rather than a weakness. In fact, even if the king and many powerful royal allies among the *magnaci* and senators were Catholic, so long as the country did not acknowledge a single, state religion at the expense of others, than regional religious diversity and the political autonomy of the szlachta created a system of tolerant equilibrium under the first two Wazas.[966] Thus, the combination of an official policy of religious neutrality and toleration actually complemented political values of republican society as well as the institutions of a fairly decentralized society that retained high levels of individual autonomy. This was at least the case of Greater Poland (Wielkapolska), where Wilson concentrated her studies,[967] though the author sees no compelling reason to suggest that this would not be the case throughout other regions of the Commonwealth, especially given how Ducal Prussia, the Polish Crown, and the Grand Duchy of Lithuania retained cultural, political, and to a very real extent religious autonomy throughout the entire lifespan of the Commonwealth, i.e. that the country was already a decentralized union to begin with, at both the inter as well as intra-regional levels. While this

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excluded the Polish Brethren. The last act of the Warsaw Confederation, formally binding until the end of the Polish-Lithuanian Commonwealth, began during the interregnum of 1648. The more than eighty-year life of the Act of Toleration was definitively cut by the date 1658, when the Seym of the Commonwealth passed a decree to banish the Arians," Korolko, *Klejnot swobodnego sumienie*, pg. 26.

[966] "Toleration would have failed when dissenters were excluded from decision-making' this was not yet the case in Great Poland under Zygmunt and Władysław. Under the father, reconversions to Catholicism did gather pace, affecting representation in the Senate, though this trend was reversed under the son. Yet dissenters had a regional alternative to royal patronage; they found tolerant Catholic sponsors among the highest palatines and general starostas. Dissenters made up a quarter of castellans and remained a consistent one third of envoys in the key palatinates of Poznań and Kalisz, making them a force to be reckoned with in both chambers of the Sejm, on two sides of the triangle of mixed government. Though the crown favoured Catholics at court, this was balanced by a regional szlachta who still knew that liberty of conscience was central to their liberties and that religious peace was needed to preserve political peace; mixed confessions were part of a mixed government. Thus toleration was fostered by the devolved structure of the Commonwealth, sustaining confessional diversity despite a Catholic royal court and more Catholic senators. The success of Zygmunt's Counter Reformation was limited; state confessionalisation was resisted by a tolerant szlachta at the heart of the Polish Kingdom," Wilson, *The Politics of Toleration*, pg. 113.

[967] "The 1632 Confederation was refined to reflect the changes which occurred under Zygmunt III's rule; Socinians were excluded but other churches strengthened by the agreement. It specifically mentioned the Catholic Church, stated the right of the non-Uniate Orthodox and Protestant churches to worship, the right to prosecute clergy for causing confessional conflict, and to condemn unjust Tribunal rulings. The 1648 version was almost identical, indicating that under Władysław, szlachta opinion on toleration had not changed […] The Deluge seems to be the real hiatus; during the Swedish invasion and civil war of the late 1650s, the Socinians were banished by Sejm decree and key supporters of toleration, the Protestant Jan Comenius and Catholic Łukasz Opaliński, began to question whether szlachta liberty really was a sound basis for liberty of conscience," *ibid*., pgs. 81.

was always a constant source of tension, it could theoretically serve to prevent a powerful, absolutist king from rising to power as well as prevent the formation of unity when exposed to a great external threat. It is hindsight bias to say that religious pluralism and toleration was an inherent weakness in the Commonwealth, because this does not naturally or automatically flow from its constitutional principles. Instead of comparing actual historical events with a totally abstract, ideal type or with the events going on in neighboring countries during the same time period, historical events should be compared with their own understanding of ideal types, that is that constitutional principles being put into practice should be evaluated with what the Polish-Lithuanian Commonwealth's polity had themselves understood them to be.

The abrogation of the Konfederacja Warszawska was a failure along three main dimensions. First, it was an outright, illegal and unconstitutional undermining of the constitutional system. Full stop. Secondly, by allowing for constitutional principles to be overridden by practical concerns, it was a fundamental confusion of the political level of institutions vs the constitutional level of institutions. Perhaps, objectively the case could be made that reducing religious pluralism was necessary at a tactical (political) rather than strategic (constitutional) level, given the specific events of the Deluge. But while the battle may have been won—in the historical case the war was won—the war for the spirit, identity, and longtime well-being of the nation was lost—in the historical case the whole 17th century was lost. Finally, and perhaps most devastating of all, the forfeiting of minority groups' constitutional rights undermined both the rule of law as well as undermined faith by minorities in the overall constitutional and political system. That the majority of mainstream Protestant Churches[968] approved the expulsion of a minority group as a political compromise in effect undermined their own position in the long term. It is impossible to say whether the decline in cohesion among Protestant sects facilitated the resurgence of Catholicism or vice versa, but the long-run result was the same: Poland-Lithuania's support for religious minorities, particularly those who were considered to be "too extreme" would continuously decline as the alignment between the Catholic Church, Catholic *magnaci*, and the Crown would continue to grow. The stereotype that Protestants were disproportionately anti-royalist dissenters was ingrained into the subconscious of the Polish-Lithuanian polity.[969]

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[968] It is here important to remind ourselves that this was the position of Protestant Churches as institutions, that is their policy, rather than something necessarily shared by the majority of Protestant practitioners themselves. As we have seen earlier, many Protestant and even Catholic nobles were defenders of the anti-Trinitarians and even sheltered them. Many Protestant and Catholics were sympathetic toward the Eastern Orthodox, and many Easter Orthodox saw themselves as citizens of the nation.

[969] "Thus under the first two Wazas, before and after the rising, dissenters were included in the political system and Catholics challenged royal authority; confession was not the determining factor in opposition to the crown. Rather than the *rokosz* of 1606-1609, the 'Deluge' of 1655-60 was more of a hiatus in Commonwealth relations in church and state. This combination of civil war and invasion split the Commonwealth once more, causing devastating far greater than that of the *rokosz*. The argument that Catholics rebelled for 'political' and Protestants for 'religious' reasons recurs in this conflict. Bohdan Chmielnicki (1595-1657) led the Cossack rising of 1648 which laid the way open for Swedish King Karl Gustav (1622-1660) to invade in 1655-70. Facing a rising tide of szlachta joining forces with the invaders, King Jan Kazimierz Waza (1648-1668), who had left the Jesuit Order to take the throne and fought on the Austrian side in the Thirty Years' War, had no choice but to renew the Habsburg alliance. By the Swedish invasion, the stereotype of anti-royalist dissenters had crystallized; Comenius wrote his *Panegyricus Carolo Gustavo* (1655) in praise of the Swedish king and a response to this argued that the Swedish and their Protestant allies would destroy the Catholic faith in Poland," Wilson, *The Politics of Toleration*, pg. 221.

Once a right that is supposed to be unalienable is proven to be alienable, then the principle of inalienability of rights is undermined as a whole. Confidence in the foundations of the constitutional system is shaken.

Confusing Praxis and Poiesis*: Liberum Veto, Liberum Rumpo*, and Resistance to *Vivente Rege* Election (1639-1695)

Of all the Polish-Lithuanian Commonwealth's institutions, perhaps none has received greater scorn than the *liberum veto*, by which a single member of the Seym could rise up and declare that they disagreed with a certain piece of legislation. Since passing legislation required full consensus—generally interpreted as unanimity, but not always—a *liberum veto* all but doomed the piece of legislation, unless the other members of the Seym could convince the dissenter to withdraw his petition. Due to the predominance of the negative interpretation of the *liberum veto*—much of it more instinctive repeating of orthodox historical view rather than substantive, critical reflection upon the matter—it is necessary to deviate from our approach slightly to conduct a demythologizing of the *liberum veto*—our *aletheia* and *destruction*—so that it may be grasped more clearly on its own ground.

Pessimistic Polish-Lithuanian historiosophy has long interpreted the *liberum veto*—along with the szlachta's self-serving "Sarmatism"—as the entelechy of the "anarchism" that plagued the Commonwealth and led to its untimely demise. However, most critiques of the veto—for example, neither Bobrzyński nor Konopczyński—never ask the two most pertinent questions: "Why did citizens who earned the right to approve all new legislation in 1505 suddenly begin to assert in 1652 that the opposition of a single deputy was sufficient to dissolve the parliament? And why, if everyone recognized the destructive the power of the veto, did it exist for nearly a century and a half?"[970] It would pure presentist bias to merely assume that the Polish-Lithuanian *szlachta* were too incompetent, too self-interested, or simply too idiotic to not recognize the major constitutional problems of their own time and that it is only with the crystal clarity of a more morally advanced, more civilized age that we can go back and "fix" the problem of *liberum veto*, at least theoretically.

A complex historiosophy is not needed to counteract such pessimism, nor is one needed to defend the *veto*, or at least to problematize oversimplistic and ahistoricist critiques of it, rather what is merely needed is a modicum of general respect for the intelligence of other human beings and common sense. It is both patently absurd and woefully hubristic to assume that human beings in the 17th century were incapable of making decisions to defend or reform their own societies, and to imply that had an enlightened, modern person been there then all solutions would have been automatic with problems simply melting away into the ether. Before one can *even consider* such a pessimistic view, we must question *why* no *szlachcic* had thought to simply reform the system or better yet, why did Polish historians *think* that no Polish *szlachcic* had any desire to create reform? Or, was it that such pessimistic Polish-Lithuanian historians and the apologist historians of the powers that eventually conquered the Commonwealth simply either undervalued, misunderstood, or simply did not bother to look very hard at social facts and argumentation that would contradict this closed

[970] McKenna, *The Curious Evolution of the* Liberum Veto, pgs.7-8.

narrative, e.g. proposals for reforms that *were made* or inconsistences of applying the *liberum veto* itself? Rather, what *is* needed is a more nuanced appreciation of the totality of the *liberum veto*, including taking seriously the positive arguments for why it was necessary—even if perhaps a necessary evil at the time—as well as to understand the nuances of how and why said reforms were only partially completed or ultimately failed altogether. Similarly, it must be recognized that there were different logics to justify the *liberum veto* at different times and places.

Attempts at reform we will only briefly mention in this chapter, with a return to a more sophisticated assessment of them in the next chapter, given that the 17th century was the period wherein the *liberum veto* was itself developed, with reform attempts only truly emerging once the full scope of the problem was more clearly understood. As we shall see, this constitutionalist understanding of the *liberum veto* further reinforces and clarifies the qualitative shift taking place within 17th century Polish-Lithuanian constitutionalism away from more ontological and teleological issues—architectonic or substantive dimensions of constitutionalism—toward more praxical and poietic dimensions—procedural dimensions of constitutionalism.

Thus, to understand the *liberum veto* is a highly contextualist proposition, and only after establishing such an understanding do the barest contours of a nuanced, transhistoricist appreciation for its relevance, its "lessons learned" for our own time become possible. For our investigation, this takes an explicitly constitutional dimension, that is the *liberum veto* was a contributor to how 17th century Polish-Lithuanian political and legal ideas, institutions, and practices developed. It is this systematic analysis of the *liberum veto*—even its mere existence, if not its actual exercise—that has been largely historically lacking in the literature on the topic.

As Grześkowiak-Krwawicz succinctly summarizes:

> The liberum veto is among those political institutions of the Commonwealth that aroused the greatest emotions both among contemporaries and researchers. Interestingly, although it has sometimes been the subject of heated apologia, it seems never to have been evaluated unequivocally positively - one could say that although it was considered one of the most important rights of freedom from a certain point in time, it was at the same time the most controversial right. It seems that this subject, although it has already received a lot of attention, has still not received a full analysis and has sometimes been presented too emotionally - the latter is especially true of the most comprehensive work on the subject - the treatise of Wladyslaw Konopczyński. In addition, the effects of this principle in practice were analyzed more often and more extensively than its theoretical underpinnings, and when writing about the latter, more attention was paid to the arguments of the opponents of the veto. Meanwhile, it seems worthwhile to try to analyze precisely the theoretical basis of *ius vetandi* as an important element of Polish thinking about the state and the place in it of the citizen.[971]

Some of the critiques of pessimists such as the Kraków school have been made earlier throughout our investigation, but they will bear some repeating in greater detail. However, it is both easiest and most logically straightforward to first make a brief summary and critique

[971] Anna Grześkowiak-Krwawicz. 2004. "Veto—Wolność—Władza w Polskiej Myśli Politycznej Wieku XVIII." *Kwartalnik Historyczny* 3, pg. 141.

of how the *liberum veto* has been used in a broad, poorly defined, symbolic sense—that is, to begin with the low-hanging fruit, so to speak—before moving on to more detailed, substantive or theoretical critiques. A brief summary of some of the more standard, generally negative interpretations of the *liberum veto* within a wide variety of literature is given below:

> The weakness of the League of Nations is that the vote of the Council must be unanimous, but this weakness is without remedy, because the members of the Council are sovereign States which will never consent to abdicate their sovereignty for the rule of any majority. Like the Polish Diet in the days of its Kings, when each member could by exercising the "liberum veto" prevent any action, this rule ties the hands of the League of Nations.[972]

> The anarchical principle of the liberum veto, which ruined Poland, has made its home in Hungary, where it seems destined to produce its logical consequences.[973]

> Finding a satisfactory voting formula for an international organization of "sovereign" states, such as the Security Council of the United Nations, is a different task from establishing rules of voting for a national legislative body. In an international body both the character of the work to be done
> and the composition of the body are governing factors. If the body has to make decisions involving the use of force, full respect for sovereignty by requiring unanimity permits the exercise of a liberum veto that blocks action. Simple rules of "democratic" usage by which the members are assumed to be equal in strength, though in fact they are not, cannot be applied, for this might pit weak numerical majorities against preponderantly powerful minorities.[974]

> Many Europeans are worried that Brussels is too strong, but the other extreme of the old Polish parliament will not work either.[975]

> Why, during the succeeding centuries, did it become the sort of egg state that could so easily be fractured and destroyed by neighboring grenade states? Among the many complexities of Polish life and history, we cannot single out any simple explanation, but one item that would attract the attention of a comparativist was the ability of the country's powerful gentry to enforce the liberum veto , an equalitarian rule of unanimity which gave every member of parliament, the Sejm , a veto over its decisions. The power of the Sejm had become equal to that of the king by the early 16th century and, later in that century, the hereditary monarchy became a republic with essentially weak elected kings. Eventually, a dissident member's dissent could even compel the assembly to dissolve itself. This rule, which initially empowered the gentry in its opposition to an increasingly moribund regime, led eventually to many abuses, including even the ability of foreign embassies to provoke dissolutions of the Sejm by bribing members. Americans familiar with Senate filibusters that enable a handful of recalcitrants to block even the most important presidential initiatives will understand the potential for regime-destruction of the *liberum veto.*[976]

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[972] James W. Gerard. 1926. "League Hampered by Balance of Power Policy." *Current History (1916-1940)* 24(2), pg.168.
[973] Géza Jeszenszky. 1975. "Hungary and The Times during the political crisis of 1904-1906." *Acta Historica Academiae Scientarium Hungaricae* 21(3/4), pg. 388.
[974] Dwight E. Lee. 1947. "The Genesis of the Veto." *International Organization* 1(1), pg. 33.
[975] Walter Laqueur. 2011. "Night Thoughts on Europe." *The National Interest* 116, pg.31.
[976] Fred W. Riggs. 1994. "Thoughts about Neoidealism vs Realism: Reflections on Charles Kegley's ISA Presidential Address, March 25, 1993." *International Studies Notes* 19(1), pg.2.

The liberum veto allowed any delegate to the Sejm who believed that a proposal was detrimental to the interests that he represented to cease debate on an issue indefinitely and force the assembly to temporarily disband. The practice was frequently used to stop the progress of political reform and to help perpetuate a government that was prone to factionalism and corruption.[977]

The crowning ornament of Sarmatian liberty was the liberum veto, a legal device that allowed a single deputy to veto a decision of the entire Sejm. Conceived as a way of protecting minorities from tyranny of the majority, it became a tool of selfish interests and a means for foreign powers to influence the legislative process. It was meant to safeguard the principle of equal participation of all representatives of the Polish–Lithuanian Commonwealth, but instead contributed to its demise. The idea behind the liberum veto was that the laws that were passed should satisfy everyone; in this way, minority resentment would be avoided. One seventeenth-century political writer argued in favour of liberum veto for still another reason: it allowed a few wise persons in the Sejm to annul the dictatorship of a reckless majority […] Halfway through the Sarmatian period, the political abuses of liberum veto and of other gentry privileges increased, while statesmanship and readiness to compromise declined. Liberum veto allowed a single voice of dissent to derail important bills, such as those that raised taxes. It thus became a perfect tool for neighbouring countries bent on increasing their influence in Poland to break up Sejms by bribing deputies.[978]

The Polish-Lithuanian Democracy of Nobles, based on an elective monarchy and governed by a common parliament, stood in stark contrast to other European countries, most of which were absolute monarchies in the seventeenth century. Particularism eventually trumped patriotism (loyalty to the dynasty) when the Polish deputies began to abuse the unique *liberum* veto, which guaranteed every nobleman the right to oppose a decision made by the majority in the Parliament. The decline of the democratic principles of this "golden freedom" and growing anarchy did not occur without the intervention of foreign forces interested in weakening the Polish kingdom. In 1795, the Polish-Lithuanian Commonwealth was partitioned among Austria, Prussia, and Russia and ceased to exist as an independent state.[979]

The *szlachta* democracy in the First Republic was not, however, an effective form of government, already from the mid-19th century it was the *szlachta* that began to be blamed for the partitions, pointing to anarchy, impotence in decision-making, bribery, *liberum veto*. According to this opinion, instead of defending the Republic, the *szlachta* baffled it at the sejmiki. This is how the democracy of the First Republic was portrayed by historians from the Kraków school. Therefore, one can risk saying that the first experience of Poles with democracy was a negative one, and that is why they approached democratic mechanisms with reserve, seeing them as an area of idle dispute, inaction and anarchy.[980]

We see no prospect at present of the lapse of society into the *Kleinstaaterei* of the old German Empire, or into a state where all public questions will have to be decided by Polish parliaments with the liberum veto in full operation.[981]

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[977] Phillip Papas. 2014. *Renegade Revolutionary: The Life of General Charles Lee*. New York University Press, pg. 70.
[978] Ewa Thompson. 2018. "Sarmatism, or the Secrets of Polish Essentialism." In: Tamara Trojanowska, Joanna Niżyńska, Przemysław Czapliński, and Agnieszka Polakowska, eds. *Being Poland: A New History of Polish Literature and Culture since 1918*. University of Toronto Press: Toronto, pg.7.
[979] Svetlana Vassileva-Karagyozova. 2015. *Coming of Age under Martial Law: The Initiation Novels of Poland's Last Communist Generation*. University of Rochester Press: Boydell and Brewer, pg. 132.
[980] Tomasz Jakubec. 2009. "Dlaczego Polacy nie lubią sporu w polityce?: o romantycznej genezie pewnej postawy wobec współczesnego zycia politycznego w Polsce." *Politeja* 11, pgs. 442-443.
[981] Herbert L. Osgood. 1889. "Scientific Anarchism." *Political Science Quarterly* 4(1), pg. 36.

> Enfin, la loi, en établissant le principe de l'unanimité, impossible à observer en pratique, poussait aux abus, ce qui se passa réellement : La Diète fut postérieurement mystifiée par le droit de veto appelé liberum veto qui aboutissait à anéantir ses travaux. [982]

> These two words [*liberum veto*] with an un-Polish sound have played a great role in our history. For three hundred years they have swept through its pages like the flesh of a serpent that tied up and choked off everything that was good, and which ultimately doomed us to a fate similar to that which that biblical serpent did to our first parents and all mankind [clarification added].[983]

> Beginning in 1652, the Sejm became notoriously paralyzed by obstruction due to he liberum veto principle, which effectively introduced the requirement for unanimity in voting and so gave a single deputy the right to protest all decisions of the given session. In total, seventy-three sessions of the Sejm were nullified this way in the seventeenth and eighteenth centuries, radically limiting the parliament's capacity to introduce new taxation and legislation and reducing it to an arena resembling nothing but a political salon.[984]

> [T]he liberum veto was used repeatedly in the common seim after 1652, and was mostly voiced by the envoys of the grand duchy and of the Russian provinces. Maybe the liberum veto meant an indirect protest against the union and the predominance of the Poles. The separatistic tendencies in the provinces of Lithuania and the different laws could hardly have had a direct influence upon the union, because diversity in laws and in political status was characteristic of medieval states. There was a *sui generis* unity in diversity."[985]

> [T]he acme of exaggerated individualism was reached in Poland with the famous Liberum Veto, through which, as practiced from 1652 on, a single member of the Diet, by the simple formula, *Nie pozwalam* ("I will not permit"), could not only thwart the proposal to which he objected, but also dissolve the Diet at once and nullify all the decisions previously made by the assembly.[986]

> [T]he Poles, as soon as the Jagiello line died out, began unwittingly to plot their own ruin by insisting in their parliament on the principle of the unanimous vote for all measures (*liberum veto*), so that a single member might veto a bill, or even demand an immediate adjournment, which the rest of the Diet was powerless to prevent.[987]

> European history has seen two types of union. The Polish- Lithuanian Commonwealth and the Holy Roman Empire of the German Nation were weak polities, partly because they were paralysed by internal divisions, and partly because of constant interference by outside powers. In Poland, neighbouring Russia, Austria and Prussia steadily undermined the sovereignty of the state, and within the Polish parliament the liberum veto or a single vote could block decisions and render the state helpless in the face of internal factions and external predators.

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[982] Tadeusz Wyrwa. 1977. "Monarchie élective et démocratie nobiliaire en Pologne au XVI e siècle." *Revue historique de droit français et étranger* 55(4), pg. 605.
[983] Stanisław Osada. 1900. *Liberum veto. jako nasza wada narodowa*. Nakładem Wydziału Oświaty Związku Nar. Pol.: Chicago, pg. 3.
[984] Adam Kożuchowski. 2019. *Unintended Affinities: Nineteenth-Century German and Polish Historians on the Holy Roman Empire and the Polish-Lithuanian Commonwealth*. University of Pittsburg Press: Pittsburgh, pg. 105.
[985] Joseph Jakstas. 1963. "How Firm was the Polish-Lithuanian Federation?" *Slavic Review* 22(3): 442-449.
[986] Robert Howard Lord. 1930. "The Parliaments of the Middle Ages and the Early Modern Period." *The Catholic Historical Review* 16(2), pgs. 137-138.
[987] J. Dyneley Prince. 1920. "Slav and Celt*." Proceedings of the American Philosophical Society* 59(3), pg. 187.

> *Both polities were preoccupied with precedence, legality and procedure to the point of paralysis.*[988]

> With the recognition of unanimity in the form of the *liberum veto*, deliberative democracy was severely undermined; a deputy using this measure would leave the session, making it impossible to persuade him to change his mind, or, basing his protest on a charge of violating the law, would refuse to engage in discussion or would not accept the reasonable arguments of the other participants in the debate. It was then that a more restrictive approach to parliamentary procedure, and in particular to the deadlines applicable to it, began to be adopted: each one took on the character of a time limit; the previous practice of derogating from the applicable procedure by a one-time resolution of the chamber was abandoned (emphasis added).[989]

To summarize, the *liberum veto* became synonymous with anarchism, so much so that by the 19th century its use had gone well beyond its original meaning within the history of the Polish-Lithuanian Commonwealth, that it was obstructionist and opposed to all progress or reform, that it weakened the state and facilitated internal divisions, and that it enabled the worse tendencies of the *szlachta*. It has been explicitly compared to universal problems of whether or not to adopt majoritarian or unanimous voting thresholds, such as during the formation of the League of Nations, the United Nations, and the European Union. It also has been compared to filibuster rules within American parliamentary practice. While these demand deeper theoretical reflection and consideration in their own right, they are beyond the scope of the task for us now.

Of the miscellaneous anecdotes given above, the last two entries, though negative, inform us how the *liberum veto* had shifted the constitutionalist debate to procedural issues. Or perhaps it would be better to say that it was the very nature of the *liberum veto* as a poetical instrument combined with its strength as an institution that helped precipitate such a shift. As we have lightly touched upon earlier and shall return to later, *liberum veto* was indeed a facilitator of this qualitative constitutionalist shift, though the political context of the time was also a significant pressure, both within and without the Commonwealth. On the other hand, not all assessments were explicitly negative. A brief sample of such neutral to positive-leaning evaluations is presented below:

> Requiring a more than majority vote gives a veto power to a minority, but the higher the threshold, the greater the discrimination against the majority. In the extreme case of the old Polish Sejm, the principle of liberum veto allowed one member to determine the outcome by voting against the wishes of every other member of the Assembly.[990]

> Political and social institutions, again, are impregnated by an ideal of life. Any political institution, as indeed any office organization, depends for its success on tacit understandings as to how it is to be worked […] Equally an ill-conceived institution will work well enough if people wish to make it work. The liberum veto of the Polish Diet, which is the stock

[988] Brendan Simms. 2012. "Towards a mighty union: how to create a democratic European superpower." *International Affairs (Royal Institute of International Affairs 1944-)* 88(1), pg. 50.
[989] Izabela Lewandowska-Malec. 2012. "Demokracja deliberacyjna w 'Rzeczypospolitej Obojga Narodów." *Z Dziejów Prawa* 5, pg. 85.
[990] Richard Rose. 1976. "On the Priorities of Citizenship in the Deep South and Northern Ireland." *The Journal of Politics* 38(2), pg. 254.

> example of a wayward constitutional arrangement, *would have had no bad consequences if it had been tacitly understood that the right of veto was to be exercised with the greatest restraint* (emphasis added).[991]

> Although unanimity is much more generally insisted upon in the Council than in the Assembly, the probability that the liberum veto will be exercised by a small state has been greatly reduced since 1926.[992]

> Gurowski saw the liberum veto as "an expression of Slavonic spirit striving for political equality".[993]

> Even the so-called liberum veto has to be understood in its uses and not in its abuses. It was a symbol of equality of rights among the different strata of the nobility.[994]

> [I]t would be an unjust oversimplification to conclude that the veto's supporters saw no resulting dangers. Probably no law has evoked such mixed feelings, and not only among its critics, but also among its most ardent defenders. Even the most ardent apologists of the *ius vetandi* generally realized that reality deviated from the ideal vision they presented. The same people who wanted to "defend it to our throats" as the foundation of liberties were at the same time concerned that by breaking up the Sejm, the Commonwealth's "freedom" and its most virtuous rights [would not] be lost. *Recognizing it not only as the "foundation" but as the quintessence of freedom*, they also pointed out that it is, or at least can be, a threat to that freedom (emphasis added).[995]

The neutral to positive evaluations of the *liberum veto* have understood it as purely a parliamentary mechanism that has the potential to be abused, but that it is not *malum in se*. The more appreciative evaluations of it consider that the *liberum veto* was the bulwark—the lynchpin—of the *szlachta*'s freedom within the Polish-Lithuanian system, or at least that it should be considered that the *szlachta* considered it to be so themselves. Whether one agrees with this understanding of the role that the *liberum veto* played or not, it is important to consider the role that it played, constitutionally speaking, something that has been neglected because the majority of the literature on the *veto* was written by critics of it.

Grześkowiak-Krwawicz succinctly draws attention to this very problem that we are attempting to solve:

> Trying to analyze what the *liberum veto* was, especially for its supporters, is not easy. It can be said that it had more apologists than ideologues - it was much more often warned that a violation of this law would mean the collapse of freedom than subjected to deeper analysis. The broader statements about the veto tended to come from under the pen of its critics, or at least from people who were somewhat more skeptical of it [...] It can be assumed that most defenders of the free "I-don't-allow" didn't see the need to explain more broadly the foundation on which it was based, as a matter of course for readers. They were generally limited to elevating its merits as a protection and basis for freedom and warnings of the

[991] A Mac. Armstrong. 1956. "The Fulness of the Time." *The Philosophical Quarterly* 6(24), pg. 219.
[992] Cromwell A. Riches. 1934. "The League of Nations and the Promotion of World Peace." *The Annals of the American Academy of Political and Social Science* 175, pg. 130.
[993] Andrzej Walicki. 1979. "Adam Gurowski: Polish Nationalism, Russian Panslavism and American Manifest Destiny." *The Russian Review* 38(1), pg. 18.
[994] Daniel-Louis Seiler. 1993. "Inter-Ethnic Relations in East Central Europe: The Quest for a Pattern of Accomodation." *Communist and Post-Communist Studies* 26(4), pg. 362.
[995] Grześkowiak-Krwawicz, "Veto—Wolność—Władza," pg. 150.

> dangers that could arise from its violation. At the same time, both were done with great zeal. It was not only the pupil, but the "soul", and "fortress" of freedom, the "most delicate part of the body" of the political Republic" the most precious jewel of our nation.[996]

Summarizing the deconstruction of the *liberum veto*'s mythology, we can now outline a few hypotheses with which to ground a deeper investigation into it. The first is that its first usage in 1652 was a seminal event that changed the destiny of the Commonwealth by setting the groundwork for breaking apart future Seymy. Concordant with this is the second hypothesis that it introduced a unanimity principle into Polish-Lithuanian political discourse, or which elevated a preexisting principle to prominence. A third hypothesis is that the *liberum veto* was a relatively coherent institution, such that it was possible for future generations to speak of *the liberum veto*, rather than *a liberum veto* being one institution in a class of ideas, institutions, or practices that enveloped voting rights and parliamentary procedure.[997] We shall now put these hypotheses to the test against the known historical record and the secondary literary analysis of it to explore the topic more deeply.

The first hypothesis may be rejected quite simply. Before the first evocation of the *liberum veto* in 1652 by Władysław Siciński, the Seym had in fact broken apart multiple times due to internal disagreement among the *szlachta*. The 1573 election parliament saw a deep split in the Polish-Lithuanian polity over the choice of Henri, with threats of breaking up the Seym.[998] Davies notes how the 1580 Seym broke up due to a disagreement over tax policy.[999] Even Konopczyński acknowledges that the 1582 and 1585 Seymy broke up.[1000] During the forty-five year reign of Zygmunt III Waza (1587-1632), Seymy were broken up without successfully passing legislation several times. During the 16-year reign of Władysław IV (1632-1648) three Seyjmy failed to pass any legislation at all. During the twenty-year reign of Jan II Kazimierz (1648-1668) the Seymy broke up seven times.[1001]

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[996] Grześkowiak-Krwawicz, "Veto—Wolność—Władza", pg. 142.

[997] This is precisely the view of Konopczyński, which unfortunately still casts a long shadow over *liberum veto* historiosophy: "Until recently, it was believed that the first accident of "I do not allow free" took place in 1652 in the person of Siciński. Indeed, this institution took shape and took control of minds not earlier than in the middle of the 17th century. Before that, one MP could not break the Seym. But even before that, we did not recognize majority rule. In the West, during the early modern era, majority rule was making progress everywhere; before that there was a time when it was not recognized. In the beginning, therefore, there was no majority rule anywhere; over time, it found its way around the world, but not in Poland, where the right of an individual to break up a session was born. Well, whoever does not consider the history of Poland as the essence of everything, and the history of Europe as an exception and an anomaly, must agree that the history of the development of the principle of majority is of fundamental general importance, while Poland is the exception," Konopczyński, *Liberum Veto*, pgs. 6-7.

[998] "Enfin, la loi, en établissant le principe de l'unanimité, impossible à observer en pratique, poussait aux abus, ce qui se passa réellement : La Diète fut postérieurement mystifiée par le droit de veto appelé liberum veto qui aboutissait à anéantir ses travaux. Quant à l'élection du roi effectuée ultérieurement dans des conditions contraires à celles prévues par la loi de 1573, elle était déjà entachée du fait que les voix minoritaires étaient étouffées, dans le tumulte, par ceux qui, venus à la Diète d'élection encouragés par les magnats, criaient le plus fort, à quoi s'ajoutait souvent la rupture d'unité de l'électorat, divisé en deux parties dont chacune avait son candidat," Wyrwa, "Monarchie élective, " pg. 605

[999] Davies, *God's Playground*, pg. 264.

[1000] Konopczyński, *Liberum Veto*, pgs. 248, 320-329.

[1001] *Ibid* ; Izabela Lewandowska-Malec. 2009. "Sejmy rozerwane i zerwane w XVII stuleciu." *Studia z Dziejów Państwa i Prawa* 1, pgs. 126-127.

While Konopczyński would likely agree with much of this evaluation, in his view there are qualitative differences between these earlier types of "breaking up" the Seym than one accomplished by the *liberum veto*, though he is not always clear as to how they should be differentiated.[1002]

The second hypothesis can likewise be tested relatively easily. As we have already explored, the Polish-Lithuanian Commonwealth had a sophisticated political theory and constitutional identity strongly influenced by classical republican thought, tempered by the experiences of the Commonwealth as a crossroads between Eastern and Central Europe, as well as Catholicism, Eastern Orthodox, and Protestantism. One of the major contributions of the long 16th century was to clarify the principle of *Nihil Novi* (nothing new without us) away from a passive consent of the *szlachta* deferential to a king to a strong and active *szlachta* that participated as co-rulers through local Seymiki as well as in the Seymy and later the Trybunał. Szlachta political traditions of formal egality before the law—including religious toleration and separation between the Crown from the Church—had essentially won the battle for the soul of the Commonwealth against the absolutist flirtations of the Jagiellonians, the reactionary supporters of the Counter Reformation, and the more hierarchical political culture of the Lithuanians.

These political trends naturally converged into a model of governance by consensus, if not by full unanimity, that likely emerged during the time of Zygmunt I Stary. However, during the time of Zygmunt I and Zygmunt II August it was recognized that unanimity had to be somehow limited or used sparingly,[1003] though it was only under the reign of Zygmunt III that it began to be seriously experimented with by the *szlachta* and it was this atmosphere that partially contributed to the Rokosz Zebrzydowskiego.[1004] Thus, there is an argument to be made that while unanimity was the legal *practice* under the last two Jagiellonian kings it only became a legal *principle* sometime in the second half of the 16th century.[1005] In a great surprise to absolutely no one, Bobrzyński argued that the 1589 adoption of the unanimity principle naturally proved to be a "death sentence for any deeper reform".[1006] Taking Bobrzyński at his word, we could honestly say that the maturation of the unanimity principle was essentially not so significant within Polish-Lithuanian constitutional history, given that

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[1002] Konopczyński, *Liberum Veto*, pg. 248.

[1003] Dankowski, *Liberum Veto*, pg. 73; Marek Borucki. 1972. *Seymy i seymiki szlacheckie*. Książka i Wiedza: Warszawa, pgs. 268-269.

[1004] Dankowski, *ibid*., pgs. 77-78.

[1005] Kutrzeba, "Parliamentary Procedure in Poland", pgs. 47-48.

[1006] "The final adoption of the principle of unanimity in 1589 was a death sentence for any, any deeper reform whether in the field of law, the judiciary, the treasury, the army, the administration. Any such better conceived reform, by its very nature, had to infringe on someone's interests, provoke someone's resistance, and this resistance to the principle of unanimity no one could break. At the end of the sixteenth century the whole legislation, which had once been our rightful pride, finally collapsed. Although the number of parliamentary *konstytucje* is increasing, these are loose provisions, dictated by the need of the moment, shallow in content, increasingly convoluted and incomprehensible by their casual stylization. Although Polish law in the second half of the 16th century entered a new track of development, benefited more and more from the awakened science of Roman law, assimilated its principles, for which the excellent work of Przyłuski gave a great initiative, became the subject of scientific research and work, but all these efforts in the absence of a properly functioning legislative authority did not bear the expected fruit. Unanimity thwarted any change for the better," Bobrzyński, *Dzieje Polski w zarysie*, pgs. 175-176.

every constitutional achievement not named absolutism led to the death of the Commonwealth. Davies gives a thorough evaluation of the unanimity principle, but the short version of it is that unanimity was the basis for the entire political system. This was for practical as well as for theoretical reasons, in that a law that was not unanimous would not be respected by all and that the *szlachta*—who themselves participated on the courts to review the conduct of the king as well as other *szlachta*—had to have complete consensus on the law in order for the judicial system to function properly. It also served an ideological purpose of uniting the state together. Davies argues that the principle of unanimity did not purely emerge in isolation, but rather together with the concept of *konfederacja*. In fact, they were both from the same root, even if they emerged in different historical periods.[1007]

It is worth examining this claim in greater detail. The *konfederacja* was a mechanism whereby the *szlachta* could supersede traditional constitutional, legal, or parliamentary pathways in order to achieve the good of the nation, such as in the election of a new king, in times of war, or when the king was unable to act himself. Essentially, it naturally derives from the conceptualization that the *szlachta* were the Republic as a composite of citizens endeavoring for the common good, rather than the Republic as a set of permanent state institutions. In this sense, both the szlachta taking direct control of the political institutions themselves in the absence of a king as in a *konfederacja* or the szlachta themselves adopting a unanimity principle via the *liberum veto* are both compatible with the principles of egality before the law and the classical republican understanding of citizenship.

Dankowski challenges the traditional narrative by asserting that unanimity existed over half a century *before* the *liberum veto* was first exercised:

[1007] "The Sejm, the dietines, and the Royal elections were all governed by the principle of unanimity. It seems incredible to the modern observer that such an ideal should have been taken seriously. But it was, and it formed the basis of all their proceedings. No proposal could become law, and no decision was binding, unless it received the full assent of all those persons who were competent to consider it. A single voice of dissent was equivalent to total rejection. Majority voting was consciously rejected. There was to be unanimity or nothing; there was to be no middle ground between a state of perfect harmony, and total chaos. Three lines of reasoning can be discerned. One argument, in a state where the executive arm depended on the voluntary support of all its citizens, was purely practical. Laws and decisions which were passed in the face of opposition could not have been properly enforced. The second was based on the consideration that the prospect of chaos might concentrate men's minds on harmony. The third derived from the somewhat naive belief that institutions which are less than perfect are not worth keeping anyhow. In the hurly-burly of the dietines and the Royal elections, the principle of unanimity could not be applied with finesse. But in the Sejm it was the subject of serious debate, and applied with meticulous insistence. It was responsible for two constitutional practices, the Confederation and the *Liberum Veto,* which made the Republic famous throughout Europe […] The *Liberum Veto* came into flower rather later than the Confederations, though it too was grown from very ancient roots. It was a device whereby any single member could halt the proceedings of the Sejm by the simple expression of dissent. Such was the strength of feeling about the need for unanimity, that it was considered quite improper to continue when a single voice was raised with the words *Veto* (I deny), or *Nie pozwalam* (I do not allow it). Usually, of course, an interruption of this sort produced nothing more than a temporary delay […] At this point, the Marshal would call a break in the debate, and inquire more closely as to what the objections were. If a simple misunderstanding was involved, or a call for clarification, the debate would resume quite quickly. If something more serious had arisen, the break might last for several hours or even days, with the Marshal working hard in the corridors to repair the conflict. If the objection occurred during the Second Phase of Sejm, when constitutions were being passed, the particular bill at issue would be dropped, notwithstanding a majority vote in its favour. After several such difficulties in the early decades of the Republic, including one in 1580 which blocked all taxation for that year, the matter did not really come to a head till the Sejm of 1652," Davies, *God's Playground*, pgs. 259, 264.

> Of course, it was not the case that the *liberum veto* was born in the mind of Wladyslaw Sicinski in 1652 and did not have the rationale contained in earlier parliamentary actions over the centuries. Suffice it to say that already during the papal legate's visit to Zamość in 1596, an Italian noted that "in this Kingdom it comes with difficulty to treat about public business, because the number of votaries is considerable, and enough of one giving the opposite, and for the whole business to collapse, when everyone can grant use of the Trybunał's legal prerogative." Thus, already more than half a century before Sicinski's stunt, an impartial foreigner can see indications of a drive directly to sanction the dangerous and, in effect, state-destructive tendency to break off parliamentary sessions on the basis of the inverted principle of unanimity.[1008]

In fact, eight out of nine Seymy between 1548-1562 failed to produce any legislation at all[1009]—the very eve of the executionist movement's major parliamentary successes! As such, dissolution of the Seym was not particularly new at all.[1010]

While Konopczyński's analysis of the *liberum veto* itself might be flawed in many ways, one of his most successful contributions discusses how unanimity was often a fiction to demonstrate that there was indeed consensus among the *szlachta* pursuing the common good. Some of the concrete methods to create such a fiction would be that the deputies would only present a legal act to which they had already agreed in advance,[1011] or that they would create a document and then give it to the senators, who would then reach unanimity before giving it to the king.[1012] Both of these were not unanimity in the true sense of the term, but rather manipulations of parliamentary process. Otherwise, it was possible that if enough *szlachta* simply wanted to ignore a protestor, then the Seym would simply move on as if they never existed.[1013] This meant that, practically speaking, multiple *konstytucje* were passed even in the presence of opposition.[1014] In fact, the kings and senators who supported a stronger, more centralized government were some of the harshest critics of unanimity simply

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[1008] Dankowski, *Liberum veto*, pg. 72.

[1009] Wrede, *Sejm i dawna Rzeczpospolita*, pg. 67.

[1010] Wenceslas J. Wagner. 1985. "Some Comments on Old 'Privileges' and the 'Liberum Veto'." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pgs. 59-60.

[1011] "Thus, each deputy was allowed to protest, was allowed to have a dissenting opinion, but until a full, if only apparent, agreement of all was reached, the matter did not go beyond the Izba Poselska, and since the *szlachta* was aware of its leadership role in the state, therefore it often went to conciliation for the good of the Republic. In order to streamline the work of the Sejm and avoid the nullification of parliamentary resolutions by the discontent of one or a few deputies, while at the same time preserving the apparent principles of unanimity, the Chamber of Deputies often presented the Senate with draft constitutions supposedly adopted by all deputies, with the provision that each of them would have the right to protest the resolutions adopted after the end of the Sejm," Wagner, "Some Comments on Old 'Privileges' and the 'Liberum Veto'", pg. 74.

[1012] *Ibid*., pg. 75.

[1013] Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pgs. 200-201.

[1014] "The principle of unanimity has been in force since the beginning of the general Sejm. However, during the last Jagiellons and the first elected kings, when the nobility was not so demoralized and indifferent to the matters of the future of the Homeland, no attention was paid to the individual protests of the deputies, which, by the way, were timid and did not find fertile ground. Practically then, the majority was decisive," Borucki, *Seymy i seymiki szlacheckie*, pg. 238; See also: Władysław Czapliński. 1985. "The Principle of Unanimity in the Polish Parliament." In: Władysław Czapliński, ed. 1985. The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies. Ossolineum: Wrocław, pgs. 115-116.

because the king had much greater capacity to influence and manipulate the votes of individual deputies under a majoritarian system.[1015]

The final hypothesis—as to the coherency of *liberum veto* itself both within parliamentary practice as well as within constitutional theory—is more difficult to answer than the previous two, mostly because it is dependent on what one considers to be the *liberum* veto, i.e., whether one defines the breakup of the Seym in a broad or narrow sense. To unravel this mystery, it is necessary to examine the "original" *liberum veto* by Władysław Siciński in 1652, as well as the social and political climate occurring at the time. Jan II Kazimierz was not particularly well-beloved of the *szlachta* and certainly less well-liked than his brother had been, and clearly saw the Seym as an instrument to manipulate in order to enact his own will.[1016]

There is in fact some debate as to whether the first *liberum veto* was in 1639 or 1652, though the majority of historians now consider 1652 to be the first "true" *liberum veto*.[1017] Both Seymy broke up without reaching a decision, and at both the king was trying to pressure the *szlachta* to pay higher taxes to finance the army. At both parliaments, the *szlachta* presented a long list of complaints, with both Władysław IV and Jan II Kazimierz refusing to make compromises. There had been attempts to extend both Seymy in order to pass some solution to the problem. Both had a lone member of the Seym stand up to protest the extension of the Seym. It is important to recall that, per the Henrician Articles, the duration of the *Seym* was to only last six weeks, with the possibility to either call for special sessions or to extend the Seym but only if the *szlachta* agreed. As such, there was nothing outright illegal nor necessarily against the spirit of the fellowship amongst the *szlachta* if one of them rejected an extension of the Seym, as it was well within their constitutional prerogative. In fact, fights about whether to prolong the Seym or not had caused the Seym to break up before.[1018]

The crucial difference, however, was the manner in which the decision to not extend the Seym occurred. In 1639 it was quite clear that there was an impasse and when it was suggested to not extend the Seym, the other members readily agreed. The delegate who also raised the objection, Jerzy Lubomirski, was following the *instrukcje* of his local seymik. The Seym had already been extended for one day.[1019] Siciński's objection was against an *additional* extension of the Seym. However, when Siciński raised his objection, it was not readily agreed upon by the other *szlachcice* and then he essentially left the Seym and did not return to discuss the matter the following day. At first there were attempts to ignore the protest, but other deputies came forward to protest in solidarity.[1020]

[1015] Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pg. 40.
[1016] Stefania Ochmann. 1985. "Plans for Parliamentary Reform in the Commonwealth in the Middle of the 17th Century." In: Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pgs. 167-168.
[1017] Dankowski, *Liberum veto*, pgs. 81-82.
[1018] Kutrzeba, "Parliamentary Procedure in Poland", pgs. 32-33.
[1019] Dankowski, *Liberum veto*, pgs. 99-101.
[1020] McKenna, *The Curious Evolution of the* Liberum Veto, pgs. 55-56.

There is another critically important distinction between the 1639 and the 1652 cases, in that 1652 was already a period of deep constitutional and political crisis for the Commonwealth. The war against the Cossack uprising was already into its fourth year. At the end of 1651 Vice-Chancellor of the Crown Hieronymus Radziejowski entered into a serious feud with Jan II Kazimierz. Jan II Kazimierz manipulated the court and interfered in its proceeding to strip Radziejowski of his title in 1652, which outraged the *szlachta* and only gave more fuel to the opposition.[1021] In 1664, the king would also strip Jerzy Lubomirski—who himself was a highly popular *magnat* and statesman and who is often claimed to be responsible for the breakup of the 1639 Seym—of his offices of Crown Marszałek and Hetman.

The two cases are actually quite close, procedurally speaking, but in terms of context and the intentions of Lubomirski and Siciński they were vastly different from each other. Whilst Lubomirski was merely voicing a popular opinion during a period when the *szlachta* was in disagreement with the king's policies, Siciński was acting during a time of constitutional and political uncertainty and instability. Whilst Lubomirski's was in line with his seymik, Siciński's veto appears to have been done solely on his own behalf. This appears to be against the spirit of the Commonwealth. It was also rumored that he was perhaps an agent of or had otherwise been bribed by an enemy of the king—most likely a Radziwiłł.[1022] However, Dankowski makes a strong case that there was probably no connection between Radziwiłł and Siciński, though there was widespread belief in a conspiracy, particularly fomented by political opponents of the Radziwiłł family.[1023]

Despite the clear differentiations in method and the clear personal interest of Siciński in making his *veto*, in terms of parliamentary substance the 1639 and 1652 Seymy were almost exactly the same, with both of them doomed to fizzling out without any significant compromise or any legislation.[1024] It should also be stressed that at first the Marszałek of the Seym, a young Andrzej Maksymilian Fredro, attempted to ignore the *liberum veto* as well as make every effort to track down Siciński within Warszawa in order to try to convince him to stay and continue the deliberations.[1025] Ultimately, when the king threatened to close the

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[1021] McKenna, *The Curious Evolution of the* Liberum Veto, pgs. 84-87.

[1022] Stone, *The Polish-Lithuanian State*, pg. 183.

[1023] Dankowski, *ibid.*, pg. 109; For an example of how Władysław Siciński was supposedly a "tool" of Radziejowski, see: Borucki, *Seymy i seymiki szlacheckie*, pg. 241.

[1024] Jerzy Lukowski. 2012. "'Machines of Government': Replacing the Liberum Veto in the Eighteenth-Century Polish-Lithuanian Commonwealth." *The Slavonic and East European Review* 90(1), pg. 68.

[1025] Davies presents a summary account of what happened, which we agree with, save the suggestion that Siciński acted on the orders of Radziwiłł, of which the historical record is not so clear. "After several such difficulties in the early decades of the Republic, including one in 1580 which blocked all taxation for that year, the matter did not really come to a head till the Sejm of 1652. It was the fourth year of Chmielnicki's Rebellion in the Ukraine, with all its attendant horrors. After six weeks in session, the agenda was still full of unfinished business, and the Marshal rose to announce a prolongation. The members were tired, uneasy at the increased taxes which had just been voted, and ready to go home. It was a Saturday afternoon. A single voice was clearly heard: 'Nie pozwalam.' [I disagree]. The Marshal called a break, and the chamber emptied. At first, no one seemed to know for certain who had invoked the veto, or what the objection was. On the Sunday, many members started to leave for home, believing the Sejm was complete except for the closing ceremonies. By the Monday, the Marshal learned that a formal statement of veto had been registered with the Crown Secretariat by one Jan

parliament himself, Fredro had no choice but to accept the decision to close down the Seym, though he was greatly displeased by it.[1026] In fact, during this period it was not altogether unusual for protests by individual representatives to be ignored, so long as there was overwhelming consensus by the remainder of the members of the Seym.[1027] Part of the difficult also stems from both Jan II Kazimierz's supporters as well as those who criticized him both had very little incentive to prevent the *liberum veto* from breaking up the Seym and saw the breaking up of the Seym as an excuse to claim the moral high ground and criticize their opponents.[1028]

Święcicka cautions that the *liberum veto* should not be overstated within the history of the Commonwealth in that nearly all attempts to break up a Seym by lone individuals completely failed or were ignored, at least until the middle of the 17th century.[1029] Parker also cautions against exaggerating against its use, in that after the 1652 Seym another Seym was called a few months later that passed all legislation brought before it.[1030] The 1652 emergence

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Sicinski, envoy of Upita in Lithuania. It was an impasse which no one had foreseen. Sicinski had apparently gone straight from the Chamber to the secretariat, and had taken horse to the east without a word to a soul. Lengthy consultations with lawyers and colleagues gave the Marshal no solution. He had to admit that Sicinski's veto was legal and valid. He could not recall the Sejm, as there were not enough members left in Warszawa to form a quorum. The constitutions could not be written into the Crown Register. All the work of the session was declared null and void. It was a baleful precedent. Henceforth, any member sufficiently determined to destroy the working of the Sejm, had an excellent means of doing so. It is now known that Sicinski had acted on the orders of Janusz Radziwill, and in future years there were to be many more *magnaci* who were ready to paralyse the central government for their own local advantage," Davies, *God's Playground*, pgs. 264-265 [clarifications added]. However, Tracz-Tryniecki gives by far the deepest accounting of Fredro's role at the 1652 Sejm, which we shall return to later when discussing Fredro's work. See: Marek Tracz-Tryniecki. 2021. "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 roku—nowe spojrzenie." In: Kupisz, Dariusz, ed. 2021. *Na Sejmikach i Sejmach: Szlachta ziemi przemyskiej w życiu politycznym Rzeczypospolitej XVI-XVIII wieku.* Wydawnictwo Sejmowe: Warszawa, pgs. 26-116.

[1026] Dankowski, *Liberum Veto*, pg. 102; Tracz-Tryniecki, "Andrzej Maksymilian Fredro," pgs. 80-86.

[1027] "First of all, it is known that Sicinski's protest was initially ignored and did not lead to an interruption of the deliberations, specifically; despite doubts, the collection of declarations regarding the approval of the extension was started. It's hard not to see, in this move, a conscious decision by Fredro to ignore the veto of the MP from Upita . After all, ignoring was a practice that had been used before at Sejmy against individual protests and - when the vast majority of Sejm attendees were interested in doing so - proved effective. Moreover, at the 1652 Sejm in question. Fredro had already tried this method earlier, on February 17, and ignored two protests that would abolish the Sejm," Tracz-Tryniecki, *ibid.*,pg. 80.

[1028] "The king achieved his political goals at this parliament, and the successful conclusion of the session may no longer have been in his interest. In turn, this probably influenced the attitude of the deputies supporting the court. Historians note that there was little chance of a positive outcome to this Sejm, and Sicinski's veto was a convenient pretext for the conflicting parties to end the deliberations and shift the blame to political opponents," Tracz-Tryniecki, "Andrzej Maksymilian Fredro," pgs. 85-86.

[1029] "The liberum veto should not be taken literally, however, because up until the middle of the seventeenth century, if a Diet was concordant it paid no heed to the protest of a single deputy, and only when a considerable minority voiced discontent could the liberum veto be exercised successfully. The breaking up of the Diet occurred for the first time in 1652 in consequence of a protest lodged by a deputy against the prolongation of the debates by one day," Maria A. J. Święcicka. 1975. "The 'Memoirs' of Jan Pasek and the 'Golden Freedom'." *The Polish Review* 20(4), pg. 143.

[1030] "At this stage, the veto of just one representative on just one issue required the king to dissolve the Diet without passing any legislation (not even measures already agreed upon). Although both foreign contemporaries and most subsequent historians castigated the Liberum Veto as a weakness that doomed the Commonwealth to

of the *liberum veto* occured at the midpoint of a larger constitutional trend over a larger 75-year period where Seymy were occasionally dissolved without passing significant legislation. In fact, over the period of 1493—1572 only 14 out of 72 (19.44%) of Seymy failed to pass any resolutions, whereas over the period of 1573-1648 only 12 out of 75 (17.44%) of Seymy failed to pass any resolutions, whilst over the period 1648-1696 only 17 out of 48 (38.63%) Seymy failed to pass any resolutions.[1031] While the number of failed Seymy doubled after the first *liberum veto* in 1652, the vast majority of Seymy successfully passed resolutions.

Given the sheer geographical expanse, the cultural, religious, and ethnic diversity within the Polish-Lithuanian Commonwealth, the reality that the *szlachta* who participated in both the seymiki as well as the Seymy were not professional politicians but had to give up management of their lands and properties to travel for weeks or months to an extremely expensive capital city out of their own pockets, as well as the fact that the constitution stipulated that Seymy could only last *six weeks*, it is not surprising that occasionally they did not agree on a particular legal reform within a given session and had to extend debate into a future session. It is reasonable that a member of the *szlachta* who was not particularly wealthy would vote against extending a parliamentary session away from home in a large, expensive city to attempt to grind out a compromise against a king or another political or religious faction that had no intention of any kind of compromise to begin with. It simply cannot be compared to a modern permanent political institution occupied by a permanent political class. Accordingly, it is important to push back against the traditional historiography that links the 1639 breakup of the Seym and the 1652 *liberum veto* together, and that this was somehow demonstrative of a decline within the parliamentary system itself. [1032] In her survey of the *liberum veto*, McKenna notes that many historians have tried to make the case that the *liberum veto* emerged as an alliance between the szlachta and the *magnaci* against the king and that heavy-handed intervention was occasionally necessary, but reading exchanges amongst the *szlachta* themselves reveals that it was generally a spontaneous occurrence, rather than anything planned.[1033] On the contrary, it seems most plausible that breaking up of a Seym without any significant accomplishment was in fact just a regular—if somewhat rare—function of the parliamentary system itself.

As such, the third hypothesis has to rejected, at least given the period between 1639 and 1652. Oversimplified statements suggesting that the *liberum veto* sprung as *liberum veto Parthenos* from 17th century constitutional discourse are to be rejected forthright.[1034] Even Konopczyński himself recognized that there was a distinction between *liberum veto* that broke up the Seym altogether and one that simply prevented its prolonging. Thus, there was

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decline, they exaggerate: no one used it until 1652 – and even in that year a new Diet convened four months later and passed all pending legislation," Parker, *Global Crisis*, pg. 154.

[1031] Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pg. 37.

[1032] McKenna, *The Curious Evolution of the* Liberum Veto, pgs. 57-58.

[1033] *Ibid.*, pgs. 92-93.

[1034] E.g., "The principle of liberum veto was used throughout the existence of the *rzeczpospolyta*. 1652, decision making at the Sejm went smoothly, and the liberum veto was used only to stop individual bills. In 1652, however, Jan Simski registered a formal veto that nullified a whole session of the Sejm. In the following decades, liberum veto's use to nullify whole sessions became frequent and appears to have paralyzed the Sejm's decision-making capacity," Dalibor Roháč. 2008. "'It is by Unrule That Poland Stands': Institutions and Political Thought in the Polish-Lithuanian Republic." *The Independent Review* 13(2), pg. 214.

a clear evolution of the *liberum veto* between 1652 and 1669.[1035] It is also doubtful that the 17th century *szlachta* saw the 1639 and 1652 Seymy as critical constitutional events. The 1639 Seym—as had others that had broken upon before it—was seen as a regrettable waste of time, it was not particularly noteworthy.[1036] One of the first commentators on the importance of the 1652 Seym and the novelty of Siciński's "kontradykcja" was the jurist Gottfried Lengnich (1689-1774) in his book *Ius Publicum Regni Polonae* (1742). So it is noteworthy to admit that the very search for such a constitutional continuity and its attending narrative of decline is due to 18th century historicism,[1037] given that Siciński was not particularly well-known or commented upon in his own lifetime.[1038] However, this does not *a priori* preclude the possibility that the *liberum veto* may have eventually stabilized within 17th Polish-Lithuanian constitutionalism, and this is something to consider very seriously, for just as the idea of political participation by the *szlachta* was nominally introduced in the 15th century, it was not until the 16th century that it began to consolidate in a more concrete form.

Jan II Kazimierz has been historically blamed for squandering the opportunity after the war to improve political institutions within the Commonwealth, given that there were some who were indeed worried at the precedent started by the *liberum veto*. What were the reforms proposed by the king? He wanted the adoption of *vivente rege* election, not purely as a constitutional principle, but in fact he was influenced by his French wife Louise Marie of Gonzaga to push for the election of Henri Jules, Prince of Condé and duc d'Enghien. Though Frost insists that this should not only be interpreted as *only* Jan II Kazimierz and Louise Marie demonstrating private or dynastic reform, it appears that this was the lens by which most of the *szlachta* saw it.[1039] In 1660 Andrzej Maksymilian Fredro published his famous defense of the *liberum veto*, in his *Scriptorum seu togae et belli notationum fragmenta*.[1040] There were also strong political divisions among the *szlachta*, with those who

[1035] "Searching for the first liberum veto in the perfect, crystallized sense of the word is difficult inasmuch given that, as we have seen, even fleeting, unsuccessful attempts had to be taken into account here, as long as they harmed the very existence of the given assembly, while indirect obstruction of the Diet by not allowing a prolongation was left aside [...] As a lower degree of the negative power of the "free vote", *sisto activitatem* finally developed between 1652 and 1669. It differs from the veto proper in the non-final nature of the act, and from the former disallowing nothing - in that it put the chamber in a state of complete passivity. It was thus a kind of lethargy, but not death. After the blocking of an act - at least according to Saxon practice - the deputies still speak, but in passivitate, their words have no legal weight, and the Speaker can do nothing more than send a deputation to the blocking deputy asking for mercy; whereas in the past, during the reign of Sigismund III, if someone allowed "nothing", the chamber could send and receive all kinds of messages, negotiate, listen to bills, as long as it didn't pass anything that should be included in the *konstytucja*. These are, simple as that, finesse on which the general consensus did not recognize, but which history should recognize. It is befitting to speak subtly and delicately about delicate and subtle things, like Brabant lace," Konopczyński, *Liberum veto*, pg. 268.
[1036] McKenna, *The Curious Evolution of the* Liberum Veto, pg. 68.
[1037] Jerzy Lukowski. 2012. "'Machines of Government': Replacing the Liberum Veto in the Eighteenth-Century Polish-Lithuanian Commonwealth." *The Slavonic and East European Review* 90(1), pg. 70.
[1038] Kriegseisen, *Sejm Rzeczypospolitej szlacheckiej*, pgs. 56-57.
[1039] Robert I. Frost. 1993. *After the Deluge: Poland-Lithuania and the Second Northern War 1655-1660*. Cambridge University Press: Cambridge, pgs. 23-24.
[1040] Andrzej Maksymilian Fredro. 2014. *Scriptorum seu Togae et Belli Notationum Fragmenta. Accesserunt Pieristromata Regum Symbolis Expressa. / Fragmenty pism, czyli uwagi o wojnie i pokoju. Zawierają dodatkowo królewskie kobierce symbolicznie odtworzone*. Narodowe Centrum Kultury: Warszawa.

had long-supported the Habsburgs and the Bourbon dynasties began to compete against each other, with divisions between the *szlachta* and the *magnaci* also reviving.

The political winds came to a head in the rivalry between Jerzy Lubomirski and Jan II Kazimierz. Though Lubomirski played an important role in blocking the extensions of the 1639 and 1645 Seymy, the great popularity and favor he enjoyed from the *szlachta* were due to his military prowess in campaigns against the Cossacks, Swedes, and Muscovites during the Deluge. Seeing that the king had no heirs and perhaps harboring royal ambitions for himself should the king die without them, at the 1661 and 1662 Seymy he firmly joined the antiroyalist faction and shut down the king's plans. Lubomirski refused to take part in a new campaign in the continuing war against Muscovy, and Jan II Kazimierz used this as an excuse to rig the 1664 Seym court against him, which condemned him as a traitor, confiscated his land, and condemned him to death. Jan II Kazimierz's manipulations greatly angered the *szlachta*, and Lubomirski was saved by his allies, fleeing to Silesia though some of the antiroyalist *szlachta* were caught and executed in similarly rigged trials.[1041] Seeking the help of foreign powers, he returned and raised a large army, gathered his allies, and created the Rokosz Lubomirskiego (1665-1666).

Unlike the Rokosz Zebrzydowskiego nearly half of century later, Lubomirski easily defeated the king's armies in the summer of 1666. Lubomirski came to peace accords with the king from a position of strength, and he officially and publicly asked the king for forgiveness in exchange for the king agreeing to give up his reform ambitions and restoring Lubomirski to his position. Humiliated and with no real options, Jan II Kazimierz accepted Lubomirski's terms, which weakened the king so much that all of his future ambitions were destroyed.[1042] In the long run, neither Lubomirski nor Jan II Kazimierz truly "won" in that Lubomirski died in 1667 and Jan II Kazimierz abdicated in 1668, realizing that the *szlachta* would never accept his reforms.

The Rokosz Lubomirskiego was in of itself not really constitutionally significant as it simply ended the ambitions of Jan II Kazimierz and reinforced—once again—that the Commonwealth would never accept *vivente rege* elections or a powerful king. However, the build up to it was extremely important, in that it refined and expanded the usage of the *liberum veto*.

As McKenna explains:

> In a republic of laws based on shared sovereignty among the estates, the king should not have been able to condemn a senator to infamy and sequester his property simply because the senator opposed the king's (illegal) policies. In fact, it was a senator's duty to point out when the king violated the laws and customs of the Commonwealth. Delegates at the sejm of 1664-5, at which Lubomirski's trial was held, protested both the trial and the illegal tactics used to rig its outcome, but the court party conspired to have the delegates' protests ignored until after Lubomirski had been convicted and sentenced. This violation of the delegates' *głos*

[1041] McKenna, *The Curious Evolution of the* Liberum Veto, *passim*; Stone, *The Lithuanian State*, pg. 176.
[1042] Stone, *ibid*., pg. 176; Davies, *God's Playground*, pgs. 262-264, though he seems to have mistakenly written that the final battle was in the summer of 1667. On the whole, Davies is much more negative toward Lubomirski and the Rokosz Lubomirskiego, whereas Stone and Frost are more neutral in tone.

> *wolny* [free speech] changed irreparably the significance and power of the liberum veto in Polish politics.
>
> At the parliaments that followed, the court tried to invalidate delegates' protests in defense of Lubomirski by claiming that delegates had used their *ius vetandi* [right to prohibit] illegally. Since there was no express law about the circumstances under which a delegate could legally protest at the sejm, the two sides argued about what constituted a legal and proper liberum veto. Delegates refused to allow any limit to their right to protest because, as the court had demonstrated for more than a decade, it was willing to use all means available to achieve its ends. The court faction, led by the queen, the French ambassadors de Lumbres and de Bonzy and the two chancellors, Bishop Mikołaj Prażmowski and Krzysztof Pac, employed bribery, deceit, manipulation and intimidation to a degree formerly unknown in the Commonwealth. Faced with such tactics, the republican opposition needed more than their traditional exhortations for civic virtue and "brotherly persuasion." Over the course of several years, the argument about what constituted a legal and proper protest escalated. Eventually, a new incarnation of citizens' longstanding *głos wolny* emerged: a delegate had the right to issue a protest and suspend parliamentary deliberations at any time, for any reason. Proposals to limit a delegate's right to protest in any way were associated with the court's efforts to silence szlachta opposition [translations added].[1043]

Frost explains that this was essentially a sea change in the Commonwealth, in that Jan II Kazimierz's disastrous reign reawakened the *szlachta*'s fears from the Rokosz Zebrzydowskiego and proved to be a catalyst that transformed these anxieties and tensions into a coherent, new constitutional principle.

> It was in the reign of John Casimir that the vital psychological shift took place. The political and military collapse in the face of the Muscovite and Swedish invasions shocked the Commonwealth's political leaders out of their complacency, convincing many of the most influential that reform was essential. Yet, despite widespread support for reform proposals between 1656 and 1662, not only was change definitively rejected, but in the struggle to resist royal plans in the 1660s the *liberum veto* came to be seen as a vital defence of noble liberties, and a necessary barrier against the monarchy's alleged desire for absolute power.[1044]

After a brief interregnum from November 5th, 1668[1045] to May 2nd, 1669[1046] there was another controversial election with heavy competition by pro-Habsburg and pro-Bourbon parties among the *szlachta*. The next king elected was Michał Korybut Wiśniowiecki, whose only claim to fame was being the eldest son of the Wiśniowiecki family. He was elected essentially by accident as something of a compromise candidate, but his reign lasted four years until his early death. His reign could not have started off more poorly, with a *liberum veto* being called during his 1669 coronation Seym that was not in opposition to his election itself, but rather some *szlachta* whose demand for recompensation for property lost during the wars in the East were not. They angrily left the Seym prematurely, which prevented any further business from taking place. According to Lewandowska-Malec this was a significant new precedent in the breaking up of the Seymy by the *liberum veto,* in that it was aimed at

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[1043] Mc Kenna, *The Curious Evolution of the* Liberum Veto, pgs. 161-162.
[1044] Robert I. Frost. 1993. *After the Deluge: Poland-Lithuania and the Second Northern War 1655-1660*. Cambridge University Press: Cambridge, pg. 14.
[1045] "Konfederacya Generalna, Omnium Ordinum Regni et M.D. Lit. Na Konwokacyi Głowney Warszawskiey Uchwalona," 5 November, 1668, in *Volumina Legum,* Tom IV, pgs. 482-501.
[1046] "Akta Seymu Walnego, Elekcyi Nowego Krola, 2 May, 1669, in *Volumina Legum,* Tom V, pgs. 5-22.

specifically preventing the passage of *konstytucye* rather than merely preventing extending a Seym wherein no legislation had been passed, and that there should be a distinction between a "torn up" (*rozerwane*) and a broken off (*zerwane*) Seym.[1047] We will return to this important distinction later.

A war broke out against the Turks in 1672 and another two *liberum vetoes* were used in that same year, exercised by both the royalists and their opposition. Wiśniowiecki was assessed to be largely incompetent both politically and militarily. The pro-French faction under hetman Jan Sobieski demanded that he abdicate, and Sobieski won multiple victories against the Ottomans. He threatened to rebel against the king, but his preoccupation with the war and attempts by the Court to make peace prevented Sobieski from consolidating any political movement. Wiśniowiecki actually died *en route* to what would become Sobieski's great victory in November 1673 at Chocim that turned the war in favor of the Commonwealth. Davies believed that his reign was so unmemorable that it was a "nonentity",[1048] which had the main result of propelling Sobieski into the spotlight. However, within the last twenty years or so there have been some attempts to reevaluate his reign.[1049] Wiśniowiecki's reign was met with worsening internal conditions and persistent rivalry with Sobieski and his *magnaci* allies. He also reigned briefly, merely four and a half years.[1050] After a brief interregnum Sobieski was elected king on April 20th, 1674.[1051]

It was under Sobieski that the next—and arguably final—major evolution of the *liberum veto* occurred at the 1688 Seym, when the Sapiehas—a powerful Lithuanian *magnat* family opposed to the king—instructed their allies to invoke the *liberum veto* before the parliament could even elect a new Marszałek to officially begin the Seym. The Seym was suspended for six weeks before it was cancelled, never really having begun.[1052] This final form of the *liberum veto* effectively paralyzed the parliamentary system; after Sobieski's death in 1696 the *liberum veto* broke up nearly every Seym for the next 75 years until it was abolished as part of 18th century reforms. A typical of the summary of how the *liberum veto* has been appreciated in the literature is given by: Konieczny and Markoff:

> The Polish parliament itself had some very unusual rules for decision making during the six weeks for which it typically was convened each year. Because the szlachta were no more inclined to place themselves involuntarily under the authority of a central parliament than a king, decisions were increasingly made by unanimity, and from about mid-seventeenth century a single parliamentary delegate could veto any legislation (a practice known as the liberum veto); *indeed, a single objector could insist that a parliamentary session be brought to an end and all legislation previously enacted at that session be annulled*. A very large number of parliamentary sessions were thus brought to a premature end, paralyzing the Polish system, to the delight of Poland's neighbors, who would often bribe deputies for the very

[1047] Lewandowska-Malec, "Sejmy rozerwane i zerwane, pg. 131.
[1048] Stone, *The Polish-Lithuanian State*, pgs. 233-236; Davies, *God's Playground*, pgs. 355-357.
[1049] For a summary of newer research into Korybut Wiśniowiecki's reign, see: Robert Kołodziej. 2013. "Z najnowszych badań nad parlamentaryzmem szlacheckim Rzeczypospolitej." *Historia Slavorum Occidentis* 2,pgs. 49-50f.
[1050] For a brief synopsis of Korybut's reign, see: Stone, *ibid*, pgs. 233-236.
[1051] Akta Seymu Walnego, Elekcyi Nowego Krola, 20 April, 1674, in *Volumina Legum*, Tom V, pgs. 132-146.
[1052] Mc Kenna, *The Curious Evolution*, pg. 282; Stone, *ibid*, pg. 183; Lewandowska-Malec, Sejmy rozerwane i zerwane," pg. 131.

> purpose of disrupting the sessions. In addition, it was regarded as legitimate for networks of aristocrats to form independent, armed "confederacies" that had legal status (emphasis added).[1053]

Though perhaps one could argue that *liberum veto* made it easier to break up Seymy, it does not appear obvious that it did so, and perhaps it simply provided another process with which to disrupt legislation, rather than itself increasing said disruption *per se*. Indeed, this is the suggestion of Kołodziej as well, who argues that there were indeed multiple ways to stop parliamentary procedure: the *szlachta* choosing to ignore a protest or a controversial idea, that the *szlachta* purposely busied themselves to "run out the clock", so to speak given that the Seym was limited to six weeks in duration, the Marszałek carefully selecting an agenda that avoided certain parliamentary, financial, or political issues of the time, as well as vetoing at various stages in legislation.[1054] In some sense, the establishment of the *liberum veto*, rather than as an anti-constitutional, anarchic, anti-systemic, etc. principle, was itself a mechanism that gave some regularity to what was irregular: the disruption of the Seymy occurred whenever there was general social or political unrest, with or without the *liberum veto*. This increasing concern with parliamentary procedure is something that historians have either misunderstood, or otherwise maligned as wasting time. Davies makes his opinion quite clear on this point, lamenting how the *instrukcje* of the seymiki to their representatives at the Seym were purely an excuse to waste time:

> The detailed, parochial nature of the dietines' instructions is indicative of the nobility's deepest concerns. In 1667, Jan Chryzostom Pasek served as Marshal of the *sejmik* of Rawa in Mazovia, and recorded their instructions in full. Although this was a time of civil commotion caused by Lubomirski's Rebellion, and by the failing powers of the King, Jan Kazimierz, the nobles of the province showed an extraordinary concern for pettifogging detail.[1055]

This, however, is a fundamental misunderstanding of what is going on, or perhaps a historiosophical bias due to presentism in that, if one takes the point of view that the Commonwealth was driving toward the edge of a cliff it appears that its drivers are more concerned with adjusting the radio than with trying to break in time. Put another words, there is the underlying suggestion that parliamentary procedure was a case of being "more interesting in details" than trying to identify "the real problem." However, as we have outlined earlier, to 17th Polish-Lithuanian constitutionalism, procedural questions very much were "the real problem" itself. It was not simply the *liberum veto* and voting rules that were becoming increasingly sophisticated, but the parliamentary process itself was rapidly diversifying. During the Sobieski period, Kołodziej outlines several steps within parliamentary procedure:

> 1.The king's traditional legislative initiative had transformed into a more sophisticated process of consulting his advisors during Senat councils or by

[1053] Piotr Konieczny and John Markoff. 2015. "Poland's Contentious Elites Enter the Age of Revolution: Extending Social Movement Concepts." *Sociological Forum* 30(2): 286-304.
[1054] Robert Kołodziej. 2021. "The Legislative Process at the Sejms during the Reign of Jan III Sobieski (1674–96)." *Przegląd Sejmowy* 6, pg. 148.
[1055] Davies, *God's Playground*, pg. 251.

special letters known as *deliberatoria* where parliamentary business was discussed. These in-person councils or councils via correspondence often contained proposals that became writs, which were then discussed by pre-Seym seymiki or could be given to the Marszałek before each Seym. The pre-seym Seymiki often created their own initiatives as well.
2. The election of the Marszałek, who then read the requests of the King or other supplicants before the Seym, though sometimes the King gave the speech himself.
3. The *Wota* or the opinions and commentaries of the senators to support, make additions to, or otherwise propose adjustments of the king's proposals.
4. The break of the Seym into two both chambers for discussion, sometimes creating special committees to further break off and work out details on specific proposals, sometimes known as *deputations.*
5. After a *konstytucye* was finished the Marszałek would write it down and then ask for consent.
6. If consent was achieved then the *konstytucye* would be sent to the Senat or a combined Seym again.
7. If the Senat approved it passed to the king, who then could sign it or veto it.
8. If the king accepted it, then the Marszałek and others would make sure to send the laws to royal printing houses and publish them.
9. The *szlachta* would bring the *konstytucye* home with them to their local regions and then participate in special debriefing seymiki where they had to give a report of their activity at the Seym and why they did or did not undertake various actions.[1056]

The emergence of the seymiki/Seymy system throughout the 15th and 16th centuries was a spontaneous process, with many parliamentary or legal procedures being driven by either custom or pragmatism, rather than concrete planning and rational thought. If the *liberum veto* is to be judged appropriately, then it must be recognized that it was developing as part of a context where the details of parliamentarianism were still being worked out, so it is not surprising that some of the institutions developed may have been problematic, but it cannot be denied that many invocations of the *liberum veto*—or other methods to break up the parliament—were done in accordance with the will of the seymiki, rather than rogue and selfish *szlachta* acting alone and on their own behalf. How one evaluates whether or not this problematizing of constitutional process had a negative or a positive impact is largely dependent on one's historiosophical and ideological-political appreciation of the Commonwealth. If one takes the point of view that a proper state is one that is highly centralized and with a powerful monarchy—and that this was the only way to save Poland-Lithuania from the problems that plagued her—then naturally the *liberum veto* is understood as something inherently destructive and harmful to the wellbeing of the Republic. On the other hand, if one takes the point of view that a proper state is one where the individual citizens themselves take a stronger role in governing and try to take power away via decentralizing tendencies in order to empower local institutions, then the *liberum veto* was

[1056] Kołodziej, "The Legislative Process," *passim*.

working exactly as intended[1057]: if the local *szlachta* told their representative to not cooperate at the national parliament, then *liberum veto* was part of the process of self-governance and one that could save a lot of time and resources by simply ending the Seymy rather than prolonged weeks and perhaps months of pointless discussion and attempt at compromise that would have failed anyway.

Butterwick-Pawlikowski gives a succinct summary of how unanimity, the *liberum veto*, and seymiki *instrukcje* were intimately connected:

> The unwritten principle of unanimity in decision-making was in many respects laudable, for it forced conflicting interests to seek consensus. Minorities were frequently persuaded to accept the will of the majority for the good of the kingdom, but determined protests by envoys of standing were respected. However, the suicidal precedents of 1652 and 1669 established not only the *liberum veto*, the right of an envoy to block any measure whatsoever, but also its extreme form, the *liberum rumpo*, or the license to break up the proceedings of the Seym at will, and thereby wipe out all the legislation passed by it. The moral odium attached to the abuse of the *veto* was such that it was used infrequently for some decades, but by the end of the reign of John III Sobieski (1674-96), the Seym was close to total paralysis, a state it finally attained under August III (1733-63). The *liberum veto* allowed foreign powers to neutralize threats to their interests, and gave ministers *carte blanche* to abuse their positions. The hetmans (military commanders), marshals, chancellors, and treasurers of the Crown and Lithuania, and their deputies were appointed by the king for life, and could be deprived only by the Seym. The effects of the *veto* were worsened by the binding instructions that envoys received from the *seymiki* which elected them. The *seymiki* occasionally instructed their envoys to wreck the Seym if their demands were not met. The upholding and then the catastrophic cult of the *liberum veto* reflected the downfall of political culture. Often viewed as the quintessence of individualist anarchy, the *veto* was in fact a pillar of conformism, a disincentive to novel and controversial proposals, and such were all ideas of serious reform.

[1057] McKenna discusses a tradition with Polish history to treat the *liberum veto* as part of the "old federalism of the Polish state. From this federalism originated the customary rule of *unanimitas*, required for legislative decisions of the seim, which was a congress of delegates from the independent districts, lands, palatinates, and other units. The delegates had merely to transmit the requirements of their mandators to the sejm and were not bound by the decision of the majority. Thus the *liberum veto* was inherent many years in the federative Polish state before it was voiced by the Lithuanian delegate." What is problematic about such an analysis is that it specifically discusses the idea of a "Polish federalism", which is obviously ahistoricist, given that the Polish-Lithuanian Commonwealth was not even a modern state, let alone a composition of states. McKenna, *The Curious Evolution of the* Liberum Veto, pg. 444

Another such problematic, ahistoricist analysis is given by Geoffrey Parker:

"The Constitution of the Commonwealth deepened this diversity. At the death of each monarch, representatives from every region assembled in a federal Diet (the Sejm) to negotiate concessions from the various claimants before electing one of them king. Thereafter, representatives from the Sejmiki met together for six weeks at least once every two years, with emergency sessions when necessary, and at the end of each Diet, a plenary session debated all the legislation recommended for enactment. At this stage, the veto of just one representative on just one issue required the king to dissolve the Diet without passing any legislation (not even measures already agreed upon). Although both foreign contemporaries and most subsequent historians castigated the Liberum Veto as a weakness that doomed the Commonwealth to decline, they exaggerate: no one used it until 1652 – and even in that year a new Diet convened four months later and passed all pending legislation. In fact, the Liberum Veto safeguarded regional rights (which is why attempts to replace unanimity with some form of majority rule always failed); and the Sejm offered the earliest example in world history of a federal parliament that bound together a multi-national and multi-ethnic state." A better term would perhaps by the concept of political sovereignty or freedom, or perhaps a reference to a functioning Republic that respected the rights of its citizens to manage their own affairs and to participate in political life. Irrespective of what precise term is appropriate for this conception, "federalism" is much too modern and too far from outside of Polish-Lithuanian political tradition to be appropriate. See: Parker, *Global Crisis*, pg. 154.

> The *szlachta* became convinced that the king could corrupt the majority of the Seym, and so the *liberum veto* became the hallowed *pupilla libertatis*.[1058]

Though he follows a more pessimistic evaluation of the *liberum veto*, Butterwick-Pawlikowski puts his finger on another problem with Polish historiography: the association of the *liberum veto* under August III Wettin with the *liberum veto* used in the 17th century. We shall return to the reign of the Wettins in the following chapter, but it is necessary to recall historians and political scientists' insistence that there was one *liberum veto* is deeply flawed, rather than attempt to explain how it developed over time. Equally problematic is to assert to work backward from the 18th century *liberum veto* to locate its seeds within the 17th century. An issue with Konopczyński's analysis of the *liberum veto* was that he was an expert on the 18th century and used the lens of the Enlightenment and the collapse of the state to appreciate the 17th century.[1059] Instead, historical and constitutional appraisals of the *liberum veto* must look at in a deeper context as an evolving institution, as we have attempted to do.

There is, however, an even deeper challenge to the traditional narrative of the *liberum veto*. Instead of looking at an evolution of "the *liberum veto*", it must be asked if there ever was "a *liberum veto*" itself. Lewandowska-Malec has extensively written about the distinction between *torn* Seymy and *broken off* Seymy. According to Lewandowska-Malec this was a significant new precedent in the breaking up of the Seymy by the *liberum veto*, in that it was aimed at specifically preventing the passage of *konstytucye* rather than merely preventing extending a Seym wherein no legislation had been passed, and that there should be a distinction between a "torn up" (*rozerwane)* and a "broken off" (*zerwane*) Seym, where the first one was when a Seym was merely split up before its conclusion though it did pass some legislation. The second is that a Seym was broken up in such a manner that it nullified the passage of any laws. According to Lewandowska-Malec, the 1652 Seym was not a true *liberum veto* because the "tearing up" of the Seym prevented its extension, which made sense given that the Seym had failed to pass any legislation. This is quite a different matter than destroying the Seym altogether. By this definition, the first "true" *liberum veto*–in the sense that it is normally understood—was actually the destruction of the Seym in 1669.[1060] Lewandowska-Malec continues to give a more precise distinction between the two terms:

[1058] Richard Butterwick. 1998. *Poland's Last King and English Culture: Stanisław August Poniatowski, 1732-1798*. Clarendon Press, Oxford University Press: Oxford, pg. 20.

[1059] Dankowski, *Liberum Veto*, pg. 11.

[1060] "Although it is often said that it was in 1652 that the Seym was broken for the first time, in fact it was a torn Seym. Referring to Stanisław Kutrzeba's theses, the first broken Seym should be considered as the Seym that split up before the conclusion, so it was not possible to pass any *konstytucje*. The first such incident took place in 1669 under extremely embarrassing circumstances. At that time, the Seym koronacyjny of Michał Korybut Wiśniowiecki was broken a week before the conclusion. The deputies from Kiev with Aleksander Woronicz and Adam Olizar (the so-called exulants), dissatisfied with the refusal to grant them compensation for property lost in the east, protested on November 5, 1665, on the 35th day of the meeting. It should be noted that officially the session ended on November 1226. The inability to complete the session, and thus to carry out its obligatory length (the chamber was in the state of passivity), is defined as breaking the Seym," Lewandowska-Malec, "Sejmy rozerwane i zerwane," pg. 131. See also: Edward Opalińsk. 2021. "Sejm of the Commonwealth of Two Nations 1572-1668." *Przegląd Sejmowy* 6, pg. 110 Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pg. 37; Wagner, "'Some'" and the 'Liberum Veto', pg. 58; Borucki, *Seymy i seymiki szlacheckie*, pgs. 240-241; Butterwick-Pawlikowski, *Poland's Last King*, pg. 20.

> The decisive criterion for the division into torn and broken Sejmy is, in the first place, the end of the session - after or before the obligatory duration of the Sejm, and in the second place - the reason for the breakup of the deputies: whether it was decided on formal (procedural) or substantive grounds. The Henrician Articles adopted an iron rule that the Sejm could not last longer than six weeks. At the Sejm of 1590-1591, this term was precisely defined. The Sejm was to close its sessions on the day of the week corresponding to the day on which it began, according to the date set in the royal universals. So, starting in 1591, the Sejm was to last exactly 43 days. This was a mandatory length of deliberation to which extraordinary importance was attached. This period was supposed to discipline the Sejm states to agree on resolutions without delay, and was also supposed to be a guarantee against abuse. That is why it was with such reluctance that the prolongation of the session was agreed to. It was officially banned by a Sejm resolution in 1633. Failure to agree to an extension or to object to another extension (deputies used this tool very carefully, usually agreeing, especially in the times of Wladyslaw IV and Jan Kazimierz, only to one-day extensions) led to the closure of the session without passing laws. In such a situation, we are dealing with a broken Sejm. At the time, this was not considered a misfortune.[1061]

A *torn up Seym* did not make it to full term and was essentially a procedural problem, whereas a *broken* Seym was substantive. A *torn up* Seym was not considered to be particularly unusual or tragic, and according to a 1633 statute Seymy were never supposed to be prolonged. According to this interpretation, Siciński's 1652 *liberum veto* was actually perfectly legitimate and in fact correct parliamentary procedure. If we use the definition of *liberum veto* as a member of the Seym breaking it up, then the 1652 *liberum veto* was not actually a *liberum veto* at all. Furthermore, during the entire Waza period no Seymy were broken up at all, for all of the protests were procedural.[1062] She further clarifies that just because a delegate objected to part of the Seym on either substantive or procedural grounds did not necessarily mean the immediate breakup of the Seym. Indeed, when an objection was made the traditional parliamentary and customary procedure was to keep the Seym going its full duration so that the other delegates had time to work out compromises or to rewrite legislation in the hopes that the objections might be withdrawn. Instead, the practice of immediately dissolving the Seym should be known by the principle *liberum rumpo*.

> The *liberum veto* identified in the literature with the breaking of parliaments should be regarded as erroneous. The implementation of the *nemine contradicente* [without anyone speaking out against] principle by recognizing that the objection of one deputy negatively determines the fate of a resolution (procedural or substantive) does not mean that the procedure of breaking the Seym is applied. It was only *liberum rumpo* that led to just such an effect. Since the *"free, I did not allow"* it to be used during the deliberations; before the 43rd day of their duration, the Seym was broken.[1063]

While this distinction might appear to be purely academic in nature, Lewandowska-Malec further explains that much of the problem with how the *liberum veto* has been conceptualized in the literature has been because, following Konopczyński, it has been the subject of historians, rather than lawyers.[1064] As such, extensive, systematic research into the

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[1061] Lewandowska-Malec, "Sejmy rozerwane i zerwane," pgs. 127-128.
[1062] *Ibid*., pg. 132.
[1063] *Ibid*., pg. 133.
[1064] To this list should arguably be added political scientists and economists, with most references to the *liberum veto* outside of Polonists being purely symbolic. As far as the author is aware, the only such serious attempts to

liberum veto by legal scholars is still required.[1065] For Lewandowska-Malec, the *liberum veto* could lead to either the preventing of a Seym from prolonging *(rozerwane*) or the complete breakup of the Seym altogether (*zerwane*) but neither of these were automatic, and both should be distinguished from *liberum rumpo*. The *liberum veto* was not incompatible with the Commonwealth and was in fact a contributor to its "deliberative democracy" by affording the members of the Seym the time to discuss and reach a compromise or consensus. It was only when the *liberum veto* was used to disrupt these good faith discussions that it became anathema to the Commonwealth and that reformers seriously began to concern themselves with questions of procedure.[1066]

This distinction between *liberum veto* and *liberum rumpo* began to be used by 18th century reformers, though they are often confused with each other, including by Skrzetuski.[1067] We shall return to it in the next chapter as we analyze the various reform attempts throughout the 18th century, but it is sufficient to note for now that the distinction between *liberum veto* that intended to break up the Seym for either procedural or substantive issues, either to prevent the Seym from prolonging or to break it up prematurely, were all significant questions and unclear to Polish-Lithuanian constitutional thinkers. Furthermore, simply because one opposed the extension of the Seym on procedural grounds did not mean that *liberum veto* usage did not have a substantive impact. In fact, the 1652 *liberum veto* by Siciński was technically a protest against the Seym's elongation, the contentious Seym had not yet passed any legislation nor made any agreements amongst themselves. Thus, even though he was protesting against extending the Seym rather than a specific issue at hand, his *liberum veto*—and many others that would follow its precedent—would have the secondary effect of blocking substantive issues. It is also worth noting that the era of supposed total parliamentary paralysis was comparatively quite brief—lasting through the reign of August III Wettin—some 30 years. Thus, from the moment of the first evocation of the *liberum veto* in 1652 to its removal its 1791, the period of total stagnation was itself only a fraction of a fraction of Polish-Lithuanian constitutional historical development.

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look at the *liberum veto* as a contribution to political and constitutional theory more broadly have done by Dalibor Roháč. See: Roháč,"'It is by Unrule That Poland Stands'"; Dalibor Roháč. 2008. "The unanimity rule and religious fractionalization in the Polish-Lithuanian Republic." *Constitutional Political Economy* 19(2): 111-128.

[1065] Lewandowska-Malec, "Sejmy rozerwane i zerwane," pg. 132.

[1066] "With the recognition of unanimity in the form of *liberum veto*, the deliberative democracy was seriously shaken; the deputy using this measure left the meeting, which prevented him from being persuaded to change his mind, or based his protest on an allegation of infringement of the law, refused to engage in discussion or did not accept the reasonable arguments of the other participants in the debate. It was then that people began to approach the parliamentary procedure more restrictively, and in particular to the time limits in force therein: each one acquired a strict character; the hitherto practice of derogating from the procedure in force was abandoned by a one-off resolution of the chamber," Lewandowska-Malec, "Demokracja deliberacyjna," pg. 85.

[1067] "Moreover, the Piarist [Wincenta Skrzetuska] tried to make the students of his textbook aware that the truncated reform of 1768 *de facto* meant not only the restriction of the *liberum veto*, but also the so-called *liberum r*umpo, that is, contesting validity sooner adopted resolutions. Cardinal rights determined that despite the opposition in matters concerning the matter, the status, discussion and work on the so-called economic issues could go on, and the decisions made became binding law," Wojciech Organiściak. 2010. "Wincenty Skrzetuski 'O Senacie' w Rzeczypospolitej szlacheckiej." *Z Dziejów Prawa* 3, pg. 34.

Ultimately, the problem was how to balance the need for a centrally organized government—and specially to collect taxes to support its military—and the *szlachta*'s desire to govern themselves and to protect their own rights. Indeed, there is great meaning in recognizing that, just as most 16th century reformers opposed to the kings did not want to do away with the monarchy but instead to limit its powers to prevent absolutism, so too did very few critics of the *liberum veto* want to do away with the entire institution. Instead, most sought a way to prevent its excess, which even advocates of the *liberum veto* recognized was a very real danger.[1068] The reaction to the *liberum veto* and debates about how to reform it were critical parts of 18th century Polish-Lithuanian constitutional reforms, more of which will be discussed in the next chapter.

The implementation of the *liberum veto* as well as the intense debate concerning how to define it, how it should be used, etc. reveals that there was a clear problem in 17th century Polish-Lithuanian constitutionalism: the lack of clarity between praxis and poiesis. To put it in more general, less technical terms, there was a confusion as to whether or not the breakup of a Seym should be possible on purely procedural grounds (*poesis*) or for substantive grounds (*praxis*). The former implies that the disruption of the Seym itself was the main objective, the latter that the disruption was in service toward a larger goal. This does not preclude the possibility of praxical and poietic concerns overlapping. The original attempts to shut down the Seym in 1639, 1652, and throughout much of the Waza period were poietic in that they prevented the prolongation of the Seym or forced it to conclude earlier.

Later iterations of the *liberum veto* were due to substantive issues, whether specific issues that the *szlachta* objected to such as not receiving adequate compensation that drove the exercise of the *liberum veto* in 1668, or simply—and more ominously—because they wanted to prevent the king from doing anything. This latter type was praxical, in that the disruption of the king was instrumental towards another aim. Of course, both the *torn up* and the *broken* as well as the *liberum veto* vs *liberum rumpo* distinction could be either praxical or poietic, depending on the circumstances. For example, the disruption of the Seym in 1688 before the election of the Marszałek—a *liberum rumpo*—could be interpreted as poietic, whereas the usage of *liberum rumpo* by a senator or deputy who came to the Seym late in order to annul some legislation that they disagreed with from a prior day that they could not attend would clearly be praxical in nature.[1069] Throughout the reign of Jan III Sobieski the Seym met twelve times and was broken up for six of them, though 3 were broken up over the course of the proceedings and three were broken up before a Marszałek could even be elected.[1070]

The origins of the poietic form of the *liberum veto* are fairly straightforward, given that the six week duration for a Seym is written into the Henrician Articles and was confirmed

[1068] McKenna, *The Curious Evolution of the* Liberum Veto, pgs. 8, 11-12, 110, 129-130, 193-194; Grześkowiak-Krwawicz, "Veto—Wolność—Władza," pgs. 143, 147-148, 154.
[1069] "Moreover, the senators readily made use of existing gaps in the law for the purpose of undermining already agreed-on projects, and intentionally delayed their arrival in order to become able to apply the right to contradict," Andrzej Stroynowski. 2021b. "The Role of Senators in the Commonwealth Sejm." *Przegląd Seymowy* 6, pg.206.
[1070] Kołodziej, "The Legislative Process", pg. 144.

multiple times throughout the 17th century. Though no one could have foreseen that a mechanism intended to keep the Seym focused and limited would have the consequence of being used to break up the Seym itself,[1071] in fact, that the six week period was often too short to pass any significant legislation was known at the time.[1072] The origins of the praxical form, however, are more difficult to ascertain, other than perhaps it is following the logic of unanimity and *Nihil Novi* to their logical extreme. Another hypothesis could be that the *liberum veto* was exercised in a praxical way to avoid having to make any commitments to controversial or complex political issues.

Regardless of the particular reason, it was quite clear that there was a growing intensity and complication of parliamentary procedure beginning in the second half of the 17th century, in both praxical and poietic and dimensions. How this demands changes for our overall hermeneutic approach—that is, how the events of 17th century constitutionalism force alterations in the lens with which we view Polish-Lithuanian constitutional development—will be explored a bit later on. Additionally, the general confusion in clearly distinguishing praxis and poiesis will allow some deeper and more subtle reflections on constitutionalist theory, which will also be addressed below. Suffice it to say for, the overemphasis on the *liberum veto* as the downfall of the Polish-Lithuanian Commonwealth is needlessly myopic and poor historiosophy. There were many efforts to complicate and diversify constitutional procedures throughout the 17th century, much of it as a way to avoid or minimize substantive political conflict between the *szlachta*, the *magnaci*, and a dynasty that had little interest in making reforms beyond further concentrating their own political power. It was both these internal political divisions, as well as the overall economic, military, political, and religious situation throughout 17th century Europe that created the divisions of society, of which the *liberum veto* was but one manifestation and reflection, rather than a determinate cause.

A Republic of Three Nations: The Failed Unia Hadziacka (1658-1667)

The final crisis of mid-17th century Polish-Lithuanian constitutionalism was similar to the decline of religious toleration and the abrogation of the Konfederacja Warszawska in that it concerned the nature of the Ruthenians within the Commonwealth as a whole. As we have noted throughout, the 17th century witnessed something of an awakening among the "Ruthenians" with the Zaporizhian Cossacks under Khmelnytsky started several revolts, claiming particularly over the rights of the Eastern Orthodox Church, *inter alia*. Similarly, important statesmen families hailed from the lands that were part of the Crown or what are now considered to be Ukraine, such as the Wiśniowiecki family were half-Ruthenian, half-Moldavian who converted to Catholicism and were Polonized.[1073] Thus, to a very large degree it was the periphery of the Commonwealth—the frontier, so to speak—rather than the splendid palace at Wawel or the hallowed halls in Gniezno where the destiny of the nation was being decided.

The Ruthenian situation proved to be something of a Gordian knot. The ever-present weight of geographical concerns—Muscovy to the East and the Ottoman Turks to the

[1071] Dankowski, *Liberum Veto*, pg. 79; McKenna, *The Curious Evolution of the* Liberum Veto, pg. 94.
[1072] Frost, *After the Deluge*, pg. 14.
[1073] Davies, *God's Playground*, pg. 355.

Southeast—meant that the powerful armies of the Cossacks were necessary for the security of the Commonwealth. However, the unruly Cossacks knew that in many ways the Commonwealth needed them more than they needed her—at least in the short term—and many of them extracted a steep price for siding with the Roman Catholic Waza kings and their predominantly Catholic subjects against Muscovites. The political wounds from the unsuccessful Union of Brześć and the unclear legal status of the "disuniates' certainly weighed heavily.

Over time, it was recognized that a more permanent solution could be possible. The concept of *Gene Ruthenus, nations Polonus* (Ruthenia by birth, Polish by nationality) as well as the support for the Union of Brześć by significant members of Ruthenian *magnaci* and the upper echelons of the Easter Orthodox Church evidenced the "*szlachtization*" of the Ruthenian lands. As the tide turned against Sweden, Poland-Lithuania was able to reconcentrate her efforts at dealing with the Russians and the Cossacks. There were cracks in the Muscovite-Cossack alliance wherein it became increasingly clear that Muscovites wanted to use the Cossack host to gain territory.[1074] In 1657 Khmelnytsky died and wished for six sixteen-year-old son to succeed him as Hetman, which enraged the Muscovites who wanted a say in the election. The leaders of the Cossacks ignored his request and instead elected Iwan Wyhowski as Hetman, who wanted to reconcile with the Rzeczpospolita. This angered some of the pro-Muscovite Cossacks, with Wyhowski putting down a rebellion. Now—more than ever—reconciliation with the Commonwealth was necessary for him and likeminded Cossacks.

A group of Commonwealth and Cossack representatives under Wyhowski formed what they referred to as the *Komissya* (the commission), which proposed renewing the relationship between the Commonwealth and the Ruthenian lands. Less than two years after Khmelnytsky's death, Wyhowski signed the Ugoda Hadziacka on September 16th, 1658 in Hadziacz, backed by Eastern Orthodox nobles and Cossack senior officers who embraced *szlachta* ideals in exchange for ennoblement and full participation in political and civic life of the Commonwealth.[1075] This established the Ugoda Hadziacka (Union of Hadziacka), Tables 4.8 and 4.9 summarize the constitutional archetypes introduced by the new Ugoda Hadziacka, which established the "Commonwealth of Three Nations" or the Polish-Lithuanian-Ruthenian Union.[1076] A brief discussion will follow.

[1074] Stone, *The Polish-Lithuanian State*, pgs. 165-166, 170-172.
[1075] Stone, *The Polish-Lithuanian State*, pgs. 170-171.
[1076] For what is arguably the most thorough exploration of the Ugoda Hadziacka, see: Janusz Kaczmarczyk. 2007. *Rzeczpospolita Trojga Narodów: Mit czy Rzeczywistość. Ugoda Hadziacka – Teoria i Praktyka*. Księgarnia Akademicka: Kraków.

Table 4.8 Enumeration of Constitutional Archetypes in the Ugoda Hadziacka[1077]

Text	Outcome(s)	Constitutional Archetype(s)	Constitutional Archetype-as-Such
The ancient Greek religion, one with which ancient Ruthenia joined the Polish Crown, so that retained its prerogatives and a free use of religious practice, […] both in the Polish Crown and in the Grand Duchy of Lithuania, as well as in the Seymy, in the army, in the courts, not only in churches, but also during public processions, […] and in all other practices, such as religious services libere et publice [publically and freely] the ritus romanus [the Roman rite] is to be applied.	Eastern Orthodox Religion Granted Full Status in the Crown and Lithuania, Equal to Roman Catholicism	N/A	N/A
And the Union, which had brought confusion to the Commonwealth, is hereby dissolved in the Grand Duchy of Lithuania so that whoever wishes could return to the Greek or to the Roman rite. On the other hand, both lay and hereditary lords, as well as officials of His Majesty of the Roman religion, shall have no jurisdiction over the clergy, over the laymen or the monks of the Greek religion, except the duly appointed priest.	The Union of Brześć Dissolved	N/A	N/A
In the Kiev, Bratslav, and Czernihów provinces, senatorial seats are to assigned only to noblemen *ritus graeci* [of the Greek rite greckiego], *capacibus* [appropriate], *natis et bene possessionatis* [with a birthplace and large property] in those *provinces,salvo iure* of the current owners. Meanwhile, as regards the hetman'position, the first senator in the three provinces is to be the Hetman of the Ruthenian Army	Senat Seats[1078] are Required Residents of this Region and Required to be of the Orthodox Faith	Representation, Participation, and Citizenship	Ontology
	Senatorial Post of Hetman for the Ruthenian Army is Established	Representation, Participation, and Citizenship	Ontology

[1077] *The Treaty of Hadiach (1658).* Quoted from: Piotr Borek, ed. 2008. *W kręga Hadziacza AD. 1658 od Historii do Literatury.* Collegium Columbinum: Kraków. Translator Uspecified. The Polish History Museum, Warszawa: The Legal Path of Polish Freedom. [Accessed 6 August 2022] https://polishfreedom.pl/en/treaty-of-hadiach/

and the entire Kiev jurisdiction is to be placed at his disposal.			
His Majesty and the Crown Estates permit to erect an Academy in Kiev, which is to enjoy [gaudere]the same prerogatives as the Cracow Academy, on one condition: that no cults be admitted to the Academy, namely: Aryans, Calvinists, Lutherans, neither professors nor students. Therefore, in order to prevent any occasion for quarrel between the students and the pupils, all other schools that previously existed in Kiev, His Royal Highness shall order to move elsewhere.	Protestants and Radical Dissenters Banned from a Royal Academy to be Established in Kiev	Representation, Participation, and Citizenship	Ontology
Amnesty granted to all of the members of the "Zaporizhian Army"		N/A	N/A

The first selection of text from the Ugoda Hadziacka is relatively straightforward in that it addresses the most obvious questions: the ending of the war as well as the question of the Eastern Orthodox Church. The Union of Brześć—long hated by traditional Eastern Orthodox and Cossacks was dissolved and members of the Eastern Orthodox church were not barred from holding public office throughout the Commonwealth. This essentially effectively removed the status of "dissenter" from the "disuniates." In fact, it created the exact opposite situation, in that it called for the establishment of a new, royal academy in Kyiv, which would be closed to Protestants and Dissenters. Though whether or not Catholic students or professors were admitted is not explicitly mentioned but seems implied given that it was the *de facto* dominant religion of the king. The Ugoda Hadziacka, in effect, elevated the Eastern Orthodox religion to be on par within the Catholic one "both in the Polish Crown and in the Grand Duchy of Lithuania, as well as in the Seymy, in the army, in the courts, not only in churches, but also during public processions, […] and in all other practices." This was not religious toleration *per se* bur rather a rebalancing of the power of religious institutions, in that it acknowledged a standardized hierarchy. In other words, the emphasis was on the rights of the Eastern Orthodox church, rather than the rights of the *szlachta* to be members of the Eastern Orthodox Church.

Table 4.9 Enumeration of Constitutional Archetypes in the Ugoda Hadziacka, Part Two

Text		Outcome	Constitutional Archetype(s)
The Zaporizhian Army is fixed at 60,000 persons and entirely ruled by the Hetman of Ruthenia.		N/A	N/A
Also individually, in order to further encourage service for His Majesty, whoever is presented to His Majesty by the Hetman of the Ruthenian Army, worthy of noble status, shall with no impediment be nobilitated and granted all freedoms of the nobility without any hindrance.	Members of Ruthenian Army to be Ennobled	Individual Rights	Ontology
For a better confirmation of this pact, and for surety, the Hetman of the Ruthenian Army ad *extrema vitae suae tempora* [until the last of his days] shall be Hetman of the Ruthenian Army and the first senator in the following provinces: Kiev, Bratslav, Chernihiv pro hac vice [in that order] and post facta [after death], the hetman shall be elected freely, that is four candidates shall be elected by the Estates in the provinces: Kiev, Bratslav, Chernihiv, from which His Majesty shall confer.[1079]	Hetmans Hold Office for Life, Serve as Senators, and are Elected Locally but Approved by the King	Horizontal Organization of Institutions	
		Hierarchical Organization of Institutions	
Hetman and the Zaporizhian Army, now and later, having abandoned all foreign protection, shall not bind himself with them. And shall remain for ever subjects and in obedience to the Highest Majesty of the Polish Kingdom and its successor, as well as to the entire Commonwealth.	The Hetman and the Zaporizhian Army Obedient to the King of the Commonwealth		
And to adjudicate in certain matters, both criminal and common, the three provinces are to have a separate Trybunał, constituted in a manner of their own choosing.	Establishment of Local Trybunałs	Horizontal Organization of Institutions	

[1079] Here the author and Marek Tracz-Tryniecki contend that there has been a slight mistranslation in the original text the original is that there has been an error in the translation of the original text from Polish into English. The phrase "jego ma być wolne obieranie hetmana, to jest czterech elektów obiorą status [stany prawne] województw" has been translated incorrectly as: "he hetman shall be elected freely, that is four electors shall elect status [legal estates] in the provinces" rather than "the hetman shall be elected freely, that is four electors candidates shall be elected by the Estates status [legal estates] in the provinces," which we have supplied. This original translation suggests that electors should elect the legal estates, when in reality the legal estates [the local *szlachta*] would elect candidates, with the king ultimately choosing one from among them. This revised translation is logically more consistent with the political system of the Commonwealth, wherein after the success of the executionist movement local seymiki won the right to elect candidates for local administrative positions, one of whom would be ultimately chosen by the king.

<table>
<tr><td rowspan="4">And for better certainty, since the Hetman and the Zaporizhian Army and all the other the severed provinces refuse protection, and freely as free men to free men, equals to equals and honorable to honorable are hereby reinstated. Thus in order to keep this decision with greater certainty, it is hereby permitted that this Ruthenian Nation by His Majesty the King and the Commonwealth shall have separate chancelors of seal, marszałki, treasurers cum dignitate senatoria [with senatorial dignity] and other offices of the Ruthenian nation, who according to the formula of the oath Crown officials should swear an oath, that they sign no document against this present decision, and shall keep it so, so that nothing adverse toward this decision by constitution or by Seym decree or any other rescripta [ordinances], universals or privileges is effected.[1080]</td><td>The Ruthenians shall have their own seals as well as administration officers parallel to in Poland and Lithuania</td><td colspan="2">Separation of King from the State</td></tr>
<tr><td rowspan="3">Ruthenian officials agreed to follow konstytucje and decrees of the Seym</td><td>Sources of Law</td><td rowspan="3">Ontology</td></tr>
<tr><td>Consent and Legitimacy</td></tr>
<tr><td>Hierarchical Organization of Institutions</td></tr>
<tr><td>And so that the commission enjoy eternal gravity and stature, as it sounds from the beginning to end, it should be incorporated into the common law, that is secured by the constitution, approved by the Seym and regarded as permanent and inalienable law.</td><td>Integration of Laws</td><td>Sources of Law</td></tr>
<tr><td>And the Hetman of the Ruthenian Army shall be exempted from the obligation to reside with His Majesty the King.</td><td>The Hetman over all of Ruthenia Exempted from Residing with the King</td><td>Establishment of the Office of Hetman</td><td>Ontology</td></tr>
</table>

[1080] The author and Marek Tracz-Tryniecki have again altered translations from the original text for clarity and accuracy.

The second selection adds more substantive details and clarifies the role of the army as a means for the ennoblement of the Cossacks into members of the *szlachta*, something that was long consistent with the *szlachta* belief in citizens as soldiers and direct from their own evolution from the knighthood during the Piast, Angevin, and Jagiellonian dynasties. The limitation of the "Zaporizhian army" thus has political as well as military dimensions in that the Commonwealth was constantly afraid that the warlike Cossacks—should their army ever get too large—would stir up trouble, either against the Commonwealth, the Ottomans, or Muscovy. This was not without precedent, given that the Cossacks raided the Crimean Tartars with regular frequency over the years, which often dragged the Commonwealth into disputes with the Ottomans.[1081] On the other hand, participation in the army was the mechanism for higher ranking officers to receive ennoblement and enter into the *szlachta*, thus limiting the overall army of the new Ruthenian territory would reduce the numbers eligible to become ennobled.

Kyiv, Bratslaw, and Chernihiv would have the right to freely elect four candidates for Hetman, with the king choosing one of them. However, the position of the first Hetman (Whyovski) was for life. Each of the three aforementioned provinces would also have a separate Trybunał, but that the local administrations throughout Ruthenia would promise to abide by the present laws and the *konstytucje* passed at the Seym.. In some sense, this elevated the Hetman of Ruthenia above the *magnaci* of the Grand Duchy as well as the Polish Crown since he was not an advisor to the king but something of a *de facto* ruler of Ukraine [1082]as a whole.

The very need for a permanent Commission seems to anecdotally suggest that the new union was still fraught with problems and highly unstable. Exactly six months after the Ugoda Hadziacka was signed, it was taken up by the Seym starting March 17th, 1659. Many of the same problems of the Union of Brześć resurfaced, with many *szlachta* displeased that rule of Ukrainian lands should pass to the Cossacks instead of to the *szlachta*, and many Catholic clergy were angered that Eastern Orthodox clergy would get seats at the Senat. Much of the Eastern Orthodox laity, peasantry, and weaker *szlachta* within Ukraine also did not like the return of Polish-Lithuanian rule after they had revolted so many times. Many within Ukraine preferred Muscovite rulers, who at least shared their Eastern Orthodox religion, and pro-Muscovite Cossacks joined up with a powerful Muscovite army to invade Ukraine.[1083]

Unfortunately, the Commonwealth of Three Nations never truly came into existence, as the Poles-Lithuanians were either unable or unwilling to help assist Wyhowski when another civil war broke out amongst the Cossacks, largely precipitated by those sympathizing with Muscovy. Wyhowski was quickly overthrown and lived out the few remaining years of his life in exile in Poland-Lithuania. Within five years he would be dead, and the Cossacks would effectively lose their independence and would be fought over by the Commonwealth, Muscovy, and the Ottoman Turks for hundreds of years. Unlike the Rokosz

[1081] Stone, *The Polish-Lithuanian State*, pgs.146, 161; Davies, *God's Playground*, *passim*.
[1082] At this time, "Ukraine" refers to the combined sum of the Ruthenian provinces of Kiev, Bratslav, and Czernihov.
[1083] Stone, *ibid.*, pgs. 169-173.

Zebrzydowskiego, the uprisings of Khmelnytsky and the attempts to repair them by Wyhowski did not have a positive effect on repairing the institutions of the Commonwealth and checking the power of the king—albeit a great cost. Rather, they destabilized the Commonwealth and effectively transformed the Eastern Orthodox Ruthenians and Cossacks from second class citizens in Poland-Lithuania to serfs enthralled to Muscovy.[1084]

Nevertheless, the Ugoda Hadziacka is critically important to the biography of Polish-Lithuanian constitutionalism. It first and foremost presents a strong counter narrative to the historiosophical pessimism that generally plagues studies of the Commonwealth and its history: the overemphasis on the supposed selfishness, self-interestedness, and the overall willingness of the *szlachta* to watch the Rzeczpospolita fall apart, so long as their personal freedom and lands were secure. It is not the failure of the Ugoda Hadziacka that is important so much as trying to understand the constitutional, political, and religious questions that it asked as it attempted to repair the nation and its institutions: we must not simply observe the failure of institutions and then shrug and sigh, but rather we must contextualize them, that is to say, to understand *what, how,* and by *whom* such repairs were made and correspondingly whether they succeeded completely or partially failed partially or whether they merely failed utterly.

The Ugoda Hadziacka represents just such an unfulfilled opportunity to right the ship, a "missed" constitutional moment. The Commission ennobled mainly Eastern Orthodox Cossacks into *szlachcice* themselves. While this technically was also a violation of the Konfederacja Warszawska in that it simply replaces the Uniate Church with the Eastern Orthodox Church rather than simply secularizing the state outright, to the author it appears to be that it was the only realistic political solution to the Cossack question. At the same time, that the Estates would continue to elect their own grand Hetman as a *de facto* ruler over Ukraine would also be unique, and suggests that rather than Poland-Lithuania-Ruthenia being equal parts of the same whole, there would be significant tensions to work out between the Commonwealth and Ruthenia on how institutions, the law, and political power would be

[1084] Davies does not mince words in his stinging critique of Khmelnytsky: "Chmielnicki's reputation largely derives from the scale of these catastrophes, rather than from any practical achievement. He is claimed by a number of competing interests. In Ukrainian history, as 'Khmel'nyts'kyy', he appears as a pioneer of national liberation. In Soviet Russia, as 'Khmyel'nitskiy', he is remembered as a Moses who led his people's exodus from Polish bondage towards the great Russian homeland. In the Valhalla of Marxist and sociological heroes, he is presented as a champion of social conscience and protest. He was none of these things. He was a deserter from the army of the Republic where he had obtained the rank of *pisarz* or 'scribe', and the son of an officer who had fought at Chocim in 1621. He harboured a deep, personal, and understandable grudge against Jarema Wisniowiecki, whose men had assaulted his property; and he gravitated to the *Sich* as the natural haven for all such fugitives and malcontents. Then, having failed to obtain redress by his initial resort to force, he had no alternative but to fight to the end. Otherwise, he would have been hanged as a traitor. The sparks of his resistance fired a conflagration whose spread he could not possibly have foreseen. Soon, in the Ukraine, his Cossacks would be fighting for their own survival against their Muscovite protectors. In 1657, by the Treaty of Hadziacz, their leaders sought to reincorporate the Ukraine into the Republic as an autonomous duchy. But it was too late. Their rebellion had so encumbered the Republic with other, more pressing problems, that it was unable to help. The Cossack horse, having thrown its Polish rider, was now to be bridled by a far more demanding master," *God's Playground*, pg. 353.

precisely divided. Ultimately, it is impossible to possible to definitively say *what would* have happened, though it opens a door for future speculative and comparative work.

Finally, the recognition of the Eastern Orthodox Church would have also been a further bulwark against absolutism, by breathing new life into institutional and political opposition to the Catholic Church, which had weakened as Protestantism had weakened and as the majority Protestant Ducal Prussia gained more autonomy in the aftermath of the Swedish Deluge. In other words, just as Protestantism in the Commonwealth was declining at a time when Catholic Counter-Reformation was spreading throughout Europe, the Eastern Orthodox Church would yet again be in ascendance in the Commonwealth. Whether this would have ultimately prevented the Commonwealth from more entanglement in religious conflicts prevalent across Europe at the time or presented more opportunities *to become* entangled in said conflicts is an open question. However, it seems reasonable—at a minimum—to suspect that a strong Eastern Orthodox Church and the ever-looming threat of Muscovy would have certainly weakened absolutist reforms within the Commonwealth.

V. Political and Legal Thought During the 17th Century: Defending Freedom or Nationalist Megalomania[1085]

Background: the 17th Century as a Lost Age in European Political and Legal Thought

To better understand 17th century Polish-Lithuanian constitutionalism, it is necessary to again include a variety of broader, sociological, ideological, or anthropological approaches to law, going beyond what may be thought of as a purely textualist understanding of constitutionalism. Whereas the 16th century is relatively well-known within Polish-Lithuanian thought because of the important milestones of multiple interregna, the first election, the Konfederacja Warszawska, and finally the Henrician Articles, the 17th century is relatively less known, aside from pervasive pessimism due to the Deluge and the advent of *liberum veto*. This is despite the abundance of critical events occurring on the European scene at the time, which provoked strong reactions within the Polish-Lithuanian political community, namely the powerful imperial Muscovy and Habsburg Austria. While there were some kindred spirits in distant England and the Netherlands, there was also great fear of the Cromwellian Revolution.[1086] It cannot be doubted that this was a period when the republican form of government fell into decline.

The malaise of republicanism was something concretely addressed by Montesquieu, who diagnosed two general, mutually reinforcing issues: the disruption of the delicate balance between institutions as the nobles gained in strength, transitioning aristocracy to oligarchy, as well as the elites' declining public morals. These processes fed off each other, leading to more and more corruption as power concentrated into fewer and fewer hands while destabilizing the state. As the core of every republic was virtue—the love of the public good

[1085] The term was originally coined by Bystroń. See: Jan Stanisław Bystroń. 1935. *Megalomanja narodowa*. Towarzystwo Wydawnicze "Rój": Warszawa. See also: Zbigniew Ogonowski. 1979. *Filozofia i myśl społeczna XVII wieku*. Państwowe Wydawnictwo Naukowe, pg. 32.

[1086] Jerzy Michałski. "Z problematyki republikanskiego nurtu w polskiej reformatorskiej myśli politycznej w XVIII wieku." *Kwartalnik Historyczny.* 1983, s. 327 – 337.

over the self—this effectively spelled the death of the republic. Due to the sensitivity of the balance of internal political power, once it was broken the constitutional system could not easily correct itself.

> The misfortune of a republic is, when intrigues are at an end; which happens when the people are gained by bribery and corruption: in this case they grow indifferent to public affairs, and avarice becomes their predominant passion. Unconcerned about the government and every thing belonging to it, they quietly wait for their hire […]
>
> In a republic, the sudden rise of a private citizen to exorbitant power produces monarchy, or something more than monarchy. In the latter, the laws have provided for, or in some measure adapted themselves to the constitution; and the principle of government checks the monarch: but, in a republic, where a private citizen has obtained an exorbitant power, the abuse of this power is much greater, because the laws foresaw it not, and consequently made no provision against it.[1087]

The Seventeenth century throughout exhibited a tendency toward political centralization and declining of individual freedom, either outright absolutism or toward oligarchizing of republics. Places where absolutism was staved off—such as Cromwellian England after the reign of Charles I—came at a high price of civil war or oligarchy.[1088] While Poland-Lithuania followed this same general trend, ending the 17th century in a series of devasting, pyrrhic civil wars, there was a concerted effort by many Polish-Lithuanian intellectuals and within public discourse to prevent the same fate for the Commonwealth. Indeed, there were explicit parallels drawn between the precarious final years of the Roman Republic and the situation of republics in general throughout Europe. For example, Polish-Lithuanian's were greatly afraid of a Cromwellian type situation arising within the Commonwealth[1089] and lamented Czech and Hungarian lands falling to the Habsburgs. Subsequently, Polish-Lithuanian politics was practical, not merely trying to copy the ancient model of the republic but to actively promote it in their current age.[1090]

[1087] Montesquieu, *Spirit of the Laws*, p. 56, 57.
[1088] Trevor-Roper, *The Crisis of the Seventeenth Century*, *passim*.
[1089] Por. W Czapliński, *Dwa sejmy roku 1652*. Zakład im Ossolińskich: Wrocław, pg. 84.
[1090] "Thus, the fundamental conceptual effort of the 17th-century Polish political reflection was by no means limited to formulating a new vision of a political community or radically reconstructing it, but determining how this Aristotlean community should respond to new, practical political challenges, and especially to the more and more frequent and more numerous wars with neighboring powers, Cossack revolts, rebels taking the form of civil wars or the progressive processes of oligarchizing social life. This reflection based the political community on classical republican axiology and often referred to the categories used by eulogists of the Roman republic, i.e. to Polybius, and above all Cicero. It perceived the challenges themselves through the prism of the degeneration of the republic, as commented on by Roman historians who observed the retreat from the values, virtues, and republican institutions of the principate era, primarily active participants or keen observers of public life who were looking for specific political solutions. In 17th-century political discourse, the issues of reflecting on foreign affairs, above all political practice, occupy a prominent place. Naturally, its attention was drawn to the monarch's absolutism. It was so because contemporary doctrinal liberalism was at best in *statu nascendi* [in the state of being born], formulated its essential theses only at the very end of the seventeenth century in distant England, and most importantly - it would not be able to create systemic institutions or shape political practices that could already be considered as clearly liberal. On the other hand, absolutism was the most real system that dominated in Western Europe. In the Polish political discourse, it was most often perceived in classical, ancient republican categories, also coming from Roman historians focusing on the politics of the principate period. For

As with the previous chapter, to understand constitutionalism it is useful to examine the public discourse at the time in order to illustrate some of the more substantive issues in the manner in which Poles-Lithuanians would have understood them. Kamiński has notably described the emergence of three broad paradigms within 17th century thought: republicanism, monarchism, and constitutionalism. The first were those supporters who generally favored the *szlachta* increasing their political power and was associated with the seymiki and the Izba Poselska. The monarchists favored strengthening the power of the king. The constitutionalists rejected both absolutism as well as the rule of the entire *szlachta*, and favored the Senat as their main institution. However, they also favored strengthening the power of the government, but combined with improving the operation of the state, being especially concerned with military reform and tax policy. They also defended the law and civil rights. Though the Rokosz Zebrzydowskiego had some radical anti-monarchists within it, in general the first half of the 17th century was a victory for the constitutionalists, with the idea of a mixed government becoming the most prominent.[1091] In many ways, the constitutionalists were a direct successor to the executionist movement. Here, the republican, anti-monarchic point of view will be represented by Kasper Siemek,[1092] whereas the monarchical party will be represented by Łukasz Opaliński and the constitutionalist party by Andrzej Maksymilian Fredro.[1093] Each of their ideas will be reviewed in turn, though it is important to recognize that these are not necessarily fixed categories, nor are they mutually exclusive. It may be that the distinctions of "republican," "monarchist", and "constitutionalist" may not even be the best descriptor of their supposed representatives at all. That the relative authors are representatives of their relative fields is also therefore necessary. Finally, we shall move on to the work of Samuel Przypkowski, a radical theologian and important social critic of the era, whose works cross-cuts many of the political and social movements throughout the Commonwealth, even some of it carrying forward to today.

Polish authors, what happened in the France of Louis XIV or, especially, under the Habsburg rule in the Czech Republic and Hungary, was a deadly threat to the republican ethos, which was the essence of the Commonwealth's identity. The lack of freedom of speech eliminated public debate. The rulership of the monarch, who refused to listen to the voice of his subjects, led them to the most shameful condition in which they had to be guided by someone else's and not their own will. The impeachment of public institutions precluded, in turn, their effective participation in public life," Zbigniew Rau. 2018. "Przemowa." In: Kasper Siemek, *Civis Bonus* / *Dobry Obywatel*, tł. Józefa Macjona, Wstępem i przypisama opatrzyli przez Ilona Balcerczyk i Paweł Sydor. Narodowe Centrum Kultury: Warszawa, pgs.13-14.

[1091] Andrzej Sulima Kamiński. 2000. *Historia Rzeczypospolitej wielu narodów: 1505-1795: obywatele, ich państwa, społeczeństwo, kultura.* Instytut Europy Środkowo Wschodniej: Lublin, pgs. 84, 88-89, 92-93; Andrzej Sulima Kamiński. 1983. "The Szlachta of the Polish Lithuanian Commonwealth and Their Government." In: Ivo Banac and Paul Bushkovitch, eds. *The Nobility in Russia and Eastern Europe*: Yale University Press, pgs. 19-23.

[1092] That Siemek was a "republican" with "anti-senatorial" views is the designation given by Friedrich. We shall evaluate whether or not this claim holds up to scrutiny, though in fairness to Friedrich, her writing was before the recent works on Siemek had been translated and published. See: Friedrich, Karin. 2007. "Poland-Lithuania." In: Howell A. Lloyd, Glenn Burgess, and Simon Hodgson, eds, *European Political Thought, 1450-1700: Religion, Law and Philosophy.* Yale University Press: New Haven and London, pgs. 227-228.

[1093] Kamiński, *ibid*, pg. 91.

Kasper Siemek (?-1642)

Kasper Siemek was a lesser-known 17th century Polish political thinker whose works *Civis Bonus* (1632)[1094] and *Lacon* (1635)[1095] have been recently translated and published as part of the series the Biblioteka Staropolskiej Myśli Politycznej (The Library of Old Polish Political Thought). Born to a *szlachta* family in Małopolska, he studied at the Akademia Krakowska before studying in Bologna in 1620. Both *Civis Bonus* and *Lacon* cover a critical period in Polish-Lithuanian constitutional thought: the end of Zygmunt III Vasa's turbulent reign and the beginning of his successor's reign, Władysław IV Waza. As Paweł Sydor writes in his introduction to *Lacon*, though Władysław IV Waza had not been elected *vivente rege*, it was more or less accepted that he would be the successor to Zygmunt III Waza. The tension between the theory of an elected king and the real world practice of a ruling dynasty—ever-present throughout the political lifespan of the Commonwealth—seemed to be of particular concern for Siemek, who clearly identified himself as a "republican", or at least believing that the republican approach to politics was the best.[1096] The two books are complementary to each other, with *Civis Bonus* concerned with the nature of the good citizen, whilst *Lacon* concerns itself with the proper exercise of power. Accordingly, he presents the importance of unity of disposition (which he refers to as *animus*) as a prerequisite for good citizenship. Critically, Siemek notes that an enemy is not necessarily one who is external to a country, but one who can lie within its walls: the only criteria for citizens to become "enemies" is that they seek to defend the freedom of others.

> Nevertheless, one should also look at the disposition (*animus*) in the citizens, which in particular - and also by deeds - differ from their enemies, not nature or place at all. Thanks to nature, they sometimes agree with their enemies - even if someone has learned the greatest secrets of nature - because the essence of humanity is common to all people. Often, by chance and unfriendly fate, our enemies were with us, not even separated by walls. Uniformity of disposition in promoting what is beneficial to the freedom of citizens, is that which no one can renounce unless he renounces the state. Therefore, just as enemies cannot be our fellow citizens by disposition, so also fellow citizens by disposition can be enemies if they do not feel what all good people feel and have departed from fellowship with their fellow citizens in defense or promotion of freedom.[1097]

This understanding of citizenship as the defense and the promotion of other citizens' freedom clearly puts Siemek within the republican tradition, though with a strong, moralizing tone: there cannot be good citizens or bad citizens, only good citizens and their enemies. He further illustrates his concept of the good citizen by presenting a dialogue between one Zbigniew Oleśnicki and king Kazimierz IV Jagiellończyk:

> And our Zbigniew Oleśnicki, a good citizen who opposed King Kazimierz, quite brazenly heading towards autocratic rule, discouraged him from such unlawful autocracy. To him the

[1094] Siemek, Kasper. 2018. *Civis Bonus* / *Dobry Obywatel*, trans by Józefa Macjona. Introduction and footnotes by Ilona Balcerczyk i Paweł Sydor. Narodowe Centrum Kultury: Warszawa.
[1095] Siemek, Kasper. 2021. *Lacon*/*Lakon* trans and footnotes by Józefa Macjona. Introduction by Paweł Sydor. Narodowe Centrum Kultury: Warszawa.
[1096] Paweł Sydor. 2021. "Wstęp." In: K. Siemek, *Lacon/Lakon*. Introduction by Paweł Sydor. Narodowe Centrum Kultury: Warszawa, pg. 31.
[1097] Siemek, *Civis Bonus*, pg. 101.

> king said too proudly, "I am the king," and he replied, "But not the emperor, do not command like the emperor, when you are allowed to reign as king." And of these good citizens, they are chosen as the Senate from those who appear to be the best, and they were as far from greed and fear as possible. For the Senate is nothing other than the differentiation of the best citizens. In the free republic, its seriousness is the highest. And although each senator is inferior individually to the king, nevertheless the Senat is not of lesser solemnity (*autoritas*) than the ruler and on the ability to demand from the rulers reports of what they have done. For he could not give more authority (*potestas)* than he himself possesses. Indeed, what he gives, such he possesses. And greater may he have than he would give. Indeed, to give greater than he would have is utterly contrary to reason. Therefore, in free republics a king cannot be bad; good — I will say, of course, if the senate is good. For it constitutes the Republic of Poland. The Republic of Poland has as much happiness and fame as the Senate of virtue and courage. Some fame, some public calamity may come from rulers.[1098]

Zbigniew Oleśnicki was a renowned archbishop of Gniezno and primate of Poland, who was known to butt heads with Kazimierz IV Jagiellończyk due to him harboring ambitions to strengthen the power of the throne, but had to confirm and even strengthen the *szlachta* privileges granted by his father, Jagiełło II Władysław.[1099] Though Jan II Kazimierz was only three years into his reign, it seems that his absolutist tendencies had already become clear to Siemek, and Oleśnicki's warning within *Civis Bonus* would not have been lost on the king. Oleśnicki's distinguishment between a king— who is *allowed* to rule by the *szlachta*—and an emperor who *merely* rules, naturally leads to the discussion between *authority* vs *power*. Tyrants are served by slaves, but a Republic can only be served by free men.[1100] Each senator has the authority to demand things from the king, with the collective Senat his equal, though neither the king nor the Senat are allowed to demand more power than that which they naturally have within the Commonwealth. Though what this means precisely is unclear, he caveats that the Senat is to a large degree a reflection of as well as synonymous with the Commonwealth itself: if the senators have the good of the Republic in mind—that is, the Republic is "free"—then having a king can never be bad as the Senat will always check him. Siemek then differentiates legal obligations versus those that are for the good of the public, which we might call moral obligations or civic duties. Under the latter, individuals' small sacrifices yield great benefit for the public good and are a measure of true devotion to the Commonwealth.[1101]

However, in addition to the moral necessity of public service, there are more pragmatic dimensions to Siemek's defense of public obligation. The first is that public service is an opportunity for moral training, that it converts those who would otherwise be idle or pursue less reputable ends have a chance to engage in public life for the common good. The second argument is that when the wisest and most talented statesmen share their advice with the group, the group is then able to produce ideas beyond the wisdom of even the most talented of individuals or small groups of said individuals. This is an argument for

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[1098] Siemek, *Civis Bonus,* pg. 129.
[1099] Stone, *The Polish-Lithuanian State, passim.*
[1100] *Ibid*., pg. 231.
[1101] "According to the law, as it were, some duties are imposed on citizens, while others are not imposed according to the law, but are such as to give greater importance because they cause a greater amount of toil in public affairs; the more devoted one is to the republic, the more willingly he undertakes them," Siemek, *Civis Bonus*., pgs. 135, 137.

the proverbial "wisdom of the crowd".[1102] The two dimensions combine in Siemek's analysis of the current state of the *szlachta,* who collectively failed to live up to the virtues of their ancestors. The only way to activate this lost sense of *szlachta* virtue was to create a real sense of collective ownership of it. If the *szlachta* felt the Republic was theirs, then they would actively defend it.

> For there is no democratic state and a commonwealth of stupid commoners, as some people think absurdly, but the Commonwealth of those who, coming from ancestors enjoying recognition and good fame, received their inheritance virtues. There are those who squandered their parents' heritage, and these have become poor. Why do not those who despise the virtue of their ancestors lose their nobility, or is it so unfortunate a virtue that wealth will by no means survive without money, and nobility without virtue endures?[1103]

> Nobody defends someone else as seriously as everyone defends his own. Let every *szlachta* be a soldier, every soldier a *szlachta* e. [1104]

Importantly, Siemek is skeptical of the *szlachta* simply inheriting their wealth and status, without contributing to it or without the potential to lose it. The szlachta exist to serve the Commonwealth, not the other way around.[1105] Though he does not propose any mechanisms to effectively redistribute the *szlachta*'s wealth and power—or make any definitive statements about creating new *szlachta*—he shifts the discussion away from the mere perseverance of the *szlachta*'s rights *per se* toward the question of how to activate the citizenship in the defense of law, which he argues should be guarded very carefully and interpreted very narrowly.[1106] For Siemek, the law cannot exist by itself, and indeed the greater problem is not the creation of the law, but to ensure that it is properly enforced:

> There are two ways by which the perpetuity of any republic can be ensured. One is by carrying out and enacting good laws, aimed primarily at the common good. The other is to display the qualities of a great spirit along with the unprecedented hope of wisdom and prudence that will support the republic, or to improve laws that serve liberty so that it is not snatched away; one is quite safe, but more certain.[1107]

[1102] "Let everyone do his duty; if the complexities of things cannot be met. Not everyone is given the ability to quickly invent ways to maintain things, to remove difficulties, to conquer cities, to destroy enemies. However, there are people in such a crowd who must be forced into assemblies, lest for the pleasure of despicable idleness they deprive the homeland of its support, if by chance it were enough for someone to be a citizen and not strive hard to be a good citizen. Many follow their idle nature, but in this matter nature must be overcome, so that we, crushed by nature, do not perish along with the republic. Therefore, advice should be taken from the ablest and wisest, and let the crowd decide on the advice presented, a crowd that penetrates the thing more easily than the few," Siemek, *Civis Bonus*., pg. 137.
[1103] *Ibid*., pg. 147.
[1104] *Ibid*., pgs. 163, 165.
[1105] *Ibid*., pg. 167.
[1106] "One should not listen to one who advocates deviating from the law, the laws should be sacredly guarded; great adultery and a corrupt spirit is hidden in one who would think it possible, even in a small matter, to violate the laws that concern public liberty, for after all, from small things great things grow […] To change customs into laws is a good thing, dangerous laws into safer ones is a necessary thing; to deviate from laws and to manage affairs without laws is a dangerous change," *ibid*., pgs. 195, 273.
[1107] *Ibid*., pgs. 193, 195.

> Let everyone do his duty; if he cannot cope with the complexities of things. Not everyone is given the ability to quickly think up ways to keep things, remove difficulties, conquer cities, destroy enemies. However, there are people in such a crowd who must be forced into sejmiki, so that for the pleasure of vile idleness they do not deprive their homeland of their support, if by chance someone would be satisfied with being a citizen and would not try hard to be a good citizen. Many follow their idle nature, but in this matter it is necessary to overcome nature, lest we, oppressed by nature, perish with the republic. Therefore, advice should be taken from the most gifted and wisest, and the crowd should decide about the advice presented, a crowd that penetrates the depths more easily than a few.[1108]

Siemek's *Lacon* is an attempt to answer many of the questions raised in *Civis Bonus*, which he attempts to address in a deeper way consistent with a specifically republican vision of politics, with Siemek directly relating 17th century Poland-Lithuania with ancient Greece and Rome. The proper governance of the Republic is apparently not obvious, hence he uses the term "arcanus" (mystery) as the subtitle of the book: *Lacon seu de reipublicae recte instituendae arcanis dialogus* .These deeper mysteries are revealed through a dialogue between Augustus and Lacon, where "Augustus" is still young and at the beginning of his reign, seeking to rebuild and reunite a nation that had been torn asunder by civil wars whereas "Lacon" represents a Spartan. The person of Augustus represents the point of view of the state, public order, or authority, whereas the person of Lacon represents a free individual concerned with his rights.[1109]

While *Civis Bonus* generally concluded with reflections on the limitations of relying on the law alone, it had also raised the broad questions of the role of the citizen, the role of the senators and the Senat, and the issue of how to ensure that the laws are properly implemented. *Lacon* expanded on these themes by addressing the deeper questions of institutions and the nature of power. He begins by reinforcing the important role held by the Senat, which should have the greatest political power:

> Only the Senat makes the Republic of Poland exist: the more vigilantly it should be elected, the more expensive freedom is, and nothing more important. Freedom is above all else, the rest below her, including life. And since the highest authority belongs to the Senat, it should be decided by the people to choose it. This is what I called the one of a kind and the Rzeczpospolita's greatest secret.[1110]

However, he immediately warns against having an excess of political power, by noting that each citizen should share in ruling over part of their local territory, and that no one person should rule more than one area. The reasoning was straightforward: some citizens are "honor-hungry" and more interested in themselves than the good of the Republic. If special favors are given to some, including giving extra territories or positions, then all of the citizens are not equally invested in the well-being of the common good. This violation of "excess" is clearly aligned with classical republican moderation.

[1108] Siemek, *Civis Bonus*, pg. 273.

[1109] *Ibid.*, pg. 111; for an alternative, partial translation, see: "Lakończyk, Czyli Rozmowa O Tajemnicach Należytego Urządzenia Państwa", in: Zbigniew Ogonowski. 1979. *Filozofia i myśl społeczna XVII wieku.* Państwowe Wydawnictwo Naukowe: Warszawa, pgs. 166-167.

[1110] Siemek, *ibid*., pg. 129.

> Lacon: Don't be excessively benevolent to one person. If you do so, you establish and inequality and you prepare the mighty, for you unbelievers, to oppress the citizens. Take the hope of honor-hungry citizens, deprive the lawlessness of your successors, and you will do the great Poland and freedom as a blessing and defense.
>
> Augustus: What do you mean by "excessively" mean?
>
> Lacon: The Commonwealth is divided into parts, territories, districts and the like. Let no one be so nice to you that you give him more than one. Do not give two territories or lands to anyone. If you observe this, you will make your citizens proud and brave, and the Republic of Poland will be free and happy, you will strain the virtue of its citizens, and you will remove your resentments and hostility from yourself when there is an opportunity to reward the worthy.[1111]

Later in the book, Siemek gives the notion that the Rzeczpospolita is divided into "parts" a more naturalistic feel when he compares it to a body, and to statesman as doctors.[1112] This makes Siemek's ideas perfectly consistent with the *szlachta* privileges established within the 15th century as well as the executionists in the 16th: what is in need of repair or rebalancing is the management of the public and the institutions of the Republic, rather than radical changes to the Republic itself.

Lacon is not a purely descriptive work, however, and Siemek does address some practical constitutional questions, namely the principle of election as well as the differentiation between (inequality of) wealth and power. Given that Siemek was writing so recently into the reign of Władysław IV and that he had been wary of the blurring of the principles of election with the reality of the Waza family ruling in practice, it seems appropriate to begin with his discussion of election. Lacon argues that the fundamental weakness of electing a king is that it introduced a market for political power, with each of the political parties serving as merchants using the Republic for their own gain, rather than for the common good. Augustus then suggests that the Republic should be the heritage of one family. Lacon, however, argues that the rulers' children should only be "heirs of virtue", not heirs to the Republic itself. The king serves as "the head of the Senat", while the Senat is to be "the will that is free", and if the king is personally privately obligated to a select few who voted for him, he cannot exercise judgement on behalf of all. Lacon suggests that one can only have election or birth, but not both: the first reduced personal ambition, whilst the latter introduces uncertainty and makes the king less agreeable. The best form of an election is by random lot, which gives "no opportunity for wickedness and ambition".[1113]

This dialogue between Lacon and Augustus is significant in that Siemek is confronting the difficult, practical dilemma that would persist throughout the Commonwealth until its very end. Though he suggests that election by lot would be best, he is too practical to ever believe that it would work in practice and is fine to leave it to the discussion of principles. However, it is worth noting that Siemek seems to at least entertain the notion that a king is not necessary, at least in a hereditary understanding of it. Instead, what is necessary is an elected official to conduct the Senat, which, we must remember, is itself a representation

[1111] Siemek, *Lacon*, pgs. 157, 159.
[1112] *Ibid*., pg. 247.
[1113]. *Ibid*, pg. 127.

of the *szlachta* (the citizenry), in essence as a microcosm for the entire Republic. Furthermore, it is necessary to ensure that this individual is not beholden to a select few, private interests that ensured his election to the throne.

Later in the book, Siemek concerns himself with the explicit problem of balancing economic and political power. More precisely, he is worried that economic power may translate into political power, and vice versa. Inequality of wealth is dangerous because it allows for richer persons to form a political party of those persons who are less wealthy and therefore dependent on them. He also addresses the problem wherein individuals' votes may be bought, which would serve the direct personal interest of the parties immediately involved in the political-to-economic transaction but would undermine the public good as a whole. This is something that historians have noted was a real problem in the Commonwealth, in that while every member of the *szlachta* was eligible to vote for the election of the king or to vote in the local seymik, the seymik voted *szlachcice* to certain offices in the local administration or the king could appoint *szlachcice* to others. The distribution and control of offices often reflected vast disparities between economic and political power, with *magnaci* and various political factions occasionally resorting to buying votes from poorer *szlachta*. The result was that there was often a wide disparity between *de jure* equality before the law as well as political representation and *de facto* exercise of political power. Lacon directly alludes to this problem in the Commonwealth, wherein economic inequality may spill over into the political arena and disturb public life:

> Lacon: The first beginnings of wealth inequality that have long been motives for evil and wicked pride. They weigh on everything and do many things in public affairs by attracting poorer people to the party, whose zeal they abuse: what is more, votes bought or donated are not for the public good, they are seized for themselves. However, wealth itself will not matter that much, when power comes in it will be strong; it is by its nature strong and become more powerful with more wealth. And it is this inequality that stimulates, however slightly, and it is bearable; the corrupt should be somewhat indulged: excessive public authority makes them worse and makes them proud. They will think you are afraid of them because you supported them; for it is a common disadvantage to hate and serve the powerful, but futile hatred of servants, because they experience the contempt and rule of Lords and disgracefully endure for the sake of hypocritical grace, having put up their nobility for sale. These laws have no strong power, due to terrible plots in the Republic, and according to his mind, so many and such slaves.
>
> Augustus: Not so fast, the hurrying itself gets in the way. Recall which reason you gave first.
>
> Lacon: Inequality, the origin of which was power and excessive wealth. I put equality higher, which is nothing but a good union; and inequality, it's a great sort of intemperance, in vividness, horrible and distinct. Indeed, the members juicier than the rest are rotting, while the rest of the emaciated ones are weakening. The cause of hatred and envy are blessings inflicted on the few, hence the misunderstandings and disputes between citizens, which, for any reason, turn into brawls. Always hated power, if it is also harmful, becomes further powerful and damaging. Since you are not measured in dividing, you will either have rivalry among equals or ignite their hatred against each other. The Republic should be adorned with talents and virtues, stimulating them and making sure that the pride of power does not suppress them, but let them grow and practice virtue, otherwise you will reduce the necessary means of defense; and virtue unpaid will take away from the rest a certain hope of rewards and make them lazy.

> Augustus: Therefore, great men should be kept from the Republic?
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> Lacon: Not at all. You should be aware of the difference between the great and the mighty. The great are called so due to virtue, the mighty due to wealth.[1114]

The difficulty is not in the existence of inequality of wealth itself, with moderate amounts of inequality of wealth healthy to a society. The problem is when inequality turns into a mechanism of power, and when power itself is held as a virtue, in other words when power itself becomes greatness. When this occurs, laws no longer have any binding power themselves. While these natural forms of inequality cannot be truly prevented, they can be exacerbated by the king distributing these resources unequally, which either creates rivalry or self-loathing. Instead, what is needed is a culture of civic virtue that determines greatness from moral living, rather than a system that simply rewards the powerful with more power. He remarks that it is power that "abolishes and mutilates the law"[1115] and grimly concludes that "There is no freedom if the Republic is subject to power: and when nothing is due to talent, fate rules everything, just like wealth,"[1116]

While Siemek does not give concrete examples for reform, he does give some practical advice with how to deal with the problem. He notes that the powerful always hate each other, and that the more of the powerful there are in society, the more they effectively check each other's ambitions.[1117] Aristocracy only devolves into oligarchy as their numbers decline, with "the tyranny of the might few" worse than "tyranny of one". However, tyranny is "always restless and never safe" and in this sense is ultimately unstable. Siemek seems to suggest that tyranny can be improved or even overcome by those with wealth and high office practicing modesty in their private lives.[1118] Augustus suggests that the process of oligarchy will not ultimately self-correct—that it will not "ultimately collapse under its own excessive weight"—but has to be rooted out by the rule of one. Lacon concedes that the rule of one may be necessary in the short-term, but removing freedom will encourage those who want to avenge her. [1119] Instead, he proposes meritocracy, with the king setting up a good example, and conscious efforts to return to the "old Republic"[1120] but he also gives the practical advice of senators and other officials being paid by the state treasury rather than the personal monies of the king, which would naturally curb favoritism and excess.[1121]

Siemek presents several other "*arcana*" with some practical dimension, even if their implementation is not particularly clear. Lacon observes that: "The strength of Aristocracy lies in the abundance of the *szlachta*; if you do not have a powerful and numerous *szlachta* in the Rzeczpospolita, you will die amongst the multitude of enemies that you have. This is

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[1114] Siemek, *Lacon*, pgs. 159, 161.
[1115] *Ibid*, pg. 165.
[1116] *Ibid*., pg. 171.
[1117] "There is no doubt that the powerful cannot live without hypocrisy and mutual hatred, or without a civil war when there are two of them. The more of them there are, the less danger to the state but more private harm. Hence the *szlachta* is torn and restless, and are hostile to the present state if they are inferior to the Lords, because they are unequal," *Ibid.*, pgs. 185, 187.
[1118] *Ibid*., pgs. 205, 207.
[1119] *Ibid*., pg. 211.
[1120] *Ibid*., pg. 213.
[1121] *Ibid*., pg. 221.

also one of the arcana,"[1122] i.e., that the abundance of the *szlachta* itself—already unique to Polish-Lithuanian society—was already a form of inculcation against oligarchy. Secondly, when Augustus complains that the introduction of foreigners leads to the gradual weakening of national customs, Lacon counters that if the ills of the Republic are its moral and political culture, than foreigners really have no impact on this one way or another, and instead new blood offers a chance to remember the past and rediscover what was good about society.[1123] Thus, the relative openness of the Commonwealth's culture is in fact one of its strengths in that it translates into a high potential for the renewal and repair of institutions if the *szlachta* stagnate. Finally, Lacon sounds the alarm concerning the danger that the *magnaci* pose to the Republic, which only increases distrust among the citizens as well as increases the potential for rebellion.[1124]

Though Siemek does not provide extensive policy suggestions or concrete plans for correcting the ills of society, he importantly drew attention to the realities of the economic situation at the time, which only increased social and political fragility. This is somewhat unique, in that he was not purely interested in polemics or generally calls to improve public education or morality, but of a deeper diagnosis of what was ailing society in a material way. His pragmatic approach cannot be denied, in that he did not assume that simply having "correct" laws would somehow fix the Republic on their own accord, and indeed not only called for a careful and narrow interpretation of laws, but also wanted the laws to be embedded in a series of institutions that promoted the public welfare, rather than merely reflected the status quo. At a time of rising tension between the *szlachta* and the king, he encouraged and outlined how to properly manage relations at court, and sought to clarify the precise role of the king as the head of the Senat, rather than as leader of the country *per se*. In this, Siemek was clearly "republican" but we must be careful not to overstate the radicalness of his ideas, which in many ways were continuations of the executionists and other reformist movements in the 16th century. Similarly, at a time of rising tensions between the Commonwealth and its neighbors, he recognized the potential for foreign groups to revitalize institutions and political life within the Commonwealth.

While Siemek may not have had any direct impact on the development of 17th century Polish-Lithuanian constitutionalism *per se*, he does reinforce our conceptual understanding of several problematics within it, while illuminating others. Firstly, he was not so interested in law *per se*, but rather the embeddedness of law within its sociopolitical context. This clearly revives ontological themes such as what is the nature of "republicanism" and what are the precise balance of institutions within it. Secondly, Siemek further evidences a shift away from praxis to poesis that is thematic of the period of constitutional maintenance: the question is no longer what is law or what *should* law do, but rather concerns over whether it is possible for law to be carried out properly, given threats of economic power and poor public morals devolving the Republic's aristocracy into oligarchy or tyranny. What he specifically illuminates is increasing concern with the economic well-being of the society, and that while wealth is not *malum in se*, if there are weak institutions to constrain it it has the danger to disbalance delicate equilibrium necessary for a mixed government to

[1122] Siemek, *Lacon*, pg. 323.
[1123] *Ibid*, pgs. 327, 329.
[1124] *Ibid*., pg. 337.

successfully function. In this sense, he is a successor to the executionists, particularly Modrzewski, who was very concerned with the economic inequality of the serfs and the need for the state to provide compensating mechanisms such as general welfare to rebalance the political and economic spheres. Finally, the dialogue between Lakon and Augustus demonstrates that there was still an argument to be made about toleration toward foreigners and ethnic minorities, rather than concern over one "national" culture or set of institutions. It is worth remarking that while the 17th century was a period of religious conflict across Europe and that the Waza dynasty of "Swedish" kings and their foreign retainers had not been particularly well-received by the *szlachta*—for perfectly understandable reasons—they had not completely embraced xenophobia.

Łukasz Opaliński (1612-1666)

In many ways, Łukasz Opaliński is the perfect foil to Kasper Siemek. Whilst Siemek was born to a relatively poor *szlachta* family in Małopolska, Opaliński was born to one of the most powerful *magnat* families in Wielkopolska,[1125] and while Siemek's works have generally been lost to history, Opaliński is one of the best-known political writers of the 17th century. Along with his older brother Krzysztof Opaliński (1609-1655), he supported the election of Władysław IV and Jan II Kazimierz. However, his brother became a fierce opponent of Jan II Kazimierz's reign,[1126] even switching to the Swedish side during the deluge, betraying the Republic, while Łukasz Opaliński remained a strong advocate of the king, fleeing with him into Silesia and joining him on his eventual triumphant return. After Khmelnytsky's rebellion, his support for Jan II Kazimierz only increased, continuing throughout his life.[1127]

Łukasz Opaliński has generally been regarded as part of the monarchist faction, though recent work by Dankowski suggests that he was more of a political maverick [1128] and Pryshlak contends that he should be thought of as a constitutionalist.[1129] One of Pryshlak's main critiques of the standard historiography is that it assumes that the king was the one most interested in reforms, and since Opaliński was deeply concerned with reforms, he must therefore be a monarchist.[1130] Even if it is true that there were other avenues of reform other than those proposed by Jan II Kazimierz, this does not discount Opaliński's strong personal support for the king and especially his support for *vivente rege* elections of Henri Jules, Prince of Condé and duc d'Enghie.[1131] Furthermore, we must remember that a "monarchist" within the Polish-Lithuanian Commonwealth was quite unique, in that it was nearly

[1125] Maria O. Pryshlak. 2000. *Państwo w filozofii politycznej Łukasza Opalińskiego*. Towarzystwo Wydawnicze „Historia Iagellonica" z siedzibą w Instytucie Historii UJ": Kraków., pgs. 47-49.
[1126]Andrzej Korytko. 2012. "Kilka uwag o radach senatu za Władysława IV Wazy." *Echa Przeszłości* 13, pg. 103.
[1127] Łukasz Opaliński. 1921. *Defensa Polonia.* Kazimierz Tyszkowski, trans. Książnica Polska T-wa Nauczycieli Szkół Wyższych: Lwów, Warszawa, pgs. vii-viii.
[1128] Michał Zbigniew Dankowski. 2014. "Czy Łukasz Opaliński młodszy był regalistą? Filozofia ustroju państwa i postawa wobec liberum veto marszałka nadwornego koronnego." *Studia z Dziejów Państwa i Prawa* XVII(1): 37-47.
[1129] Pryshlak, *ibid.*, *passim*.
[1130] *Ibid*., pg. 17.
[1131] Opaliński, *ibid*, pgs. xix-xx.

universally accepted as a mixed system with a strong role played by the king. It was not a Filmerian sense of unchecked, absolutist power,[1132] but of a king with a very strong—even unlimited power—within very specific constitutional constraints. A "monarchist" in Poland-Lithuania might advocate for a stronger role for the king, perhaps the king having the strongest role within the constitutional system, but not absolute power in some objective sense. There is also the very specific questions of the mid-17th century context, wherein the only organized efforts at reform were by the monarchist party, unlike the 16th century where the executionist movement had united the *szlachta*.

Fortunately, Przyshlak and Grzeszczuk[1133] have done extensive work to highlight the specific context of the 17th century. During the first half of the 17th century, both Zygmunt III and Władysław IV did their best to influence the commission that was supposed to edit and publish the final versions of the *konstytucje*, with the king having the final decision on which members of the Seym joined the committee. Individual senators could also be very influential in shaping local seymiki, which often received proposals for legislation introduced by the king, which the senators would try to convince the seymiki to take up. The senators also played a strong role in conducting local parliamentary debate at the seymiki, wherein local representatives could introduce their own legal petitions or requests, with both the requests from the king and local legislation then being introduced into the Izba Poselska at the Seym. Thus, the senators' influence at the beginning and ending of the parliamentary process was quite significant.[1134] This made up for the fact that the Senat itself did not have legislative initiative while the Seym was in session. As such, though technically the *magnaci* and powerful families sat in the Senat with persons of a more modest background—who were all technically equal before the law and in terms of political voting rights—in actuality the senators and *magnaci* had the larger share of political power. Over time the *magnat* families between increasingly intertwined with the institution of the Senat.[1135]

The Henrician Articles stipulated that the Izba Poselska was supposed to meet for a period of six weeks once every two years, but Seymy could also be called whenever there was a crisis or current event that demanded an immediate reaction. Thus, the Seym met more frequently in practice than the statutory minimum, and over the period from 1573 to 1696 the Seym actually met an average of once every year.[1136] However, despite the Seym meeting relatively frequency, it was not a permanent body and the membership of the Izba Poselska had to be elected from the seymiki anew each time. However, the Senat—in the form of one royal advisory council or another—was the only permanent body, though it had no parliamentary power on its own, though it did allow for the king and his closest supporters to organize themselves much more efficiently than the general mass of the *szlachta*. Many *szlachta* respected the Senat as an institution that was supposed to be the most noble guardian

[1132] Tomasz Tulejski. 2018. *Od Hookera do Benthama: Eseje z angielskiej myśli ustrojowej.* Wydawnictwo Uniwersytetu Łódźkiego: Łódź, pgs. 181-190.
[1133] Stanisław Grzeszczuk. 1960. "Ideologia i źródła sejmowe "Rozmowy Plebana z Ziemianinem" Łukasza Opalińskiego." *Pamiętnik Literacki: czasopismo kwartalne poświęcone historii i krytyce literatury polskiej* 51(4): 287-325.
[1134] Korytko, *Na których opiera się Rzeczpospolita,* pgs. 291-293, 311-321, 324
[1135] Pryshlak, *Państwo w filozofii politycznej*, pgs. 28-30, 36.
[1136] Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pgs. 20-22.

of law[1137] with only the best interests of the Republic at heart, but in reality, the Senat usually did not check the king or his policies. Despite these, in the wake of the Rokosz Zebrzydowskiego the 17th century saw the general ascendance of the Izba Poselska as the dominant political branch, with its main threat often being internal divisions rather than disagreements with the king or the Senat. The ideological transformation of the Izba Poselska in light of the Rokosz Zebrzydowskiego was that it saw itself as the champion of *szlachta* rights, whereas the Senat was the guardian of the law. Given that the protection of the *szlachta*'s rights was effectively at the heart of the constitutional system and touched upon virtually every facet of it, this effectively granted the Izba Poselska unlimited scope of its powers, beginning with it being the source of introducing new laws.[1138]

The transformation of the Izba Poselska facilitated the emergence of the constitutionalist group between the "anarchic" mass of the *szlachta* and the more concentrated monarchist faction. In 1630 the Opaliński brothers returned from their studies abroad, with both brothers becoming politically active the following year, just in time for the end of Zygmunt III's reign. The republican faction in the Seym denied the king the money to support his war efforts, and after years of struggling over finances and foreign policy, the kingdom was in a series of financial crises. It was universally acknowledged that some form of reforms would be necessary. Given that the king was the one pushing for changes, with the republicans trying to prevent what they saw as absolutist tendencies, the king' camp became associated with new ideas and the republicans with conservative views.[1139] According to Pryshlak, given that Opaliński cites reform attempts in 1632 and 1639 in his own political writings—later published in the 1640s and afterward—as well as participated in some campaigns for parliamentary reform in 1639, we should interpret him as a constitutionalist who was stuck in the middle between the two more extreme political factions. [1140] The failures of these reform projects, particularly the Izba Poselska taking on more responsibilities and refusing to work on any compromises influenced his thinking, according to Pryshlak. His first commonly-known work, the 1641 *Rozmowa plebana z ziemianiem* (Dialogue between a Plebian and a Parson)[1141] would be shaped by these experiences.[1142]

Throughout Władysław IV's reign, the king's efforts to centralize power and the state to achieve his own goals undermined similar attempts by the constitutionalists to make centralizing reforms, because it increased the *szlachta*'s concern with the king's absolutist tendencies. In protestant, Łukasz Opaliński withdrew from court life to focus on managing his private estates as well as writing polemics attempting to convince the *szlachta* of the necessary reforms to be made. During this period, he produced his most important piece of writing, the 1648 *Polonia defensa contra Joannem Barclaium* (Defense of Poland Against

[1137] Przyshlak, *Państwo w filozofii politycznej*, pg. 39.
[1138] *Ibid*., pgs. 42-43.
[1139] *Ibid.*, pgs. 67-70.
[1140] *Ibid*., pgs. 72-75.
[1141] Łukasz Opaliński. 1938. *Pisma Polskie: Rozmowa Plebana z Ziemianiem Coś Nowego. Poeta Nowy*. Ludwik Kamykowski, trans. Wydawnictwo Kasym Im. Mianowskiego – Instytutu Popierania Nauki: Warszawa.
[1142] Pryshlak, *ibid.*, pgs. 76-79.

John Barclay), also known as the *Obrona Polski*. While the *Rozmowa* had been critical of the current political situation, the *Polonia defensa* defended the various strengths of Poland-Lithuania as a successful mixed state, with the tone shifting from realism and pragmatism to idealism and utopianism, with Zbigniew Ogonowski referring to as the "apotheosis of Polish freedom".[1143] 1648 was also a chaotic year with Khmelnytsky Uprising of the Cossacks followed by the sudden death of Władysław IV Waza and the unexpected interregnum. This uprising destabilized the Commonwealth, leading to intervention by Muscovy, Sweden, *inter alia*, over the next 15 years. Reluctantly, he returned to public life, where he supported the new king and the war effort.[1144]

Opaliński hoped that the wars and their aftermath would breathe new life into his attempts at reforms, which largely involved the weakening of the Izba Poselska. Jan II Kazimierz had other ideas, however, and attempted to pass through *vivente rege* elections. At first, Jan II Kazimierz was not so openly opposed to the *liberum veto*, if only because he thought that sufficient military reforms would increase his power to the point where he simply did not have to worry about it:

> The court intended to use two tactics in parallel: legal measures, that is, a parliamentary reform, and force, manifest in the army's support. The Queen presented to the French ambassador her plan for making use of the army, recalling the Roman emperors, who were elected and kept in power by the army, and the recent example of Cromwell's England. The adoption of a majority vote and the army's support were to break opposition in parliament. Faced with such prospects, the confirmed anti-regalists and the Austrophile clergy joined forces to thwart the court's plans. To confuse his opponents, the King [Jan Kazimierz] tried to convince them that a majority vote did not have to lead to the strengthening of his power. He asserted that he did not mind the *liberum veto*, for having the army on his side, he could rule at his will by breaking "disobedient" parliaments.[1145]

Unfortunately for Opaliński and other senators who actually wanted to strengthen the Senat and align it with the king against the *szlachta* to still preserve some semblance of a mixed government—albeit one decidedly closer to oligarchy than democracy—[1146] the king's own behavior undermined their efforts by uniting the opposition party. In many ways this was a missed opportunity for Jan II Kazimierz, who had built up good will after his victory in the wars against Sweden, Muscovy, and the Cossacks.

> [O]ne should not close one's eyes to the fact that the royal court did not manage to take advantage even of those extremely favourable opportunities which it had in the years 1654-1657 (the shock caused by defeats in war) and in 1659-1661 (the greatest opportunity for securing the cooperation of the army). This was due to the Vasa style of government through the intermediary of *magnaci* and to a grave tactical error. It was an error on the part of the court to link and try to force through such difficult, unpopular issues as a *vivente rege* election, the king's independence in parliament, the abolition of the *liberum veto* and the introduction of majority voting. These tactics, instead of dividing and weakening opposition forces,

[1143] Zbigniew Ogonowski. 1979. *Filozofia i myśl społeczna XVII wieku*. Państwowe Wydawnictwo Naukowe, pg. 14.
[1144] Pryshlak, *Państwo w filozofii politycznej*, pgs. 80-83.
[1145] Stefania Ochmann, "Plans for Parliamentary Reform," pgs. 176-177.
[1146] Pryshlak, *ibid*, pg. 107.

> favoured their unification into a cohesive, unified front. In such a situation it was difficult to achieve victory.[1147]

Grzeszczuk also points out how Opaliński's "monarchical" vision was not strictly in favor of strengthening the power of the king, but also elevating the Senat. However, Grzeszczuk points out that throughout the *Rozmowa* Opaliński's exact position is somewhat ambiguous. On the one hand, he wants the Senat to become more powerful, but on the other hand he wants the return of "the old system"—i.e. before the executionist movement, perhaps even before 1505—wherein senators served as advisors to the king and the Izba Poselska was solely where the *szlachta* could bring petitions or voice their concerns, but was a purely advisory body.[1148] Grzeszczuk posits that Opaliński's interest in shoring up the monarchy was a direct reaction to the situation that took place under Władysław IV, and is similar to other pro-monarchical strands of European thought in the 17th century.

> Opaliński's monarchical views, along with everything mentioned above, are an expression of the tendencies existing in Władysław IV's entourage to curb *szlachta* lawlessness and anarchy. Moreover, the critique of the Polish system in Opaliński's work is similar to the assessments in this matter that can be found in the works of Western European ideologues of monarchism. For example, irrespective of the most important critical observation of Polish devices, the absolutist Bodin could draw Opaliński's attention to the fact that free election does not benefit the *szlachta*, but *magnaci*, whose influence during the interregnum significantly increased.[1149]

If Grzeszczuk's interpretation holds true, then Opaliński was "constitutionalist" in the sense that reform was understood as concentration of political power and strengthening the Senat
relative to the Izba Poselska, but with the significant caveat that it would essentially disappear as a body with legislative power. He was clearly not "constitutionalist" in that he did not see the Senat as the institution that mediated between the mass of the *szlachta* and the king, but rather wanted the Senat to return to its earlier form as a body that advised the king and helped him govern. While the question of whether or not Opaliński was a "constitutionalist" or a "monarchist" is to a certain artificial and ahistoricist, it is useful conceptually as it traces a significant fault line within 17th century Polish-Lithuanian constitutionalism: whether power was to be concentrated in the king or the Senat, or whether it was better to leave the *liberum veto* and all the other decentralizing tendencies be. This distinction will serve as our interpretive key for reconstructing Opaliński's political thought in a way that is meaningful for constitutionalism.

[1147] Stefania Ochmann, "Plans for Parliamentary Reform", pgs. 186-187.

[1148] "Opaliński's recommendation that not only the king, but also the council 'next to him' should increase the scope of powers, points to a somewhat separate problem of Opaliński's political ideology. The priest and Opaliński did not only want to strengthen the royal power. They would have equally welcomed the rise of the Senat's authority, although they did not say it so clearly and unequivocally. Nevertheless, reading the correct intentions and political tendencies of the piece presents no difficulties.

"Calling for a return to the former system, where 'only the king and the Senat' decided the fate of the state, Opaliński repeatedly emphasized the harm suffered by senators from the unsatisfied privileges and power of deputies,"
Grzeszczuk, "Ideologia i źródła sejmowe," pg. 299.

[1149] *Ibid.*," pg. 300.

As noted earlier, Opaliński's first well-known work—the *Rozmowa*—is a dialogue between a landowner and a parson. What is unique about the *Rozmowa*, however, is that while the landowner's position is clearly closer to Opaliński's, the landowner effectively loses the debate. Grzeszczuk notes how this represented Opaliński's realistic understanding that even if he preferred a specific set of reforms in favor of strengthening the king, he recognized that this was impossible due to the current political climate of the nation.[1150] In this sense, its true meaning has been somewhat misunderstood by historians and political scientists: both the landowner and the parson are correct, in that Opaliński is trying to present both sides of the issue, rather than forwarding a concrete plan with which to improve the nation.[1151] Notably, the many struggles between the king and the Seym produced three broad principles: establishment of rigid rules of parliamentary procedure that tried to discipline the Seym, introducing majority rule and its extreme form in the *liberum veto*, and empowering the Seym over the seymiki, which centralized political power. Though the first principle was broadly accepted, the last two points were in contention between reformers and defenders of the *szlachta*'s golden liberty.[1152]

In the *Rozmowa*, Opaliński claims that the *szlachta*'s freedom is actually on the verge of collapse, just as it did in the times of ancient Rome:

> Parson: Verily, you guard it beautifully, Seymy thereby abolish, when ye agree on nothing in them. Apparently, no one recognizes this, that a swifter doom cannot be your Liberty, as the forfeiture (*iuris intercedendi*) [of the right to intervene] and the free vote. For the greatest forum is the Sejm, and only there do the words have a place: for us nothing without us, for when this one also passes to you through such discord, fear lest it come to you what has happened in the Roman State, where (*suspecto Senatus Populique imperio ob certamina potentium et avariatiam Magistratuum, bono Reipublicae interfuit omnem potestatem ad unum conferri*) [in the suspicion of the Senate and the government of the people, owing to the strife of the powerful and the avarice of the magistrates, it was for the good of the republic that all power should be vested in one.] And so, they write about our so far free Nation, as it is written about a free Rome.
>
> *For he who used to give*
> *The government, the bands, the legions, everything, now itself*
> *It contains and desires only two things more anxiously:*
> *Bread and circuses*
>
> And your famous Chamber of Deputies, which you now call *domicilium libertatis, legum officinam* [the home of liberty, the factory of laws] you call quite beautiful, glorious and almost unjust titles, or it will perish entirely, or if it changes, it will be like the one in which:
>
> Do not consult the sacred
> The seats were filled, but the power of the law was not close
> The praetor is present, and the corulers retire in an empty place,
> Everything was Caesar's [1153]

As Rome did, the only solution to preserve freedom is for the Izba Poselska—like the Roman Senate— to confer all powers upon one person. This was because the *szlachta* had

[1150] Grzeszczuk, "Ideologia i źródła sejmowe," pgs. 291, 302-303.
[1151] Ogonowski, *Filozofia i myśl społeczna XVII wieku*, pgs. 20-22.
[1152] Grzeszczuk, *ibid.*, pg. 307.
[1153] Opaliński, *Pisma Polskie*, pgs. 5-6.

followed the Romans and had only become interested in "bread and circuses" rather than true governance. According to the parson, this would be a restoration of the old ways, wherein: *Populus nullis legibus tenebatur, arbitria Principis pro legibus errant* (*The people were held by no laws; the awards of the prince were in accordance with the laws*.)[1154] It was only when the *szlachta* began to choose guardians of the law from amongst themselves—via the Senat—that their freedoms became threatened, especially by the *veto*, with the right "Nie pozwalam" (I do not allow) becoming something sacred.[1155] He noted that the representatives ceased to be a public council and instead took the power for themselves.[1156]

What is remarkable is that Opaliński wrote the *Rozmowa* in 1641, more than a decade *before* the infamous Seym of 1652 supposedly established the *liberum veto*, though he uses the specific terms "*veto* and "nie pozwalam" [I do not agree]. This gives more evidence to the hypothesis that the *liberum veto* emerged in the 1630s and was already recognized as something that was problematic to constitutional order. Opaliński immediately concerns himself with criticizing parliamentary procedure, specifically how the Izba Poselska—which he refers to as the Knighthood (stan Rycerski)—has taken all power from the Senat and the king.

> How well they succeeded, when it came to this, that the Knights' Estate [*szlachta*], although in last place, yet with power, with various privileged rights, I dare say, is the first in our Republic. For it [the Knights' Estate] has taken everything from the Senat, except that it sits highest by the King. The Knights' Estate writes laws and makes agreements, and only five days before the Conclusion (as I read in the fresh Constitution) comes to the King and the Senat. Where almost *in inverso ordine* [in reverse order] remain in truth to these two States the same *ius intercedendi*, [the right to intervene] however, they only talk about what the Izba Poselska reads to them. Which by the same law has nothing more to read but what it agrees and concludes in advance. And so the Knights Estate alone treats public affairs, and Senators with the King *in pulvere pingunt* [they paint with dust].[1157]

He is particularly bothered by the rule that the Izba Poselska discusses laws that are submitted, amends them, and then writes the *konstytucje* on its own until five days before the conclusion of the Seym, wherein the Senat, the Izba Poselska and the king come together again. This does not leave enough time for the king and the Senat to make their own changes to the law, and essentially leaves them with the choice of either purely accepting or rejecting the finished law, despite—according to Opaliński— both the Senat and the Izba Poselska are supposedly to be equal partners in the creation of law and to intercede, i.e. to have some veto power (zostawać w prawdzie tym obiema Stanom toż *ius intercendeni*). The prioritization of the Izba Poselska over the Senat and the king was against the natural order (*inverso ordine*). In the past, the king limited his own power, whilst the current period was evidenced by selfish

[1154] Opaliński, *Pisma Polskie*, pg. 10.
[1155] Grzeszczuk, "Ideologia i źródła sejmowe," pgs. 11-12.
[1156] Opaliński, *ibid.*, pg. 44.
[1157] *Loc. Cit.*

ambition and excess.[1158] Ultimately, the *szlachta* deputies were guilty of complete "ignorance of the Republic" (*inscitia Reipubl*).[1159]

Opaliński then focused his general critique toward the institution of *instygator*, which, as we recall, served as something of a prosecutor, but one with a broad range of duties, including ensuring that the king's appointed officials were properly "executing" the laws. Given that the *instygatory* elected by the local seymiki, they served as an effective check on the king's power. While Opaliński's critique of the *instygatory* is consistent with his overall theme of the need to further concentrate political power, he does recognize that the "the fear of accusation and punishment always keeps those in duty who cannot be stopped by conscience and Virtue."[1160] Recognizing the importance of fear as a tool for political order, he then makes several asides to Machiavellian thought on the proper governance of the state.[1161] Aside from Opaliński being well-versed in broader, contemporary European political discourse around Machiavelli[1162]—with Machiavelli being well-known in Poland-Lithuania[1163]—it also places Opaliński well within the conservative-pragmatic strain within Polish-Lithuanian political thought, which laments misuse and excess—but not necessarily the existence—of institutions or sociopolitical currents. For example, there are broad similarities between Orzechowski's critique of the executionist program and Opaliński's critique of the constitutionalist and republican reform movements of his own time: for Orzechowski improving the execution of the laws was not *malum in se*, but rather the excesses of the movement that served individual interests rather than the original corrections that had been intended; so too Opaliński argued that the *instygatory* had essentially become an extension of the *szlachta*'s concerns with individual freedom, rather than promoting good laws and institutions. It was fundamentally a critique of the *szlachta*'s freedoms, which had become essentially lawless once they became hereditary:

> No king has more than this; *tota enim vis imperii in consensus oboedientum est* [for the whole force of the government was obeyed by consent]. When no one wants to worship and obey, he who is born to the lordship will not be lord. Thus, if we are to read the failings of heredity herein, they that have the power freely in themselves and not defined by law, and wrongly so, because they do not defend the law well, and it is bad that everyone has the Virtue of to "not allow". Tyrants are not Kings, who by *magnitude Fortunae suae peccandi licentia metiuntur*. The good Lord, although *in absolute et despotico dominio* [by the magnitude of their Fortune they measure their license to sin], conscience should be a strict law that writes

[1158] "Swobod, na obronę praw zażywali. I było to chwalebne *temperamentum* władzej Królów, aby się nie unosieli swą potęgą w niesłuszne panowanie. Jednak jako kresu tej władzej nie uznąwacie i daleko jej inaczy nad pierwsze zażywacie ustanowienie, nie wiem, jeżeli to *praesidium libertatis* nie więcy szkodzi, niż pomaga! Nastąpiły albowiem malae artes: chciwość i ambicya i prywata, rady wszystkie mieszająca. Nuż upór nierozsądny, niedbalstwo o dobro R.P., niezgodne na koniec i niesforne animusze," Opaliński, *Pisma Polskie: Rozmowa Plebana z Ziemianiem*, pgs. 11-12.
[1159] *Ibid*., pg. 12.
[1160] *Ibid*., pgs. 20-21.
[1161] *Ibid*., pg. 25-26.
[1162] Anna Maciejewska. 2019. "Recepcja pism Niccolò Machiavellego w Rozmowie Plebana z Ziemianinem Łukasza Opalińskiego." *Meluzyna: dawna literatura i kultura* 10(1), *passim*.
[1163] Robert Frost. 2020. "Medicinal Herbs and Poison Plants: Reading Machiavelli in the Polish-Lithuanian Commonwealth, 1560-1700." In: Wacław Uruszczak, Zdzisław Noga, Michał Zwierzykowski, and Krzysztof Fokt, eds., *Unie Międzypaństwowe - Parlamentaryzm – Samorządność: Studia z dziejów ustroju Rzeczypospolitej Obojga Narodów*. Kancelaria Sejmu: Warszawa. 28-53.

and acts, and neither does the Free Subjects become a slave, nor sluggish servitude yield it freedom.[1164]

Opaliński then goes on to offer very specific critiques of parliamentary procedure, in which he draws extensively upon his own experience at the Seymy. His reasoning for these changes are relatively straightforward: at the moment when the Izba Poselska and the Senat divide, he did not trust that the Izba Poselska would work appropriately and that its procedures should be strict. Part of this problem was constitutional—that laws and customs are to vague to concretely outline parliamentary procedure. Secondly, the role of the Marszsałek is very weak and insufficient to organize parliamentary debate within the Izba Poselska: his only main authority is to try to shout down those who are violently debating with each other, and that he raises the questions that begin parliamentary debate but has little other direct role.[1165] Instead, Opaliński wants the Marszałek to have a much stronger, more organizing role in that he closely sticks with the *instrukcje* given by the king and the Senat, working through sentence by sentence until a contradiction is found. Only then should deliberations break out. However, much of these deliberations should also take place at the level of the seymiki before the Seym, so that the delegates are prepared. This does not only respect the principle of local sovereignty and the importance of local government but would also make parliamentary business much more efficient. [1166]

Noting that it should be agreed that it is easier to "warn the old law than to plot for the new, and to repair rather than build up",[1167] parliamentary business should begin with the discussion of *egzorbitancje* from a previous recess. Opaliński splits *egzorbitancje* into two broad categories: *Regis (royal) et civium (civil).* The former concerned the king and, naturally, were the purview of the Senat, whose purpose was to mediate between the king

[1164] Opaliński, *Pisma Polskie*, pg. 31.
[1165] "Having attended the Seymy several times and diligently listening to the consultations of the Izba Poselska, and now also asking about them, I recognize that two causes are the first and most important in reaching decisions. The first of which I will speak is that neither by law sufficiently described, nor by custom perfectly established order for consultations. Why am I not surprised. Because the knightly voice did not immediately come to the freedom that it now has, to the authority and to public councils, that they may have in it, for deputies did not have this presumption to rule in public councils with *tantum authoritatis* [so much authority], now wonder their consultations are out of order, which before this had been held in common with the Senat rather than have a separate *consessum* [meeting]. But now, when the parliamentary chamber [of deputies] splits off from the Senat, and first and only writes and arranges the laws, it is very important to have a certain order of treating such great matters, on which the whole of the Commonwealth and the security of the homeland are considered, the example of all free countries and nations that have never been without a certain order described for the celebration of the *comitiorum aut concionis* [election or sermon] […] You just don't have it with us, because it is a pleasure to choose a marszałek for the government, but no title serves him less so much as the one that sometimes gives him a message: *directiori*s [director]. For there is nothing with more authority than that that the voice of the voice cries out, Quiet! And he knocks with his staff. *Interim* [Meanwhile] everyone proposes what they want to, and all your advice begins as a simple matter: What to talk about first – and also how it ends. For, having departed far from the matter proposed by the marszałek, one reads from the instructive section and article, which he sołemni *verbo ante omnia* [with a single word before all things] was told to propose," *ibid.,*, pgs. 37-38; Łukasz Opaliński. *Rozmowa plebana z ziemianinem* (1641). In: Stefania Ochmann and Krystyn Matwikowski. 1981. *Historia Polski nowożytnej: wybór tekstów źródłowych*. Uniwersytet Wrocławski: Wrocław, pgs. 254-255.
[1166] Opaliński, *Rozmowa plebana z ziemianinem*, pg. 255.
[1167] Opaliński, *Pisma Polskie*, pg. 256.

and his subjects. The second category was more difficult to handle because the person who transgressed the law also has the right to protections of the law.[1168]

Opaliński is not explicitly concerned with *egzorbitancje*, but instead sees it as something that has to be taken care of in order to move on with parliamentary business, in that they are part of the repair of laws that necessarily proceeds the introduction of new laws or other reforms. After the first phase of parliamentary business is finished, then it is possible to move on to *konstytucje* such as the creation of ordinances of provincial acquisitions (*ordynacyje nabytach prowincyji*), treaties with other nations, establishing of public mints, military policy, and miscellaneous other affairs of the state as needed. Normally these more practical, "unpleasant" matters were reserved for the end, with the hope that successes in the earlier phases would increase cooperation in the second. To Opaliński this was too disorganized, and instead specific days should be set aside to discuss certain materials, perhaps with one day having the reading and discussion of proposals and the debate on a second date. Opaliński diagnoses the naivety of this approach on relying on good will rather than more strict parliamentary organization: if there was disagreement and bitterness in the first period, then it will carry over into the second period in two senses. First, the bitter debate may simply prolong so that the second situation simply does not have enough time. Second, that the bitterness of issues in the first period would ruin the mood of cooperation in the subsequent period.[1169] Opaliński concludes that strict parliamentary order with reading the *instrukcje* beforehand and then organizing the debate in a more formal way with specific amounts of time or days given to certain topics would actually preserve the independence and self-government of the *szlachta* and the seymiki because it would remove the temptation—and sometimes the need—for the king or his agents to interfere in the public councils. One way to insure this is to strengthen the position of the Marszałek, which is consistent with his overall approach of political concentration as the solution: the needed to be strengthened most of all, then the Senat needed to be strengthened vis-à-vis the Izba Poselska, and the position of Marszałek as leader of the Izba Poselska needed to be strengthened.[1170]

Opaliński returns to many of these themes in his second commonly known work, the *Polonia Defensa*. Whereas the *Rozmowa* had been more pragmatic and was concerned with examining constitutional, parliamentary, and political questions within the Rzeczpospolita in a nuanced, balanced way, the *Polonia Defensa* was much more polemical in nature. In it he reverses many of the claims he made in the *Rozmowa*, in that he praises the freedom and the state of Poland-Lithuania, rather than criticizing its excesses.[1171] He begins the work with an argument that because Poland was similar to other "civilized" parts of the world in terms of climate, culture, history, etc. then it had also developed similar institutions to them,[1172] which

[1168] Łukasz Opaliński. 1938. *Pisma Polskie: Rozmowa Plebana z Ziemianiem Coś Nowego. Poeta Nowy. Ludwik Kamykowski, trans. Wydawnictwo Kasym Im. Mianowskiego – Instytutu Popierania Nauki: Warszawa.*, pgs. 42-43.
[1169] Opaliński, *Rozmowa plebana z ziemianinem*, pgs. 257-259.
[1170] *Ibid*., pgs. 258-259.
[1171] Opaliński, *Polonia Defensa*, pgs. xxviii-xxix.
[1172] *Ibid.*, pg. 32.

is perhaps one of the earliest arguments against the ”backwardness” of Eastern European civilization, in which he balances comparativist and contextualist approaches.

> I have already said that our climate is identical to that of the most cultured peoples. And it affects not so much human character as herbs, grains or vegetables.
>
> Wherever you live in the world, you are always just as distant from heaven, and if you remember that you come from heaven and if you intend to return to it, you will easily admit that no one can influence "what heaven will you live under." I see no other reason but inexperience, because of which he persuades us that my life is hard. Because always being rash in judgments, he follows his natural tendency. In the farthest north I live, because our land is barren, overgrown with forests, and corrupted swamps, and to such a country he adjusts the qualities of its inhabitants, and makes them conform to the conditions of his own country, which the Poles became famous for. And I boldly say this not only to repel slander, but also to achieve fame: there can be nothing more beneficial to us than to get to know us better. It would turn out that we live in all nobility, not immersed in soft sybaritism, although comfortably and abundantly. We are not inferior to other peoples; indeed, we see many shortcomings in them.[1173]

He then goes on to defend the Republican system, that even though the *szlachta* inhabit the countryside rather than large cities, their political life is still rich. The *szlachta* participate in both the local seymiki wherein their youth are trained in love of their nation as well as practical affairs of governance. [1174] The *szlachta* also had a duty to participate in local courts, equal in importance to participating in the assemblies. In a direct reversal of his critique of the *instygatory*, he defends that they are vitally important to the health of the nation, given that the king is too concerned with matters of state and must therefore rely on local regions appointing their own officials to represent their interests. The *instygatory* were prevented from using their position to gain excess power by a very limited term of one year to which it was not possible to be re-elected.[1175]

Opaliński goes on to defend Polish-Lithuanian love of freedom as entirely good and natural, which produced a society that was essentially peaceful. That most of the laws concerned crimes of abusing office or of threatening the king rather than more serious and violent such as murder, rape, or theft was proof enough of the inherently peaceful state of the Rzeczpospolita. Individuals served their obligations out of a feeling of devotion and would fight back if the rights to hold office had been curtailed.[1176] This naturally led to discussion

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[1173] Opaliński, *Polonia Defensa*, pgs. 32-33.

[1174] “However, lest I seem to disapprove of foreign customs and deliberately ignore my own, I will explain briefly the way we live. First of all, the Polish *szlachta* do not live in cities, they leave it to merchants and craftsmen. Everyone lives in the countryside in their paternal estates, which is a great protection, as we shall see, of virtue and goodness. Although we are sitting in the countryside, life does not pass by in idleness, we deal with the affairs of the Commonwealth or household chores. The first activity is noble, even great, the second is serious, not guilty but kind. When it comes to public affairs, we go to regional councils with the right to vote and even to oppose. There is a wide field for generosity, gaining fame, proving love for the homeland and working for the good of the whole. For there we guard the rights, there we judge everything, we protest, we do not allow, there we deal with a strange moderation, between respect for authority and paternal freedom, over the good of the homeland. There, first of all, we perfect our system, and we manage it; In this way the noble youth acquire experience and wisdom to use them someday for the good of the Commonwealth with great fame of ability, reason and pronunciation,” *ibid.*, pg. 39.

[1175] *Ibid*., pgs. 39-40.

[1176] *Ibid.*, pg. 260.

of royal power, where Opaliński gives a very different version of it through the law, and that the personage of the king exists to serve the people.

As Opaliński himself makes clear, this is specifically an Aristotelian notion, in that it allows for moderation: limiting the power of the king actually increased its stability and its duration. The king—as God's representative on earth—had a duty to execute justice and promote the good, and the fulfillment of said obligations was the source of his rule: that God's rulership is demarcated by justice and goodness, so too should be the rule of a man. Evil is that which seeks to become a law for itself, thus a king should be spared from such temptation by following laws that are not of his own making, but established by the people he is to rule.[1177] Opaliński takes great pride in the fact that a revolution against the king was not necessary, with there only being one armed rebellion in Polish history, which remained a series of riots rather than a full civil war, unlike the wars that Barclay had himself engaged in. This presented a conception of monarchy very unique to Poland-Lithuania: that even Opaliński as an admitted monarchist recognizes that the king was a member of the citizenry. That the *szlachta* essentially saw the king as one of their peers is what ultimately protected the personage of the king and gave durability to the king's reign.

> I envy my homeland the fact that so far it has had such rulers who believed that they were not above the laws, but above them, and understood that this did not detract from their majesty, but were never forced by arms or violence to keep the laws [...] We are not, therefore, opponents of the monarchy -monarchomachs, who were fought against by Barclay's father in a letter overly concerned about the fate of kings. Yes, how far we are monarchists is tainted by the saying of one of our kings, who boasted that without fear of any ambush he could safely and freely sleep among his subjects, which is his sole glory, unusual for strangers. And you will not find elsewhere greater and surer proofs of the public's benevolence toward rulers. Why greater than the one I will give? After all, with us there are no nations at all where there is the royal power of a permanent dynasty, as with others, and we do not have to look for kings within it, nor do we have to be content with a necessary, as it were, heir - we, I repeat, can choose a king from among all.[1178]

What are we to make of Opaliński's seeming conversion to undaunted republicanism late in life? Indeed, we must be careful not to overestimate it from a work that is specifically polemical from the details of his actual politics in supporting the king and royal reforms throughout his life. The *Polonia Defensa* is unquestionably romantic in its defense, in that it significantly downplays the Rokosz Zebrzydowskiego[1179] as a series of riots or protests instead of months of *rokosz* followed by an actual battle fought at Guzów, that did not escalate into a full civil war. He also specifically mentions himself as a monarchist, though

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[1177] "On the other hand, human nature, because it is corrupt and inclined to evil, should not strive for a law that has its source in its own will, but should adopt a law written and established by someone else who cares not to be mistaken - and this law should be adhered to. Hence, the laws become, as it were, the guard of the authorities, and these laws should be subject to regulations," Opaliński, *Polonia Defensa*, pgs. 57-58.

[1178] *Ibid*.,pgs. 62-63.

[1179] In the *Polonia Defensa*, Opaliński mentions that there had only been one uprising, which he does not name specifically, despite the fact that throughout Polish history there had been a few *rokosze*, in addition to battles with Cossacks in the provinces and the occasional peasant revolt. The most reasonable reading—it seems to the author—is that since Opaliński is specifically referring to the Rzeczpospolita, he is concerned with the period of the Polish-Lithuanian Union specifically, and perhaps even going so far back as to the executionist movement in the 1550s and 1560s. In this narrow sense, Opaliński is right in that the only major *rokosze* was by Radziwiłł and Zebrzydowski in 1609.

within the specific context of Polish-Lithuanian constitutionalism wherein a monarch was always considered part of the mixed form of government, rather than an absolute. Given thus, where can we evaluate him on the continuum from stalwart defenders of monarchical power to radical Sarmatian anarchists? Well, to do so requires a reexamination of the specific provisions—as well as the justifications given for them—in the *Rozmowa* as well as the *Polonia Defensa*.

As we have already discussed in this chapter, the legal provision that the Seymy were only to last six weeks—established in the Henrician Articles as a way to establish the Seym as a regular, semi-permanent parliament—could actually be used as a political weapon against any attempts at reform. There was a legitimate strategy of "running out the clock" by prolonging inconclusive debate on controversial topics. Furthermore, given that *egzorbitancje* had to be taken care of before parliamentary business proper could be addressed, the Seym was often pressed for time and had to rush important decisions at the end.[1180] Thus, Opaliński's critique of an unorganized parliament—and perhaps the Senators relieving some of the administrative burden by dealing with part of it— is fully justified. Similarly, the author generally agrees with Opaliński's criticism that the first period of parliamentary activity addressing *egzorbitancje* or continuing inconclusive debate from the previous Seym would strictly hamper the possibility of generating enough good will to carry through the unpleasant and nitty-gritty details of the second period.

Opaliński is constitutionalist in the sense that he is very concerned with procedural issues and the organization of Seym debate. However, he is closer to monarchism in that he is very concerned with centralization of political power as his solution. Both from his personal activities as well as his view that centralization of political power would facilitate reforms unto itself places him firmly within the monarchist camp, albeit one with a sophisticated constitutional theory. Indeed, Opaliński distinguished parliamentary activity into phases: repairing the laws or addressing previous concerns holding over from a prior Seym, then addressing *egzorbitancje* before finally addressing new laws or policy. This demonstrates that he had a sophisticated—if not always explicitly articulated—theory of constitutionalism that recognized different types of constitutional or political activity, e.g., distinction of architectonic questions from poietic ones. Furthermore, he placed them in such a way that the architectonic questions were to be addressed first, followed by *egzorbitancje* before practical concerns. This approach was fully consistent with the overall 17th century as a shift away from architectonic questions distinguishing the role of various political branches toward how they actually conducted themselves, e.g. debates around the role of the *instygatory*, the place to address *egzorbitancje*, and the organization of parliamentary procedure and the order of parliamentary business that Opaliński draws our attention to is

[1180] "It was customary to exorbitate, that is, charges brought against the government for offenses against civil rights and liberties of the *szlachta*, to be considered first so that victims could be compensated for the injustices they had suffered. Then, controversies concerning the deputies were discussed, regardless of whether they were of importance to the general public or only to one province or województwo. If time allowed, deputies dealt with more global issues," Pryshlak, *Państwo w filozofii politycznej Łukasza Opalińskiego*, pg. 39.

generally supportive of the overall thesis that constitutionalism shifted toward a more *poietic* character.

Andrzej Maksymilian Fredro (1620-1679)

Andrzej Maksymilian Fredro was born to a wealthy *szlachta* family in Przemyśl and at the age of 17 began hi studies at the Akademia Krakowska. He then completed his education with an extensive tour of Western Europe: many German and French speaking regions, including Belgium and the Netherlands. At the age of twenty-five he was elected to the 1646 Seym and the first major events of his political life were the interregnum following Władysław IV's sudden death and the election of his brother Jan II Kazimierz in 1647. Fredro was elected Marszałek for the infamous 1652 Seym wherein the first *liberum veto* was invoked, for which he has disproportionately—and Tracz-Tryniecki argues—largely unfairly has shouldered much of the blame historically.[1181] In 1654 Jan II Kazimierz appointed him castellan of Lwów, which also elevated him to the position of Senator, just a year before the Deluge nearly overran the entire Crown and much of the Grand Duchy. Throughout the war he was twice besieged by the Swedish army in 1656 and then by the Hungarians in 1657, defeating the invaders three times. Throughout all of this, he remained loyal to the king and to the Republic and to the king's reform efforts to put the country back together again. Fredro could not support *vivente rege* election and from 1660 onward he was a political opponent of the king and played a significant role in supporting the *szlachta* from his position within the Senat, frustrating many of the king's plans. He supported the election of the next two kings, Michał Korybut Wiśniowiecki and Jan III Sobieski, that latter of whom elevated Fredro to the position of *wojewoda* in 1676. In 1678 he served as an advisor to Jan III Sobieski. [1182]

Fredro was a prolific writer across multiple disciplines: history, ethics, political philosophy, military theory and tactics, proverbs and colloquialisms, *inter alia*. Arguably his most well-known works are his collections of proverbs—*Przysłowia mów potocznych* published in 1658—or his writings about military organization—*Militarium seu axiomatum belli*, published in 1668.[1183] In fact, the wide-ranging nature of Fredro's interests have had the effect of inadvertently obscuring the literature concerning the *liberum veto* and Fredro's role in the 1652 Seym, in that Fredro's own actions at that fateful Seym as well as his own opinions of the *liberum veto* have generally not been taken into account by historians, because a thorough analysis of Fredro's constitutional and political thought has been underwhelming

[1181] Marek Tracz-Tryniecki and J. Patrick Higgins. 2022. "The Art of Interpretation or the Art of Construction? The Case of *Gestorum*—A Constitutional Treatise by Andrzej Maksymilian Fredro." *American Journal of Legal History* 62, pg. 2; Marek Tracz-Tryniecki. 2019a. *Republika versus monarchia: Myśl polityczna i prawna Andrzeja Maksymiliana Fredry.* Wydawnictwo Uniwersytet Łódzkiego, pg. 31; Dankowski, *Liberum Veto,* pg. 101; Ewa Thompson, "Sarmatism," pgs. 14-15; McKenna, *The Curious Evolution of the Liberum Veto,* pgs. 84-92.

[1182] For the most extensive, populist, recent biography of Fredro, see: Lucjan Fac and Marek Tracz-Tryniecki. 2020. *Andrzej Maksymilian Fredro (ok 1620-1679*). Muzeum Narodowe Ziemi Przemyskiej: Przemyśl; For a more scholarly approach, see also: Tracz-Tryniecki, *Republika versus monarchia:* pgs. 29-40. For a more classical take, see: Ogonowski, *Filozofia i myśl społeczna XVII wieku*, pg. 299-300.

[1183] For an up-to-date assessment of Fredro's military thought, see: Darius Kupisz. 2022. "Wyprawa łanowa w pismach Andrzeja Maksymiliana Fredry." *Res Historica* 53: 62-77.

or incomplete.[1184] This has left the unfortunate Fredro vulnerable to the projections and whims of his critics, rather than outlining a sophisticated and thorough defense of his work.[1185] Our analysis thus departs from the work of Tracz-Tryniecki that seeks to contextualize and reexamine discussion of *liberum veto* and the 1652 Seym within a deeper analysis of Fredro's own thought.[1186]

For our purposes here, we will concentrate on Fredro's works that are significant for understanding 17th century Polish-Lithuanian constitutional development, namely *Gestorum Populi Poloni sub Henrico Valesio* (1652),[1187] *Scriptorum seu togae et belli notationum fragmenta* (1660)[1188] and *Poparcia Wolności* (1668).[1189] Our approach broadly follows the "modern" approach to Fredro scholarship began by Ogonowski, which seeks to understand Fredro in a holistic sense[1190]—that is to attempt to reverse engineer Fredro as a systematic thinker— rather than more pithy examinations of only parts of his writing, as those critical of him have often done.[1191] As such, Fredro's writings will be interwoven with the details of his life and times, namely the importance of the 1652 Seym, which must be addressed, deconstructed, and then contextualized. This necessary de-mythologizing of Fredro will allow us to grasp his thought more clearly, but then allow us to incorporate Fredro's own gaze in illuminating the constitutional development of the 17th century. It is also an approach that is more overall consistent with how Fredro was well-liked and respected during his own time:

[1184] Marek Tracz-Tryniecki. 2021 "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r. – nowe spojrzenie." In: Dariusz Kupisz, ed. *Na Sejmikach i sejmach. Szlachta ziemi przemyskiej w życiu politycznym Rzeczypospolitej XVI-XVIII wieku*. Wydawnictwo Sejmowe: Warszawa, pg. 26.

[1185] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r," pgs. 33-35.

[1186] *Ibid*., *passim*; *See* also: Tracz-Tryniecki and Higgins, "The Art of Interpretation or the Art of Construction?"

[1187] Fredro, Andreæ Maximiliani. 2019. *Gestorum populi Poloni sub Henrico Valesio, Polonorum postea verò Galliæ Rege = Andrzeja Maksymiliana Fredry Dzieje narodu polskiego za czasów Henryka Walezego króla Polaków potem zaś Francji*. W tłumaczeniu przez Józefa Macjona. Wstępem i przypisami opatrzył przez Marek Tracz-Tryniecki. Narodowe Centrum Kultury: Warszawa.

[1188] Andrzej Maksymilian Fredro. 2014. *Scriptorum seu togae et belli notationum fragmenta accesserunt Peristromata regum symbolis expressa = Fragmenty pism, czyli uwagi o wojnie i pokoju: zawierają dodatkowo Królewskie kobierce symbolicznie odtworzone*. Narodowe Centrum Kulty: Warszawa.

[1189] The authorship of the *Poparcie wolności* has been unknown and is it listed as an anonymous work by the volume edited by Ochmann-Staniszewska. However, while that is the version of the *Poparcie Wolności* that will be used for quotations, recent archival work by Tracz-Tryniecki reveals that Fredro was its author. See: Marek Tracz-Tryniecki. 2020. "The Principle of *necesitas frangit legem* in the Activity and Thought of Andrzej Maksymilian Fredro." *Studia Iuridica Lublinesia* XXIX (5), pg. 316f; For the text itself, see: Andrzej Maksymilian Fredro. 1991. *Poparcia wolności*. In: Stefania Ochmann-Staniszewska, ed. *Pisma polityczne z czasów panowania Jana Kazimierza Wazy 1648-1668*, Vol. III: *1665-1668*. Zakład Narodowy im. Ossolińskich: Wrocław.

[1190] Tracz-Tryniecki highlights how Ogonowski believed that the "inconsistencies" within Fredro were more due to an incomplete record of his writings, rather than inherent problems within Fredro's own writings. This has been more or less borne out by the research that has revived interest in him, including new translations published at the behest of the Biblioteka Staropolskiej Myśli Politycznej in the last couple of years. Tracz-Tryniecki also stresses the work of Anna Grześkowiak-Krwawicz and Dorota Pietrzyk-Reeves in trying to evaluate Fredro's work more neutrally and contextually. Though this was not their explicit goal, they have thus contributed to Fredro's public rehabilitation as they have helped contribute to the clearing away of much of the negativity that has clouded historians' vision. See: Tracz-Tryniecki, *Republika vesus Monarchia*, pg. 13.

[1191] For example, see: Davies, *God's Playground*, pg. 265; Unsurprisingly, Konopczyński's opinion of Fredro is also highly negative. See: Konopczyński, *Liberum Veto*, pgs. 291-292.

> Let us note that Andrzej Maksymilian, due to his substantive qualification and past services to the Fatherland, was considerably popular amongst the *szlachta* though he was a relatively young person and – in what was a rarity for Marszałki – had not held any office.[1192]

> If sharpness of mind, deep and thorough knowledge, knowledge of national affairs, political courage and dedication, not by words but by deeds, can win and maintain the confidence of fellow citizens, then from this young man the Republic rightly expected a great minister and citizen. Now elected Speaker of the House, he seized this fortunate opportunity to serve the fatherland with joy and confidence in his strength. Opposition viciousness and partisan hatred were both alien to him. Like an eagle from the summit of the Lomnica River, the mind of this young sage looked calmly and attentively with an expression of reasonable benevolence towards the fractious elements he was to guide.[1193]

The first of his works that we shall concern ourselves with is *Gestorum*, which was published during that fateful year of 1652. Before he was elected as Marszałek of the 1652 Seym, Fredro was already a seasoned statesman, having been elected to the Seym six times as well as taking part in five separate seymiki. The Fredro family had also been relatively close associates of the Waza kings, with Fredro occasionally serving him as an adviser on state matters. Fredro supported the candidacy of Jan II Kazimierz and the *Gestorum* was published at the prestigious royal publishing press,[1194] which suggests that—even if Fredro was not necessarily in open favor of unilaterally increasing the power of the king—he was certainly on good terms with the court.

The *Gestorum* is Fredro's discussion of the interregnum leading to the election of Henryk Walezy, his abdication, and the legal and political consequences for the Rzeczpospolita. While it is not entirely clear when he began writing *Gestorum*, a major source of inspiration for it must have been the interregnum following Władysław IV's death in 1648.[1195] One of the first important facets of the *Gestorum* is thus its pragmatic appreciation of history as data to provide solutions for contemporary problems—or insight into how to narrow the search for such solutions. Thus, Fredro—like many authors previously remarked upon—is interested in what we have previously referred to as a transhistoricist grasp of history—that on one hand events must be understood within their own time and context, but also to recognize that there is a continuity between the past and the present. This informs both Fredro's *approach* to why we need history to understand law and politics—because human memory is short and often only follows what is convenient—but also gives clues into a *method* with which to interpret historical events—a narrow historiosophy heavily dependent on original texts.

[1192] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r," pg. 26. We should remember that the fateful 1652 Sejm was not only the first time that Fredro held any office – parliamentary or otherwise – in his career.

[1193] Ludwik Kubala. 1880. *Serya druga*. Nakładem Księgarni Gubrynowicza i Schmidta: Lwów, pg. 83.

[1194] Tracz-Tryniecki and Higgins, "The Art of Interpretation," pg. 3; Tracz-Tryniecki, "Andrzej Maksymilian Fredro," pgs. 29-30.

[1195] Marek Tracz-Tryniecki. 2019b. "Wstęp." In Andrzej Maksymilian Fredro. Andreæ Maximiliani Fredro. *Gestorum populi Poloni sub Henrico Valesio, Polonorum postea verò Galliæ Rege = Andrzeja Maksymiliana Fredry Dzieje narodu polskiego za czasów Henryka Walezego króla Polaków potem zaś Francji*. W tłumaczeniu przez Józefa Macjona. Wstępem i przypisami opatrzył przez Marek Tracz-Tryniecki. Narodowe Centrum Kultury: Warszawa, *passim*.

> Meanwhile, with the passing of human life, when memory is aging, disgrace and lazy forgetfulness orders the news to be silent, and everything is kept silent. Therefore, it will be no surprise to consider whether more harm will be done to a silent virtue or to a nation which, because of being plunged into the ignorant darkness of its ancestors' righteous deeds or their mistakes, does not know who to imitate and who to avoid, or what in the republic to improve, because teacher of posterity—history—was removed. Indeed, how would one know what is right or wrong, know the various effects of things, the cases of peace and war, if the story of the past were to be silent?[1196]

> Therefore, for the teaching of posterity, it will be helpful to describe the state of the interregnum and the aspirations of the electors, and all the more boldly, the more reliably written down, I have in in my hands secret speeches, senatorial letters, already published resolutions, [all of which are] a great help to the history writer. I will follow all these documents with confidence, whether longer summarized or shortly worded, citing them as they were written. [1197]

> The very assertion is that it is easier and clearer to tell a historical story if everything that was said or written is presented in this thought and these words, n. And I do not vainly hunt for fame among my readers, appropriating everything for my pen, but I have given priority to my conscience by quoting other people's statements. A lot can be deduced from the original meaning and words, perceiving people's affects as they intensify or weaken; all this is usually obscured by a talkative narrative rather than explaining, causing harm to history and the righteous judgment of readers (about this or that nation or person) with a lot of harm (emphasis added).[1198]

A thorough understanding of the history of laws, institutions, practice, etc. makes history *our teacher* and *our evaluator* in that history helps identity what the potential problems are—that is, whether or the institutions are truly deviating for their intended purpose or not—and thus economizing reform efforts. This is not merely just the importance of reading the texts *sui generis* but also understanding the thought processes of those who created them. Fredro clearly does not favor esoteric writing that is lost in an artificially reconstructed narrative of events, but rather presenting ideas clearly and leaving judgement up to the reader whenever possible.[1199] Fredro's approach to history is deeply connected to his views on human nature, society, and political power. Overall, Fredro was relatively pessimistic about the innate nature of human virtue, believing that citizens were more interested in pursuing their own wealth or defending the country.[1200] Times of social or

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[1196] Fredro, *Gestorum*, pgs. 295, 297.
[1197] *Ibid.*, pgs. 321-323.
[1198] *Ibid.*, pgs. 559, 561.
[1199] Fredro's method of understanding and then interpreting texts shares many strong parallels with modern textualist and linguistic approaches, particularly recently deceased American Supreme Court Associate Justice, Antonin Scalia's "original public meaning" originalism, which has spread throughout American jurisprudence—and more recently, has become increasingly influential around the globe. This tension reveals that there is significant amount of comparative, constitutional scholarship needed between Poland-Lithuanian ideas, institutions, and practices in our modern world. For a deeper discussion, see: Tracz-Tryniecki and Higgins, "The Art of Interpretation," pgs. 16-18.
[1200] "Moreover, it is more useful for the Republic to keep citizens' weapons ready than to collect gold; the latter often arouses the greed of enemies, the latter destroys their powers. [...] The majority in every republic is often sluggish and boorish, for whom violating the law is a sin only due to the fear of punishments, when these are removed, the greater part of citizens violates the laws, in the end, the more prudent, although they have long acted honestly for the love of justice, follow the crime, which they perceive to be unpunished, especially if

political upheaval provided the opportunity for men to overcome their self-confidence and defend the nation.

> However, I will not refrain from showing the thoughtlessness of the voice and writing of some when they unfairly pronounce and accuse our state order, or simply attribute disorder to us, imagining the Republic to resemble Monarchy, looking for France, Spain, or Italy in the middle of Poland. What Republic can long exist without order, or thrown out of its order, will not fall within a few years? This, in turn, for so many centuries not only endures but grows. Or if we are troubled by some such cases, these people should be reminded that like us, the Commonwealth is finally mortal, no State was eternal, and indeed, if God wanted it so, it would fall, but hopefully it will long endure. Therefore, the upheavals of the Republic better remind us of our virtue and make us watch over our freedom, so that, out of deep happiness, falling into peace and sleep, we do not become numb and sin with dangerous self-confidence.[1201]

In fact, as Fredro notes, there had been a long history of military service as a requisite for Polish-Lithuanian republicanism, wherein the *szlachta* did not rest of the laurels of their ancestors but had won their valor with their own hands. There was also a religious dimension to the importance of Poland-Lithuania on the border of Christian Europe, defending it against pagans.[1202] While Fredro's words may seem hyperbolic, it must be remembered that *Gestorum* was written during the time of the Cossack uprisings by Khmelnytsky, which had both political and religious dimensions. Further, there was great concerns that the war would expand across Northern Europe, which it eventually did. Fredro was also very worried about the decline of republican governments throughout Europe with France, Spain, or Italy the political model that many were looking to. Additionally, Fredro felt uneasy that the Commonwealth's only technical ally was Habsburg Austria,[1203] which had an unfortunately strong track record of invading and annexing its neighbors.

Though he was personally on good terms with the Waza kings, Fredro firmly agreed with the classical republican ideal that the king was not an absolute ruler, but rather served as the guardian of the Commonwealth. He often used the metaphor that the Rzeczpospolita was a ship where all the oarsmen—the *szlachta*—had to work together to keep the ship afloat, where the king was the helmsman who steered.[1204] Alternatively, Fredro occasionally referred to the king as "rector," rather than *rex*[1205] which suggested that he thought the proper role of the king was the *manager* of the Rzeczpospolita, rather than as *ruler.* According to

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virtue incurs a cost. Th These and other seemingly right things were said by the wicked, born to the seller of freedom," Fredro, *Gestorum*., pgs. 339, 343-345.

[1201] *Ibid*., pg. 765.

[1202] "With this kind of life the plebeians gain nobility, and the nobility gain fame, and glory is considered not to be due to his ancestors, but the fact that he himself defended the Republic. This is why Poland can oppose the forces of the enemies of its name (or, if I am to tell the truth formerly could, so far we have gone from those years, from the old customs, the fathers' dear freedom and warlike bravery, prodigal sons, uncaring toward our descendants), for the fates have been kind to this nation, so that it alone remains, to which the Christian West would owe its freedom," *ibid.*, pgs. 337, 339.

[1203] *Ibid.*, pg. 513.

[1204] Tracz-Tryniecki, *Republika contra Monarchia*, pg. 109.

[1205] Tracz-Tryniecki and Higgins, "The Art of Interpretation," pg. 12f.

Fredro, the rulers should be those who are good, rather than those who are mighty,[1206] in which he clearly adopted Plato's concept of the philosopher king: they who do not wish to rule are the best rulers, that their focus on living a good life rather than pursuit of selfish power is what gives them the right to hold power.[1207] As we shall see, this remained a clear foundation for Fredro's support of free election for the remainder of his life.

Fredro was not naïve and recognized that the king could not simply be expected to moderate his own behavior, which is why additional safeguards were needed: the role of individual senators to restrain him as well as the institutions of the Republic, namely the rule of law and its narrow interpretation, the principle of free election, and—in his later work—the *liberum veto* and proper parliamentary procedure. The specific contribution of *Gestorum* to understanding 17th century Polish-Lithuanian constitutional development is that it discusses the constitutional, institutional, and political consequences of *interregna* and the election of a king, which together served as a focal point for all of these complex phenomena within the Commonwealth. In other words, the interregnum itself as a *constitutional phenomenon*—both its failures and its successes—was the stage on which the drama of Fredro's political and constitutional thought was enacted and then clarified. Fredro succinctly summarized the challenge of interregnum as a constitutional clarificatory phenomenon as a Gordian Knot:

> But how can one prevent the Rzeczpospolita from being torn apart during the interregnum, with the ambitions of its inhabitants and clashes between *szlachta*, with the power of the primate and the power of chiefs, and the numerous, and usually armed, clientele of Senators? This is a Gordian knot for me. And I am not Alexander in this, let others be him and teach me, then I will sign the resident as my future king.[1208]

Interregna always presented the threat of imminent danger: that if the citizens of the Rzeczpospolita were sheep, it was the king who was their shepherd and protector.

> Well, the first and constant concern of the Krakow Seym was concern for religion, children and beloved freedom - mutual disgust for interregnum and love for the Rzeczpospolita, which cannot remain in the state of widowhood without a bridegroom and a manager for a long time. It was said that the Rzeczpospolita was surrounded by various nations ready to make changes with a predatory hand, that in the absence of the Shepherd, all those who either envied its freedom or desired to rule have the opportunity to plunder the abandoned flock.[1209]

[1206] "[T]he task of a wise man is to correct his mistakes, and it is good for the Commonwealth, since when he goes astray, he is given time to improve, and he does not immediately fall into the abyss when he errs. And wasn't the Commonwealth close to collapse when the Austrian was elected king? All the more for us to avoid a ruler who is powerful and threatens domestic freedom by foreign forces. Poland, on the other hand, is looking not for the wealthy, but for good managers, expecting security from the good, and danger from the mighty. Not an Emperor, not the Prince or the ruler, but whoever is considered the best among the people should be made the head of the Commonwealth, for she will give sufficient ornaments to those whom she accepts as king," Fredro, *Gestorum*, pg. 785.

[1207] Plato. 2000. *The Republic.* Edited by G.R.F. Ferrari and Translated by Tom Griffith. Cambridge University Press: Cambridge, pgs. 519d-521b, 580b-c.

[1208] Fredro, *Gestorum*, pgs. 761, 763.

[1209] *Ibid.*, pg. 307.

In addition to external threats, Fredro also posited that an interregnum could itself also pose *internal* threats to the health of the nation, in that it would effectively turn power over to local seymiki, local courts, local administrators. While they would initially take over the ruling of the nation by necessity, over time this decentralization of the nation would become officially recognized. This would not only allow individual administrators to abuse their office because there would be effectively no one better to check on them, but it would greatly injure the common good of the nation such as the rule of law across regions as well as in regard to common defense. Instead, the interrex, Archbishop of Gniezno Jakub Uchański should have called a new Seym immediately upon the death of the king to begin the process of selecting for a new king,[1210] if only to keep up political continuity. A major concern for Fredro is not that power returning to the seymiki would impair the freedom of the *szlachta*, but instead would be a situation of *excess freedom* beyond that which was necessary for the common good.

> We have seen how many województwa, by no means a good example, held meetings on the spot and illegally appropriated the powers of the Seym, but although they acted inconsistently with freedom, and which, I believe, by the solemnity of this Seym will not be invalidated, the solemnity of the Rzeczpospolita is not lightly tarnished. Here the whole is as a result of the long interregnum torn into factions. No good person likes a interregnum, but every wicked person never has enough; so don't postpone for long, lest it seems that either we don't know how to choose, or we agree not to choose.[1211]

Having established the dangers of interregna, what should be done about it? It is important to first define the key players of this constitutional drama more clearly. Firstly, Fredro was suspicious of the king because of human fallibility in light of power's ever-present temptation. Some of the king's imperfections were permissible as they stemmed from this flawed human nature and for this reason the king failing to perfectly meet all of his obligations in all cases was not sufficient cause for disobedience, which would undermine the authority and order of the state and ultimately do more harm than good. If the king lost all authority, then the institutions of the nation and the rule of law itself would be tarnished. Fredro also stresses that kings do not act alone, but always in the context of political institutions that are to advise, support, and—when necessary—restrain him. It was the role of the law, oaths, the Senat, and even the primate of the Church to prevent the king from

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[1210] "There is no one else in the Rzeczpospolita of the same authority who could, under the law, oppose an evil king (from whom we were long guarded by a kind fate). These and many other things have been written quite pathetically. However, I argue that rather due to the error of the Archbishop (Jakub Uchański held this office), these upheavals were caused in the minds of citizens, who misused his office. It was not necessary to postpone the date of the Seym overnight or from month to month, or to give województwa the opportunity to come together in private circles, to confer and make decisions, unless it would certainly happen in a nation to which the Rzeczpospolita would be more expensive than blood or life, the highest good. Separate deliberations between the various provinces could risk the danger that the separation, first established by necessity, would eventually be recognized. Our ancestors wanted general deliberations of the Seym, that they all consulted together for the common good, hated separation, got used to the community, from which comes the good, safety of all and protection. The Archbishop should have made sure that the Seym would be convened immediately after the death of Sigismund Augustus for the common good, in this way the face of the united Rzeczpospolita would teach that there is no king, but still royal power," Fredro, *Gestorum*, pgs. 325, 327.

[1211] *Ibid*, pg. 357.

becoming a tyrant.[1212] Fredro's view of the senator is consistent with his view of the ruler in general: the ruler should not support what is popular or should not pursue political power for their own ends. Rather, good senators should stand up for what is good, especially that which is *consistently* good, even if this meant it was necessary to be counter- majoritarian at times.

> For my part, I believe that every good senator should stand up not for what the majority or minority stands for, not for what he sometimes thinks or, as it seemed, he thought, but for what he considers to be best when he advises so there is not instability, but rather the constancy of wisdom and love of the Fatherland. I admit that everything was written very, very clearly in this privilege [in the Henrician Articles], many things were mentioned in detail, but I think that the Commonwealth took better care of the generality of the old laws than we did to the particularity of re-interpreting one law, doubting the power of the previous one. We have long stipulated in law that we have a free election of Kings, that then the King may not voluntarily establish anything except on the basis of a resolution of the Senate. What more do you need? It is safer to keep this law as a general one, and by interpreting it more in this way, we are freer than if we descend into a particular, which is of such a nature that if you do not express something, it is considered to be an omission.[1213]

Fredro's reflections on the role of the senator contains hints into his overall theory of jurisprudence, which is fairly conservative in the sense that he believes that the intention of the law should be taken into account when interpreting them. Furthermore—like Opaliński—he distinguishes the need to maintain and repair laws from the need to legislate new laws—and he strongly supports maintenance and constancy of law than new interpretations of it. However, at the same time, Fredro was not an idealist and instead recognized that pragmatic concerns—supporting and upholding freedom of the *szlachta* and the defense of the nation, particularly—meant that law needed to be changed and that its interpretation could not be rigid. In fact, as Fredro mentioned above, sometimes it is better to keep a law in a more general form—reserving the right to move to a particular set of circumstances as the application of the law requires—than to begin too narrowly. This was directly in line with the legal maxim *casus faciunt leges* (cases make laws) that was commonly used[1214] in 17th century Poland-Lithuania at the time and contrary to the trends to create precise legal codes.[1215]

[1212] "For many things have their origin in human fallibility, human error; whoever does not recognize human errors, does not recognize humanity, especially in a ruler, which, when the majority of activities that people must perform is allowed some sad privilege of human frailty, leads many to sin; and disobedience should not be allowed for this reason, the king's solemnity must be guarded generally, to which if we subdue anything at all, let us not think, please, that we will take better care of our liberties, but on the contrary they are harmed when the solemnity for the ruler is diminished, the nation's respect for the ruler diminishes, so that everything must happen due to lawlessness. After all, if the King persistently wishes to sin, there are other means to keep him within his powers. Written laws, oaths, the Senat, the authority of the Primate who has the right to convene the Senat if the King did not want to be a King, but a tyrant," Fredro, *Gestorum,* pg. 715.

[1213] *Ibid*., pgs. 515, 517.

[1214] Tracz-Tryniecki and Higgins, "The Art of Interpretation," pg. 5.

[1215] "Put another way, civil legal reasoning sees gaps *as exceptional*, whereas in common law they are *constitutive*," J. Patrick Higgins. 2019. "Case Comments: Patrimony vs Land Acquisition and the Development of Legal Interpretation in 13th Century Medieval Poland—the Case of the Forest of Głębowice in the *Księga Henrykowska* (*Book of Henryków*)." *Acta Iuris Stetinensis* 4(28), pg. 153. In many ways, Fredro's following of legal reasoning that balances precedent and the facts of cases, rather than axiomatic clarity when formulating or expressing legal principles reminiscent of common law reasoning, as opposed to civil law legal reasoning.

Similarly, Fredro was against a strict, textualist interpretation of the law, especially when it was used contrary to its original purpose. In this, he respected the importance of *intentio legislatoris* (legislators' intentions) as well as the popular 17th century legal principle *necessitas frangit legem* (necessity breaks the law).[1216] Here, Fredro is drawing not only on the classical republican tradition, but also Aquinas' *Summae Theologicae* and the justification is that the purpose of law is ultimately facilitate the good. Thus, if there is an interpretation of the law that produces a result that is evil or contrary to the law, the interpretation of the law must be changed.[1217] However, Fredro was not against selectively reinterpreting the law when it suited his vision of the common good or the defense of the nation, for example even editing particular words or phrases of preexisting legal texts. Given his relatively high standing in the eyes of the court, Fredro was one of the select view that had access to archives containing older legal texts and court cases, [1218] so he certainly had an unfair advantage in manipulating "history" in such a way that it would "repair" institutions in the particular way that he wanted to. However, Fredro's edits were often quite small and subtle and generally were more in line with changing how specific parts of a law should be interpreted in a manner consistent with 17th century Polish-Lithuanian republicanism, rather than outright forgeries or simply making laws up as he pleased.

Finally, the last step in solving the puzzle is the various elements of Fredro's political theory and how they all combine into his systematic approach to an *interregnum* and the relationship between *interregna* and the Commonwealth. For example, it will be necessary to grasp: how the republican understanding of a weak king (and a relatively weak understanding of authority in general, for that matter), Fredro's theory of strong senators to check the king, the view that while laws can be changed they should only be done so gradually and with good reason, and that laws should always be interpreted according to the intentions of the legislator in promoting their version of the common good. First of all, Fredro reminds us that the *interregnum* is also to be interpreted within the traditions of the Rzeczpospolita as well as its republican spirit. That is to say, that in the absence of a king, it is especially important for senators and other leaders within the nation to hold true to the institutions of the nation, respect the law, and to find the balance between the "supreme power of the individual and the unbridled will of the crowd."[1219] The second clue is in Fredro's conception of the king as weak and the importance of royal election, which reveal that

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Much of Tracz-Tryniecki and Higgins' work can be thought of trying to appreciate Fredro in part of this broader context in connection with common law. See: Tracz-Tryniecki and Higgins, "The Art of Interpretation", *passim*; See also: Helena Whalen-Bridge. 2008. "The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills." *Journal of Legal Education* 58, pg. 368.

[1216] Marek Tracz-Tryniecki. 2020. "The Principle of *necessitas frangit legem* in the Activity and Thought of Andrzej Maksymilian Fredro." *Studia Iuridica Lublinesia* XXIX(5), pgs. 312-316.

[1217] *Ibid*, pgs. 312-313.

[1218] Tracz-Tryniecki and Higgins, "The Art of Interpretation," pgs. 3-4.

[1219] "If, therefore, the same piety by which, deprived of the king, you have preserved the peace of the fatherland, in this place, in the utterance of your sentences and in the casting of your votes, you will retain, if you only think of the republic, if you only allow everything to happen according to the old customs and laws of your ancestors, by which so far the republic stands and flourishes, it is I not only hope, but the joy of your ancestors, who so united the measure of the kingdom and freedom, that between the supreme power of the individual and the debauched swagger of the mob, so reliably came up with a way of upholding the laws and expanding the state," Fredro, *Gestorum*, pgs. 369.

Fredro's understanding of sovereignty ultimately lies with the *szlachta*. The third clue is from Fredro's desire to balance the need to preserve old laws as well as to recognize that there are times when law needs to be changed, but that those changes also cannot be random, and only should meet the requirements of specific changes in specific circumstances. It is this squaring of the circle—not to admit that laws cannot ever be changed, but rather to know *how much* to change them and still be consistent with the will of the nation—that perhaps gives the greatest clue of all.

For Fredro, the key of the *interregnum* is not the uncertainty of the absence of a king in a constitutional system that requires one to function properly. This uncertainty can be dealt with by the interrex calling the Seym in a timely matter so that an *interregnum* does not draw on for years. Instead, it is in the fact that Polish-Lithuanian rulers are elected by the *szlachta* acting as the collective sovereign, that is to say, when the king dies there is no longer any manager to hold the power, which naturally and automatically returns to the *szlachta*. This understanding of the *szlachta*—either directly being the collective political nation or indirectly being representatives of the political nation—as the source of political power and sovereignty was fully consistent with the achievements made during the long period of constitutional construction: *De non praestanda oboedientia, Ius commune, Neminem captivabimus, Nihil Novi*, the achievements of the executionist movement, *inter alia*

Fredro was specifically addressing an important debate of his age:

> [W]hether the Polish-Lithuanian political nation possesses the power to establish laws and thus create its own legal and political, or, broadly speaking, constitutional order during the absence of a king. This issue was still strongly debated in Fredro's time, especially during the interregnum of 1648. During that time, he shared the opinion of those who supported the idea that the nation had such a right. The question was even more fiercely discussed during the great interregna in the sixteenth century.[1220]

> The deputies replied that while they had no power to in any way invalidate what the Rzeczpospolita had established, they would make every effort during the next coronation Seym that the states settled the matter more loosely. Meanwhile, a new difficulty has arisen among deputies, concerning the preservation of peace among people who differ in religion, for which reason for which reason it will be telling to recount what happened earlier. When at the Seym konwokacyjny, a konfederacja, or peace of those who differed in religion was to be established due to the increasing influence of heretics, which was nowhere to be found in the old laws, many bishops stood up, submitting a solemn (as it is called) declaration that they do not want to know any *konfederacje*, they are satisfied with the old laws, that this is not a time or place to establish new ones, especially since during the interregnum no matter should be dealt with except for the election, and the matter should be postponed until the new King is elected; if likewise during any interregnum, according to the whim and willfulness of the nation (where no one cares for the Kings' Majesty), no king would be needed soon.[1221]

The particular issue that evidences the capacity of the Seym to create new laws even with the absence of a king is that the Konfederacja Warszawska was passed in 1573, which quickly became a foundation of Polish-Lithuanian constitutionalism. Even the Henrician Articles themselves were supposed to be initially a kind of privilege for the *szlachta*, but over time even Fredro recognized that they had transcended their original design. As such, the

[1220] Tracz-Tryniecki and Higgins, "The Art of Interpretation," pg. 6.
[1221] Fredro, *Gestorum*, pg. 481.

interregnum is in fact the moment when the constitutional system is able to reach a new consensus and renew itself,[1222] and in this sense *vivente rege* election or hereditary monarchy were completely incompatible with the Polish-Lithuanian constitutional system because they effectively meant a return of sovereignty to the king rather than his dependence on the Seym for election and for receiving a *pacta conventa*. Thus, while traditional and contemporaries' understandings of monarchy would have understood the *interregnum* and subsequent, potentially contested election as chaotic or weakening to the state, in fact they were the exact opposite as the only mechanisms of its renewal.

Now that the *Gestorum* has shed light on how Fredro understood the role of power, the nature of the state, how laws were to be changed or created, and how laws were to be interpreted, it is important to reflect once again on the fateful 1652 Seym. To refresh our memories, Fredro had been elected Marszałek and the contested Seym had produced little results. When Fredro brought a vote to extend the length of the Seym past the mandatory six-week limit, a delegate protested and then left. Fredro tried his best to extend the Seym again and to reach a compromise, then several other members demanded that the original protest be recognized. Though Jan II Kazimierz had aided in forging compromises or had helped negotiations to prolong Seymy in the past, this time he reused, and the Seym broke up without producing anything of value. Historians have harshly criticized Fredro for acknowledging the *liberum veto* but in reality, the issue was not whether Fredro approved of the *veto*, but whether Fredro had the right to refuse it.

Fredro could not have prevented the Seym from breaking up, even had he wished to do so. Fredro's conception of political power—which seemed to be quite the mainstream view of the time—was that the king or the Marszałek of the Seym had the function of managing the Seym and the Izba Poselska respectively, that is the *szlachta* representatives always had the choice to refuse to sign the laws. Once the consensus of the *szlachta* in the Izba Poselska broke down, there was no longer any sovereignty or legitimacy held by that body to create the laws in the first place. There were only two ways out of the impasse: either the overwhelming majority of the *szlachta* could reach a consensus to ignore the protests and continue parliamentary business, or the only person with higher capacity to manage the collective political will of the *szlachta*—Jan II Kazimierz—could intervene to help build consensus and prolong the Seym.[1223] Once the *szlachta* reached the consensus that there was no consensus, Fredro could do nothing but close the Sejm. Ideas such as "arithmetic majoritarianism" were simply alien to 17th century Polish-Lithuanian constitutional thought.[1224]

While the *Gestorum* has been generally interpreted as a historical document, it was quite clear that Fredro meant it in a more pragmatic way, and in the same spirit we have turned it toward the concrete problems of constitutional development. The events from 1648-

[1222] In modern parlance, an *interregnum* is a "constitutional moment" in the sense that Ackerman uses it. See: Tracz-Tryniecki and Higgins, "The Art of Interpretation," pgs. 5-6; Tracz-Tryniecki, "The Principle of *necessitas frangit legem*," *passim*; for Ackerman's original theory, see: Bruce Ackerman. 1991. *We the People*. Vol I. Foundations. Belknap Press of Harvard University: Cambridge and London.
[1223] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r," *passim*.
[1224] Tracz-Tryniecki, *Republika contra Monarchia*, pg. 48.

1652 proved to be decisive in shaping many of the threads that Fredro would touch upon throughout his life. Though *Gestorum* sets the tone, so to speak, *Scriptorum* and *Poparcie wolności* are worth a brief exploration as well. *Scriptorum* (1660) was written just after the difficult wars of the 1650s came to a close. With Sweden and Muscovy defeated in the north and nearly all of Polish-Lithuanian lands reclaimed—excepting part of Livonia that had to be ceded to Sweden for peace—the wars now shifted toward Muscovite and Cossacks in the east. Fredro, a loyal servant of the king who happened to be living in old Red Ruthenia, once again found himself close to the source of the action, which certainly motivated him to turn again to questions on how to repair the Rzeczpospolita's institutions. As part of the peace settlement, Jan II Kazimierz also had to forfeit his claim to the Swedish throne and given that both of his children had died as infants, it was clear that the Waza dynasty—and the Swedish encumbrances that it had brought—was coming to an ignominious conclusion, just as the Jagiellonian had nearly a century prior.

By this time, there had been something of a normalization of the *liberum veto*. Whereas Fredro had been angered at the original usage of the *liberum veto*—and had certainly lost some reputation due to it being used him at the ignoble 1652 Sejm—in the *Scriptorum* he begins a more clear-headed and honest evaluation of the very concept of *liberum veto*. The *Scriptorum* has been acknowledged as the most comprehensive treatment of the *liberum veto*, at least in the 17th century.[1225] Fredro remarks that the *liberum veto* is not a particularly new idea and that such a thing existed during Roman times:

> Down with the wise lovers of novelties in the Commonwealth, who recklessly and unwisely criticize the law (veto) adopted in our deliberations. Since I do not compete with them in talkativeness, I will say enough and more than that, if I find that by abolishing the law (veto), they will do great harm to the Republic. And I am not saying it under the influence of whim or some vain thought, but by the one that was conveyed by the greatest expert of the republic, saying: (Know the state). As far as ancient writings can be made, I have found that the same custom of approving and vetoing resolutions once existed among the Romans.[1226]

> It is clear, then, that all the wonderful deeds done in Rome were attributed to the virtues of a few (by the law of approval and objection) […] [The] most important affairs of the state depended on the agility of one Cato or Caesar, and therefore only two citizens. But (I say) why should we be surprised? In each period and in each kingdom and republic, so (to be more specific), as far as I understand, both elsewhere and in our Poland, there was only one or two of these, and no more for each generation. Even now, there are very few who, thanks to their excellent families and virtues, do everything well and to whom the entire country owes its survival. What more to add?[1227]

However, Fredro was also aware that there would be many who were angry that there should be some limitation on what the majority could do, though Fredro argued that pure majoritarian politics opened the door to more zealous reform attempts, or what he referred to as troublemaking:

[1225] Jerzy Lukowski. 2012. "'Machines of Government': Replacing the Liberum Veto in the Eighteenth-Century Polish-Lithuanian Commonwealth." *The Slavonic and East European Review* 90(1), pg. 70.
[1226] Fredro, *Scriptorum*, pg. 437.
[1227] *Ibid.*, pg. 439.

> Demand now, whoever you are, a majority vote in this country, abolish unanimity and wish that the number of votes (won by the intrigue and indecision of many) gain more importance than prudence and virtue. Why should nothing done by the crowd who are the inferior be outweighed by the few who are greater? Why not see only half of it done that which the good seek to achieve for the public and fully completed that which the majority wanted to accomplish by their zealous efforts (or rather, you would say, troublemaking), if, in a word, the majority could not command the majority to do what is right and to forbid evil?![1228]

Unpacking Fredro's ideas, he is making the argument that it is fundamentally incorrect to say that the majority's opinion is inherently right and vice versa. In fact, the truly great deeds and the truly moral acts that define a country can only be done by a select few. Here, there seems to be a bit of naivete on Fredro's part in that he is arguing that partly what made the Romans so successful was that Cato or Caesar had the freedom to do as they pleased, essentially taking over the government and running it according to their individual will, which were successes for Rome. What is problematic about it is that we can say that a great deal of luck and very specific circumstances allow for a Cato or a Caesar to appear and that if we are facilitating individuals' rights over and above those of the nation or the group, we are essentially betting on: there will be the "right" person to use and that those persons will behave with the public good in mind. In theory, a political system that defends the rights of the minority to an extreme degree on the chance that the "right" person will rise to the top at the right time seems to be quite a gamble, and persons with ill-will or just the vagaries of life will lead to individuals blocking each other.

Part of the difficulty with a democratic style of government is that it incentivizes people with ill-intensions to disguise those intentions in a majority and to reap the benefits for themselves, rather than promote the good of the state. A mechanism like the *liberum veto* actually promotes the good of the state, in that allows more opportunities for those with truly moral and reasonable positions to persuade the polity, while in times of last resort they are also able to *force* the polity to do the right thing.[1229] While this is clearly a return to his

[1228] Fredro, *Scriptorum*,.pg. 441.

[1229] "Without referring to the opinion of the general public, the ruler should not undertake activities affecting the entirety of the system. If, however, he wishes to do as he pleases, I will consider him more a proud than a wise lord. For since our disposition habituates us to indulgence towards ourselves, guided by fame, hope, fear, love, opinions and considerations, we are heading for something worse without noticing a better idea that chance has hidden from us. After all, the eyes of many more are able to perceive, and one cannot comprehend everything on the basis of one's own knowledge alone. If one man makes a mistake, he only gets hurt. The prince, however, can neither confuse his strength nor suffer harm otherwise, but at the expense of the entire nation. The prosperity and failures of the ruler affect the entire Republic of Poland. Therefore, the ruler of the council will summon and begin a debate on the pressing issues, so that the people more willingly fulfill his will, which is not an expression of the sovereign's ordinary whims but serves the public benefit and is in accordance with the opinion of the general public. For would it be holy and right what someone commanded in his own opinion, without listening to others? The people then, with less confidence and less enthusiasm, will undertake it.I mentioned inferior citizens, not about the worst and deprived of all advantages, but about those who, in fact, deal with the affairs of the state, but therefore they can be considered harmful, because they are greatly influenced by hatred, sympathy, fear, consideration for personal benefits and anything that contributes to a disturbed prudence and common sense. They often think that it is not worth striving for the common good, and they willingly turn to personal aspirations, joining the more powerful parties. I would conclude that I have said too much in defense of freedom of veto, since I have given you to read what the most discreet author is saying. However, since I believe that you will pass this magazine on to other readers, I will allow myself to comment

philosopher-king inspired take on political power, it is also problematic because how does one know that *they* are righteous? If someone is willing to block the rule of the majority according to what they believe is correct, how is that substantially different from persons who use the apparatus of the state for their own ends? Who is the final judge as to whether someone is sincerely seeking the best for society, or their own ends? After all, every "villain is the hero of his own myth."[1230] Fredro concludes that societies that have been ruled by majoritarian voting do not have more persons that may be considered good or wise compared to the Commonwealth, but rather that they have no absolute ruler to reign over them.[1231] When correctly used, the *liberum veto* actually defended *szlachta* freedom, because any member of the *szlachta* could veto any threats to their liberty if they chose.[1232]

Fredro's view of the king remained largely consistent with what he presented in *Gestorum*, although an older Fredro had higher expectations. The king should always have the common good in mind,[1233] because whatever happens to the king ultimately translates directly into the health of the nation. Kings that wish to do as they please are proud more than they are wise and more likely to have a weak temperament, making them vulnerable to negative emotions such as flattery, anger, or desire for renown. The wisdom of the whole nation together always supersedes that of the king, but the consequences of making a miscalculation involve the fortune of the entire nation, whereas an individual just threatens themselves and those close to them. Fredro is also less patient with kings when they make mistakes due to their ignorance of the law:

> No king takes power arbitrarily, for it is the laws of the people that give him power and force him to swear an oath to abide by them. Therefore, if a good ruler wishes to rule fairly and calmly, he should read the laws of his kingdom frequently so that mere ignorance or forgetfulness would not lead to neglect or violation of the laws. For it is not only unfit for a ruler not to know the rules to which he should adjust his actions and reign, but if he transgressed or neglected any rule, he would lose his royal dignity and become a tyrant before the law and the people, and a true faithless person. Even if he obeyed a thousand and

more broadly. The quality of all better citizens is concern for the common good. There are two ways of reaching this goal. Because they can, by their authority (resulting from the prudence of judgment and virtues), make everyone think the same as they do, or, when it turns out that not everyone follows a good example of their own free will, they are forced to force consent to the reluctant," Fredro, *Scriptorum*, pg. 443.

[1230] Christopher Vogler. 2007. *The Writer's Journey: Mythic Structure for Writers.* 3rd Edition. Michael Wiese Productions: Studio City, CA, pg.68.

[1231] Fredro, *ibid.*, pg. 445.

[1232] *Ibid*., pg. 451.

[1233] "I mentioned inferior citizens, not about the worst and deprived of all advantages, but about those who, in fact, deal with the affairs of the state, but therefore they can be considered harmful, because they are greatly influenced by hatred, sympathy, fear, consideration for personal benefits and anything that contributes to a disturbed prudence and common sense. They often think that it is not worth striving for the common good, and they willingly turn to personal aspirations, joining the more powerful parties. I would conclude that I have said too much in defense of the freedom to veto, since I have given you to read what the most discreet author is saying. However, since I believe that you will pass this magazine on to other readers, I will allow myself to comment more broadly. The quality of all better citizens is concern for the common good. There are two ways of reaching this goal. Because they can, by their authority (resulting from the prudence of judgment and virtues), make everyone think the same as they do, or, when it turns out that not everyone follows a good example of their own free will, they are forced to force consent to the reluctant.," *ibid.*, pgs. 129, 131.

> disregarded one, he would still suffer from lightly breaking the oath he had taken both together and to each individual law.[1234]

Even failure to uphold the law by accident or forgetfulness could be grounds for tyranny, because it would lower the law in the sight of the population and hurt all the laws. While it is not precisely clear why Fredro became so much harsher on this principle than in the *Gestorum*, it is likely that as Fredro learned more about the law in public service he simply had higher expectations for the king. It could also have been that Fredro saw many attempts by Jan II Kazimierz to change the law to suit his own purposes, such as attempting to introduce *vivente rege* elections numerous times or the king trying to use the judiciary as a weapon against his enemies,[1235] whereas under Władysław IV—who was by all accounts a better king as well as had good relations with Fredro—he might not have seen the need for a more strict role played by the king. Since Jan II Kazimierz's intentions could no longer be trusted, increasing legal education, training, and knowledge not only for the king but also for those who were supposed to keep him in check became increasingly important.

Fredro noted that the practice of giving the ruler nearly limitless power to deal with crises was a feature of ancient Greece and Rome and that doing so certainly streamlined the government. In the times of the Deluge there was dire need for reforms to strengthen the king and some reforms were made. However, there was hope that the 1660s could bring about some peace and normalcy. Replacing a representative legislative body with a permanent body of non-elected officials would essentially open the door to absolutism,[1236] which Fredro opposed. Fredro observed how one of the main supposed deficiencies of the Seym—that it was slow to give out money—was actually helping prevent absolutism because the king could not call an army or raise funds for an army on his own.[1237] Thus, the slowness of the bureaucracy and the Seym helped prevent absolutism, whereas centralized, efficient bureaucracies facilitated absolutism through well-organized and well-equipped armies. Fredro also suggests that laws are useless unto themselves if a proper culture is not built around them to support and obey the laws.[1238]

The *Scriptorum* concludes with reflections defending the Commonwealth against charges that it was "lawless," which stems from people who do not understand how it works, or—more insidiously—are trying to undermine the Rzeczpospolita from within. These dangerous persons subvert the common good for their own gain.

> It is hard not to notice that Poles' freedom is baselessly defined as lawlessness, unless someone has not yet understood what the Commonwealth is and is raving recklessly, according to his own reason, always seeing a defect in the system, even if one cannot see any. Especially if he belongs to those inferior people who try to obscure private endeavors with the appearance of concern for the public good and therefore give freedom maliciously twisted

[1234] Fredro, *Scriptorum*, pg. 205.
[1235] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r," pg. 32.
[1236] Fredro, *ibid*, pgs. 547-551.
[1237] *Ibid.*, pg. 553.
[1238] *Ibid*, pg. 557.

> names that affect primarily better citizens. Only because they strive for the power of the Seym in the name of freedom, they are called troublemakers, or dull and rude.[1239]

Fredro ends *Scriptorum* on a positive note, extolling the safety of the Rzeczpospolita, both for the citizens and for the king, the latter not having to fear assassination, poisoning, betrayals, or riots because a good king would be loved and supported by all.

> What else? Suffice it to add that due to the nobility of this nation, Poles cannot live without freedom, so the more respectful and human the king is, the more faithfully they serve him. We have no assassins, no poisons, no betrayal or riots. The ruler will obtain more from this nation from meekness than elsewhere through threats, extortion, and the fear of absolute power. And, what is rarely seen among peoples, the motto of Polish kings has been preserved in our country for a long time, their king could safely fall asleep in the bosom of each citizen..[1240]

By the time Fredro writes *Poparcie Wolności*, the Commonwealth had witnessed the collapse of the Ugoda Hadziacka—though he never addresses it himself, Fredro was a wojewoda in a border region near to Ruthenia so he would have had firsthand experience—and the Rokosz Lubomirskiego where the *szlachta* had split between Jerzy Sebastian Lubomirski and Jan II Kazimierz. Jan II Kazimierz's abdication in 1668 also brought another interregnum and the third time in 100 years that a new dynasty had a chance to take the throne.

Poparcie wolności continues many of the themes laid out in *Gestorum* and *Scriptorum*. However, it is markedly different than its predecessors in actually outlining specific changes on how to conduct elections, how deputies are to be sworn in, as well as parliamentary procedure.[1241] Many of these were extensions what he had worked on earlier as well as coupled with his own, private life experience.[1242] In its opening pages Fredro launches his strongest defense of free election yet as well as the need for the king to be restrained under the law. Any who would interfere with the process of a free election—including the king—was to be punished by the Trybunał.

> The election of a new king is not to be until the death of the living one, so that the better extra *invidiam can rescindi* [out of envy can be broken] the bad affairs of the deceased under the interregnum and the improvement becomes freedom. What is difficult to do behind the obstacle of the living master (with the fictional one), and all respects die with the dead. Who would choose to choose for life - such a voice as rebellious will be called. And yes, such *in perduellionis nota* [known as treason] will be tried, *ad instantiam* [at the instance] would also be one sejmik *instygator* for the Trybunał in *recentium criminum extra ordinem regestri* [in recent crimes outside the register] cases, defendant with an ordinary claim, although without giving a mandate from the Seym and without other circumstances, in relation to the objection of the obligated *perduellionis* [treason]. The king himself is to obey this law on the charge of perjury and imprisonment.[1243]

[1239] Fredro, *Scriptorum.*, pg. 563.
[1240] *Ibid* pg. 567.
[1241] Fredro, *Poparcie wolności*, pg. 323.
[1242] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 r," pg. 51.
[1243] Fredro, "Poparcie wolności," pg. 318.

Fredro was also deeply concerned with "torn" seymiki, especially ones that were supposed to pass an agenda onto the Seym. If enough of the seymiki failed, then there was no point in holding a general Seym—at least not with the delegates of those failed seymiki—because there is little chance that consensus could be reached.[1244] Similarly, the *liberum veto* should require the person who is protesting to give reasoning for their decision under the law and then to stay throughout the duration of the Seym, else at the last minute anyone could raise a *liberum veto* about anything. [1245] Returning to the theme of *interregnum*, Fredro puts limits as to how much power the Seym can acquire without a king and also separates between major systematic changes that rework the constitution and which only be produced during an *interregnum*, versus normal parliamentary business. This is critical, because it not only shows that Fredro's thought was evolving to incorporate and then reconcile his new life experiences with themes he explored throughout his career, but also that he deepened and sophisticated his analysis into a purer constitutional one—at least when it concerned *interregna*.[1246]

Fredro also outlines rules for: the *senatorowie rezydenci*, particularly in cases where one of their members may have broken the law and was sued by an *instygator*, when there is a foreign envoy who is being entertained by the senator or senators, and that the *senatorowie rezydenci* were allowed to hold a separate session in exceptional cases, such as when the king was breaking the law. The *senatorowie rezydenci* should also act as a check on the king himself if he was accused of not ruling properly. The body of the king's residential senator advisers was also one of the tricky parts of old Polish-Lithuanian constitutionalism, since their precise role in advising the king, the definite range of their duties and tasks, and the means that they had to effectively check the king's decisions rather than simply passively observe were always contested.

> In the case of a resident senator, who, if wrongly to the detriment of the law or the Republic of Poland, was *interstitio comitiorum* [the interval of elections], and it turned out that with his permission—at the instance of any sejmik, he was sued by the powiat *instygator* elected *ad eam causam* [to that cause] to the Trybunał, has *inter causas fisci extra ordinem regestri* [among the causes of the treasury out of order of the register] to answer the side and the court *de poena trium millium marcarum* [on the penalty of three thousand marks]. If, however, new hauls over the will of the Republic are made, they will be paid from the goods of such senators. If it would be that a lord serving a foreign master who arrives at the court over three Sundays (and in larger only, *publicae pacis materiae* [matters of public peace]), then *causam dicent* [they will say the reason] at the Sejmy the resident senators residing at the time (namely, the lords court officials) for suspicion of faction and parliamentary futile costs. Therefore, the resident senatorial lords (or all of them, or a germ, if the others did not want to) will be allowed a separate session for themselves for deliberation and solicitation, if something against the law happens. What the king is not supposed to resent, or that from this conference, what they would expose with him, by whom, from among themselves, a deputy. If, however, the royal resentment of the *sequeretur* [would follow] and contradiction did not

[1244] "If the sejmik that before the Seym should be torn, then, not sending another to the court, they will lay it down themselves; if again - then it is allowed to fold it a second time, as long as the deputies could come at the end of the Seym. If I had two or three main sejmiki torn apart and not adopted again, then the Seym will not be celebrated because of the absence of such excellent parts of the Rzeczpospolita, but rather the others will be assembled as soon as possible. Because it turned out that out of deliberate repair the sejmiki were torn apart, from which they did not wish to have deputies in the parliament," Fredro, "Poparcie wolności", pg. 324.
[1245] *Ibid*, pg. 325.
[1246] *Ibid.*, pgs. 325-326.

help, the senator would be allowed to protest at the contradictory one, turning the residential one away, and to see the Rzeczpospolita, so that the seriousness of the laws and the senate would remain. (emphais added).[1247]

Though brief, "Poparcie wolności" gives some substantial insights into major developments within Fredro's thought. In some sense he returns full circle to *Gestorum* in using the question of *interregna* as the lens to illuminate and explore problems within the Polish-Lithuanian constitutionalism of his time. Though Fredro did not explicitly use the term *constitutional*, it is quite clear that he recognized that there were different types of law, with some more fundamental than others. Given that the king was a parliamentary estate whose consent was needed to enact law, major constitutional changes could not be made during the reign of a king, but only afterward. In this sense, *interregna* were merely extensions of the principle of free election combined with the *szlachta* as the true sovereign of the nation. Fredro's tone is also markedly different from other writers in that while many of them were moralists who used classical Greece and Rome as allegories for contemporary events and debates, Fredro actualized history to address modern problems. He also had a significant theory of legal interpretation, concrete proposals for parliamentary changes, as well as how and when laws should change. In a very real sense, Fredro's own intellectual journey parallels the development of 17th century Polish-Lithuanian constitutionalism, for as he matures he is no longer so interested in merely fine-tuning foundational questions—e.g. increasingly esoteric, deeper and deeper reflections on the nature of free will and history—but instead becomes more practical and procedural in his concerns. In this sense, Fredro truly used his real world experience to fill out the gaps within his own thinking, rather than as a list of examples for moralizing about the problems of his time. Fredro's own understanding of constitutionalism evolved in parallel to the context of his day and age, following the broad theme of transitioning from ontological and teleological questions to *poiesis*.

Samuel Przypkowski (1592-1670)

Samuel Przypkowski (occassionally known in the literature by his Latin name Samuel Przipcovius) was one of the key Socinian theologians, statesmen, poets, as well as constitutional and political theorists of his day. His 1628 tract *Dissertatio de pace et Concordia ecclesiae* (*Rozprawa o pokoju w Kościele* in Polish or *A Treatise on the Peace and Harmony of the Church* in English) (1628)[1248] was a specific reaction to ecclesiastical debates in the Netherlands that nonetheless proved to be critically important to religious debates in England in the 1650s due to its English translation.[1249] He continued to promote religious toleration and defended the Konfederacja Warszawska, and was elected to the 1632

[1247] Fredro, "Poparcie wolności" pg. 328.

[1248] Samuel Przypkowski. 1628. *Dissertatio de pace et Concordia ecclesiae.* G. Philadelphus: Amsterdam.

[1249] "*Rozprawa o pokoju w Kościele* in the legacy of Przypkowski's writing is a small periodical in terms of volume. In the enormous volume of the Latin writings of Przypkowski's *Cogitationes sacrae*…, which has 880 pages of a folio of fine two-column printing, it has only 15 pages. However, it is precisely this that has gained more publicity in particular. Not in Poland, where its appearance was not noticed at all. The author, publishing it in Amsterdam in 1628, and repeating it there, two years later, joined consciously and with a specific intention in the current of discussions and polemics that were taking place in the Netherlands at that time. Here too the dissertation caused a resonance, hence its copies spread in England, where then, especially after the appearance of the English translation in the 1650s, it was to play a certain role in shaping liberal views and attitudes in religion," Ogonowski, *Socynianizm*, pg. 352.

Seym where he was either one of the main sources of inspiration, if not the main writer of a letter written by dissidents to oppose the declaration of Catholic clergy at the convocation Seym.[1250] He remained a lifelong ally and consultant of a more moderate branch of the Radziwiłł family, helping them elect the more Władysław IV. After the wars throughout the 1650s he was exiled to Prussia, where he remained engaged in political and philosophical debates into the 1660s until his death in 1670. A prolific writer, most of his religious works had to be printed in the Netherlands because they were too controversial at the time,[1251] from whence they spread far and wide throughout Europe, though under different names and in Latin.[1252]

Przypkowski has been widely recognized as perhaps the predominant advocate of religious toleration among the anti-Trinitarian community in mid 17th century Poland-Lithuania,[1253] but what is most significant for our study is that he built a comprehensive social theory around toleration. As Ogonowski observes, Przypkowski's defense of toleration in his polemics against Szymon Starowolski—a Catholic political theorist and priest who was an explicit advocate of intolerance—have an explicitly political dimension and seek to transform religious tolerance into civil tolerance: that freedom of conscience was fundamental for politics.[1254] For Przypkowski, toleration was not simply a result that emerged from a stable and prosperous society—i.e. as explanandum—but rather was something to be developed in its own right in order for society to flourish--i.e. as explanans. His exploration of toleration was constitutionalist in the sense that creating toleration was itself necessary for the proper structuring for a free, just, and prosperous society. Przypkowski and other

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[1250] Ogonowski, *Socynianizm,* pg. 350.

[1251] *Ibid.,* pgs. 121, 126, 349-350, 479-480; Tazbir, *A State without Stakes,* pgs. 189-190; Ludwik Chmaj. 1927. *Samuel Przypkowski na tle prądów religijnych XVII wieku.* Cracow: Polska Akademja Umiejętności, *passim*.

[1252] For example, "Socinianism" was quite popular in England and even made it to the libraries of Newton and Locke, though held in secret due to heretical views, though Locke himself was even accused of Arian, Socinian, or generally atheist heresy by English Calvinist John Edwards in 1696. See: Nicholas Jolley. 1978. "Leibniz on Locke and Socinianism." *Journal of the History of Ideas* 39(2), pg.55; Richard Sherlock. 1997. "The Theology of Toleration: A Reading of Locke's 'The Reasonableness of Christianity.'" *Jewish Political Studies Review* 9(3/4), pgs. 41-43; Dewey D. Wallace Jr. 1984. "Socinianism, Justification by Faith, and The Sources of John Locke's The Reasonableness of Christianity." *Journal of the History of Ideas* 45(1), pg.55; Thomas C. Pfizenmaier. 1997. "Was Isaac Newton an Arian?" *Journal of the History of Ideas* 58(1): 57-80; Stephen D. Snobelen. 1999. "Isaac Newton, Heretic: The Strategies of a Nicodemite." *The British Journal for the History of Science* 32(4): 381-419; Stephen D. Snobelen. 2001. '"God of Gods, and Lord of Lords': The Theology of Isaac Newton's General Scholium to the Principia." *Osiris* 16: 169-208; Jan Woleński. 2008. "Polish-English (British) Philosophical Contacts and Comparisons from the Fifteenth through the Eighteenth Century," in Richard Unger (ed.), *Britain and Poland-Lithuania: Contact and Comparison from the Middle Ages to 1795.* Koninklijke Brill: Leiden, pg.397; Sarah Mortimer. 2010. *Reason and Religion in the English Revolution: the Challenge of Socinianism*. Cambridge University Press: Cambridge, pgs., 7-8, 104-106; Dustin D. Stewart. 2013. "'Paradise Regain'd" on Socinian Time', *Religion and Literature* 45(1): 180-192; Kenneth L. Pearce. 2014. "Berkeley's Lockean Religious Epistemology." *Journal of the History of Ideas* 75(3), pgs. 423, 434.

[1253] Ogonowski, *ibid*., pgs. 349-350.

[1254] "As we have already indicated, Przypkowski's polemic with Starowolski can be considered a political treaty, the main subject of which is the problem of civil tolerance. Just as the treatise *De pace et concordia Ecclesia* can be regarded as an example of a classic treatise on ecclesiastical tolerance, this one is an example of the writer's focus on matters of civil tolerance. The fundamental thesis, laid out in a very modern way, that in a free Commonwealth the freedom of religion is an inseparable part of political freedom. Religious intolerance inevitably leads to discrimination against citizens and makes equality under public law a fiction," *ibid.,* pg. 370

advocates of toleration ultimately lost the battle for the soul of the 17th century Commonwealth, their ideas linger on to us today, just as what is now the dissent in a prominent court case may one day become precedent under different prevailing ideological and moral conditions. By bringing to light many of his ideas in support of toleration and the importance of a holistic approach to toleration as a social theory, we present a significant departure from the doom and gloom naysayers pervasive throughout Polish-Lithuanian historiosophy. Perhaps even more important historically, his ability to push back against the dominant currents of his time in some sense allows his words to transcend time and space. In other words, he is a theorist of toleration *per se*, rather than as "merely" a radical 17th century Polish-Lithuanian theologian that can only be understood within a highly concrete context.

Przypkowski's two most relevant contributions for us are his *Dissertatio* and his *Braterska deklaracja na niebraterskie naponienie…ad dissidentes in religione uczniones* (*A Brotherly Declaration on Unbrotherly Exhortations…From Learned Religious Dissents*) (1646),[1255] both of which were eventually published in foreign presses and which made a greater contribution to foreign audiences than in his own land. Przypkowski examined tolerance not only as a *moral virtue*—regardless of how desirable it may be—that attends society, but as a constitutive *institution*. This is not the somewhat lukewarm understanding of toleration as a kind of *putting up with difference* of the modern era,[1256] but an understanding of toleration as a necessary component of social life derived from human nature and thus embedded in the natural rights of human beings. As Ogonowski notes, this was important when understood against the background of the 16th and 17th centuries, in that the political power of Churches often translated religious intolerance into civil intolerance, but that the Socinian branch within the radical anti-trinitarian community explicitly fought to reverse this trend, beginning with Faust Socyn himself.[1257]

In addition to the more standard theological and ethical grounds for the polemical defense of the Konfederacja Warszawska present within early 17th century Polish-Lithuanian discourse, Przypkowski presented his 1632 defense of it in explicitly legal terms: he wanted to restore the Konfederacja Warszawska to its original meaning (*mającą doprowadzić przywrócenia Konfederacji warszawskiej jej pierwotnego sensu*).[1258] This is of immense constitutionalist importance in that he is specifically providing praxical standards for legal interpretation, i.e. to not only look at *what* a constitutional text is, but to then suggest *how* it should be read or understood. More precisely, Starowolski argues that there are degrees

[1255] Samuel Przypkowski. 1646. *Braterska deklaracja na niebraterskie naponienie…ad dissidentes in religione uczniones*. Königsberg.

[1256] Toleration as "putting up with difference" is sometimes referred to as the "traditional" or "negative" understanding of toleration and has often been criticized as being too shallow and insufficient for building good relations within a community. See: Rainer Forst. 2013. *Toleration in Conflict: Past and Present*. Cambridge University Press: Cambridge, *passim*; John Horton. 2011. "Why the traditional conception of toleration still matters." *Critical Review of International Social and Political Philosophy* 14(3): 289-305; Ingrid Creppell. 2008. "Toleration, Politics, and the Role of Mutuality." *Nomos: American Society for Political and Legal Philosophy*. 48: 315-359; Anna Elsabetta Galeontti. 2004. *Toleration as Recognition*. Cambridge University Press: Cambridge, pgs. 21, 42, 225; Martha Minow. 1990. "Putting up and putting down: Tolerance reconsidered." In: Mark Tushnet, ed., *Comparative Constitutional Federalism*, pgs. 409-448.

[1257] Ogonowski, *Socynianizm*, pg. 314.

[1258] *Ibid*., pg. 350.

within “dissidents” and that some err more or less from the accepted truth that is the Catholic church, that is some dissidents become acceptable whilst others are not. The difficulty with such an interpretation is that — other than perhaps some vague asides to the public good or to some other ideology — that are no criteria to determine how dissident or heretical one’s views are, at least not in an objective sense. This problem of the inherent subjectivity and incompleteness when making such a determination was directly pointed out by Przypkowski, who acknowledged there were multiple dissenters whose opinions he thought were detrimental to both themselves as well as Christianity, but also acknowledged that others thought the same of him. As long as people had good intentions, their right to think whatever they wanted should be permitted.[1259] Here, Przypkowski is arguing for a more subtle understanding of “dissidents”: it is not a matter of which faith or category one puts themselves in, e.g. Catholics are true believers whereas non-Catholics are dissidents. Rather, it is a question of whether one views their faith as contributing toward the common good of the nation or not. Those who argued that they could have disagreements in theological interpretation but still agree to work together to the common good of the nation, were in this sense “true believers” of the spirit of Christianity, which is to better mankind, whereas those who saw their religion as a way to advance their own particular interests or the particular interest of their sect—whatever that may be—would be considered as the dissidents.[1260] Whereas Przypkowski’s view may have perturbed those with a purely theological view of the question of tolerance, it was quite clear that he had an approach to theology that was contextualized by social and political constraints, i.e. religion was a contributor to the good life.

It is in *Braterska deklaracja* that Przypkowski presents a more detailed constitutionalist argument for the importance of toleration, or perhaps more accurate to say,

[1259] “Distinguishing between dissidents, Starowolski writes that some of them, like Lutherans, err less, others much more; Hence, some could be tolerated out of hand, others would rather not, and some definitely not. Well, putting the matter in this way, Starowolski testifies that he does not understand at all (or does not want to understand) what the Warsaw Act is really about. And it is not about who of dissidents err and who do not err, or who of them err "more" and who "more subtly", but whether those who differ in faith may coexist in one republic or they are to fight each other fiercely. I myself, says Przypkowski, do not agree with the religious views of many dissident groups, because I find that their confessions contain errors that are very harmful to salvation. But others, in turn, perceive that they have let the reins loose in rebuke towards other religions and to give free rein to our zeal and willingness towards our own, then one will not find in the Christian world such a holy Church, which would not be "splashed" with an insulting title by sects opposed to it, or even deprived from the title of Christian. I do not approve of such zeal, because I believe that human errors in religion, being unintentional, are more worthy of pity and gentle learning than of hating and exaggerating their role and harmfulness,” Ogonowski, *Socynianizm*, pgs. 374-375.

[1260] “And in general — and this is where Przypkowski proceeds to the proper merits of the matter — the term "dissidents" has a completely different meaning than that given to it by Starowolski in the resolution on the Konfederacja Warszawska. How this term should be understood was clearly indicated by those who established the Konfederacja. For in the act itself, where peace between dissidents is mentioned for the first time, we read that legislators want to settle "common peace between torn and different people in faith and worship." And it is clearly indicated by the words that are placed in Polish in the first constitution of the coronation Sejm of 1576 [at the coronation of Stefan Batory]. Here is the expression *pacem inter dissidentes in religione*, translated there in Polish as: "peace between those who differ in faith", etc. "In old Polish" style, not those who either do not err in the Christian religion or do not err very much, but those who admit to the Christian religion, regardless of whether they err more subtly or heavier, or do not err at all, differ in their teachings from others who profess this religion. Thus, the term dissidents covers Catholics as well as all non-Catholics,” *ibid.*, pg. 375.

in how permitting and encouraging toleration helps shape society in a manner that promotes the common good. He first develops a four-stage model for the constitutional evolution of noble freedom within the Commonwealth: the first was the passage of *Neminem captivabius* by Jagiełło in 1433, which prevented any nobleman from being imprisoned without a court decision. The second stage was the establishment of the Izba Poselska itself in the middle of the 15th century. The third stage were the decisions made under Zygmunt Augustus' reign that separated religious courts from secular courts and outlawed secular power from enforcing religious degrees (something that was a clear contribution of the executionists). The fourth and final source of noble privileges was the guarantee of free election contained in the Henrician Articles. One of the first achievements of this system was the acceptance of religious toleration and political freedom for dissidents in the Konfederacja Warszawska.[1261]

Finally, Przypkowski outlines several constitutionalist roles fulfilled by the Konfederacja Warszawska, which was "the whole of the fatherland and *szlachta* freedoms, that is briefly—that it is the fundamental law in the Commonwealth" (całość ojczyzny i wolności szlacheckich, czyli krótko—że jest w Rzeczypospolitej prawem fundamentalnym).[1262]

> 1) The foundation of every republic must be consent.
> 2) The Konfederacja Warszawska is the foundation for a union of nations and allows for one throne to rule disparate realms.
> 3) The Konfederacja Warszawska is the foundation of the current Rzeczpospolita and what establishes and ensures equality among all citizens before the law.
> 4) The Konfederacja Warszawska is the foundation of freedom, allowing others to exist as they will so long as they do not harm others.
> 5) The Konfederacja Warszawska is the most important guardian of freedom (najważniejszym strażnikiem wolnosci / *fundamentalis custodia libertatis*) and prevents "slavery of consciousness" (niewola sumień). Przypkowski thus draws a direct line from *neminem captivabimus* to its natural entelechy in the Konfederacja Warszawska.[1263]

What is so striking about his argumentation is that it examines toleration on multiple levels of analysis. Firstly, he establishes political consent as the basis of every republic. This may be thought of as a continuation of classical republican ideas in that the Commonwealth is a community of citizens, that is those who accept the laws and institutions that promote the common good, agree to defend those same laws and institutions, and accept the possibility that they may be called upon to administer or help to minister those same laws and institutions. Secondly, the Konfederacja Warszawska is understood in a constitutional sense, in that it is what binds the nations together as an idea: for a group of disparate and diverse individuals and cultures to come together in one political union, there must be a mechanism or principle with which they may all be treated equally, i.e. toleration. The third point is pragmatic and political: the Konfederacja Warszawska is the current foundation of the Polish-Lithuanian constitutional system. The fourth point returns to the level of the

[1261] Ogonowski, *Socynianizm*, pgs. 370-371.
[1262] *Ibid.*, pg. 376.
[1263] *Ibid.*, pgs. 376-377.

interpersonal: the Konfederacja Warszawska is the codification of basic laws between human beings, allowing them to live together in one community. It also establishes a negative boundary of freedom as that which does not harm others. Finally, the Konfederacja Warszawska exists on the individual level: it prevents the slavery of consciousness by preserving a culture with a high degree of individualism. By examining the Konfederacja Warszawska at the constitutional, political, interpersonal, and personal levels, Przypkowski creates a system where toleration allows for the mediation of individuals both politically and socially. This allowing of individuals to retain their individuality while also becoming a supporting part of a greater collective thus returns to his original point that every republic—that is, every political order established for the procurement of the common good—must be based on individual freedom. His argument thus comes full circle.

Toward the end of his life, Przypkowski encountered radical Catholic thinker, the Jesuit Mikołaj Cichowski, who authored numerous anti-Arian pamphlets and who was afraid that there would be an easing of the 1658 *konstytucja* that forced the conversion or the expulsion of the anti-Trinitarians. Cichowski's hypothesis was that Polish toleration had brought upon them the Deluge as judgement from God to punish the Commonwealth. It was only after the Commonwealth passed *konstytucje* against the anti-Trinitarians that they again saw success in battle. Largely copying and summarizing his previous works regarding the nature of dissidents and toleration, Przypkowski added some historical corrections. He noted that the greatest victories of the Kingdom of Poland and later Poland-Lithuania had been under the reigns of Zygmunt August, Stefan Batory, and Zygmunt III, (as well as the beginning of Władysław IV's reign) with the kingdom reaching its greatest height at the beginning of the Waza period. In fact, the historical record was the exact opposite of what Cichowski said: the decline of religious toleration and the persecution of the anti-Trinitarians during the reign of Władysław IV precipitated the Deluge.[1264] Put another way, the Golden Age of political freedom, relative peace, and prosperity was a period with great religious toleration.[1265]

Unfortunately, religious toleration as a political practice was defeated in the 17th century Polish-Lithuanian Commonwealth, though it would limp on as a principle. Regarding religious toleration, it had clearly failed its constitutional stress test.[1266] Though it is certainly

[1264] Ogonowski, *Socynianizm*, pgs. 82-84.

[1265] Korolko agrees with Przypkowski's assessment, noting the importance of religious toleration as the pragmatic solution to keep such a diverse nation unified together. "Composed of various national and religious groups, the largest state in Europe at that time could only successfully exist on the basis of tolerance. Neither the differences in the field of worship, nor linguistic or cultural differences could disturb the political community. Confirmation of this the situation was the famous document of the Union of Horodel justifying, inter alia, the thesis that the Christian world should unite "in a love that does not hurt anyone". Thus, in the Jagiellonian state, tolerance became an almost necessary condition for the existence of a new state organism, ruled in addition by a dynasty originating from a pagan Lithuanian family. In this context of political union, tolerance towards schismatics and pagans was an excellent school of religious culture, the fruits of which were revealed during the Reformation," Korolko, *Klejnot swobodnego sumienie*, pg. 29.

[1266] "The principle of tolerance, for which the supporters of the Warsaw Confederation fought, turned out to be easy in practice as long as it ruled within the movement relative unity of views. However, the opponents of the confederation, especially the more intelligent ones, initially received the "gift" of the quarrelsome Protestant denominations. Therefore, the systematic exposition of the denominational breakdown (and later political) in

overly simplistic to simply correlate religious toleration with peace and prosperity—external events such as wars and the current balance of European power were also significant contributors, *inter alia*—Przypkowski's defense of the constitutional system gives critical insight as to the rich discourse in the Commonwealth at the time, and why we should be hesitant about over-arching narratives. Indeed, his contributions—both his assessment of his own time as well as his insight into constitutionalism per se—remain woefully understudied. It is worth concluding with his own words:

> What else […] contributed to the power and growth of this Most Clear Commonwealth, if not the mutual consent of so many most beloved peoples who have grown into a body of one country and who are bound in an extraordinary way? What lure lured so many peoples of Ruthenian, Lithuanian, and German blood, separated by such huge spaces, differing in laws, different in character, torn by beliefs, incompatible with dispositions and inclinations, speaking a different language and hostile to each other because of mutual and inherited wrongs? Well, this hot conviction of freedom, thanks to which even the defeated peoples considered it convenient to end a war once.
>
> Our ancestors invented this most reliable and permanent kind of victory that would not be despised, even by the vanquished. For it was not the case that the number of subjects, but the number of subjects that increased in strength, not to destroy happiness, but to the subjects was appointed the victory of victories, and the survivors were not enslaved into servitude, but to live in freedom […] This is the only remedy for the most fatal disease that ravages [our] neighbouring countries.[1267]

The Period of Seymik Rule (1669 to 1717)

Having now considered the textual evidence for changes in the constitutional and parliamentary practice of the Seym and its relationship with the seymiki, we briefly turn to evaluate what exactly the seymiki were up to. What is precisely meant by "seymik rule"? As noted earlier, the second half of the 17th century and the beginning of the 18th century was when the seymiki began to rise in importance,[1268] though naysayers and critics have also referred to this period as "*magnat* rule" [1269] due to the fact that it disproportionately favored *magnaci*. One of the innovations of shifting the majority of parliamentary activity to the local level was that majority rule could be imposed—if not the *liberum veto* and other antimajority mechanisms could be more easily weakened. The seymiki thus took much of the king's role as a parliamentary estate away from him, namely that the king no longer had exclusive power to call Seymy or to set its agenda. This meant that the seymiki could meet as often as they thought was necessary and it also greatly simplified the political process in that local representatives no longer had to be elected and thus no longer had to report back in special sessions of the seymiki. A consequence of these changes, however, was that the seymiki usually contended themselves in dealing with local matters, particularly economic issues.

Bardach, Leśnodorski, and Pietrzak clarify that:

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the counter-reformation propaganda, and especially the fostering anti-Arian sentiments among the Catholic middle-class and dissenters turned out to be the best and, consequently, the most effective means of overthrowing the Warsaw Confederation," Korolko, *Klejnot swobodnego sumienie*. 143.

[1267] Samuel Przypkowski. 1791. *Braterska deklaracja na niebraterskie naponienie…ad dissidentes in religione ucznione*. Gdańsk, pg. 545.

[1268] Lityński. "Sejmiki dawnej Rzeczypospolitej," pg. 295.

[1269] Borucki, *Seymy i seymiki szlacheckie*, pgs. 267-270.

As the activity of the general Sejm weakened along with the disappearance of general sejmiki, the importance of the land sejmiki was growing: which at the end of the 17th century surpassed the Sejm. In basic matters, the sejmiki were decided by *magnaci* acting through devoted *szlachcice*, and in local matters - *szlachta* in general. In the second half of the 17th century, the sejmiki obtained the right to elect commissioners to the Tax Trybunał, but also appointed województwa fiscal courts (commissions) themselves to judge tax arrears, settle tax collectors and perform other tasks commissioned by the regional assemblies. These practices were banned in 1717.

The functions of sejmik local self-government developed gradually over the course of the 17th century. Sessions held for this purpose were sometimes referred to as the economic sejmik. They were associated at the time—depending on the województwa—with pre-Sejm or relational sejmiki, or most often with deputy sejmiki. It was done in such a way that the sejmik was postponed to the next day, allocating the session to deliberations and resolutions on land matters.

The assemblies were convened by the king. In order to get around this limitation, in the 17th century, the sejmiki started to apply deferral - limiting the sessions, and thus became independent of the central authority. The limited sejmik could resume the formally deferred deliberations alone. It was enough to be convened by the marszałek of the regional council.

Also in the sejmiki, the assumption was basically unanimity. However, in order to ensure representation of the nobility of each province (land) in the Sejm and in the Trybunał Koronny, the majority rule was introduced in the election of deputies and Trybunał deputies. With time, most of the sejmiki, in order to enable their effective functioning, introduced decision making with a larger number of votes. There was no single *konstytucja* on this matter for the entire Rzeczpospolita, but the Sejm passed resolutions at the request of each sejmik separately. As a result, there were also regional assemblies that kept the unanimity rule until the end. Here, too, there was a far-reaching decentralization. [1270]

Kriegseisen largely confirms their analysis on several lines:

In the years 1659-1696, in just 46 years, the number of sejmiki in Sandomierz increased to 124, but parliamentary sejmiki were held only 32 in that period. Perhaps less important is the decrease in the number during the reign of Augustus III, when the Seym practically did not work - how much is the increase in the number of assemblies of a different type, convened on matters loosely or not at all related to state politics. The royal envoy would come to the regional assemblies less and less frequently with *instrukcje* that were really important in the understanding of *szlachta*, and less and less often they hoped that the postulates expressed by them in the envoy's *instrukcje* would be implemented.

The complete lack of truly political interests of the szlachta in the late period of sejmik rule is evidently evidenced by the fact that forbidden by law "private assemblies convened without a royal universal (and this was a really common practice at the beginning of the 18th century), did not deal with strictly political issues at all. Completely different from what happened a hundred years earlier at the illegal congresses during the reign of Zygmunt III Waza, which had an obviously oppositional character.[1271]

First, Kriegseisen notes that while the Seym met 32 times in the 38-year period from 1659-1696, which was greater than anticipated by the Henrician Articles but certainly within the norm, he cites that the Sandomierz seymik met over four times as frequently. It should be noted that only relying on one województwo is more anecdotal than robust evidence and that a systematic comparison of all the województwa in that period is necessary for complete

[1270] Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pgs. 203-204.
[1271] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pg. 99.

confidence. However, it does generally match the overall thesis, i.e. that it is consistent with what a constitutional or political theory would expect. In this sense, it cannot be outright discounted, even if it is unlikely that all the other województwa were as equally active as the Sandomierz one was.[1272]

Secondly, he notes that it was not just that the local seymiki were economic in nature, but rather there was a general avoidance of dealing with issues pertaining to the Seym and that issues dealing with the whole of the Commonwealth were to be avoided as much as possible. In this sense, it cannot be said that the Commonwealth was approaching anything like a modern federalism, confederalism, or even devolution, in that the local seymiki avoided any outright political decisions and largely stuck with what we would consider to be policy or administrative issues. A major constitutional tension—indeed probably the most important constitutional tension—within any compound polity is the distribution of power and responsibilities across its subunits from complete decentralization in anarchy to minimum decentralization in confederalism to a balanced system in federalism, a strong degree of centralism in unitary systems, to ultimate centralization in absolutist or totalitarian states. Instead, the Commonwealth appears to have—at least in practice, if not in a sophisticated, conscious approach—attempted to dodge this issue, which makes it historically unique, even within the internal development and history of Poland-Lithuania. As Kriegseisen summarized: "the interests of the sejmik were greatly diversified, and at the same time narrowed down to internal, and even private, particular issues."[1273] To a very real extent, "seymik rule" was not "ruling" in the traditional sense, as much as managing.

This is in direct contrast to what Kriegseisen has referred to as "seymik diplomacy", i.e., where the seymiki actually organized themselves across multiple, local self-governments. In extreme cases it could extend to reaching out to foreign dignitaries. The larger, more powerful provinces, governed by so-called "upper seymiki" naturally wielded disproportionately more influence.

> The oldest and most interesting form of sejmik diplomacy were agreements between individual local self-governments on the provincial scale and even in the Polish-Lithuanian Commonwealth. The so-called upper sejmiki willingly informed the neighboring lands about their resolutions and encouraged them to take similar decisions. It was an old practice, dating

[1272] The very reason why Kriegseisen cites Sandomierz specifically is that it was always a hotbed of *szlachta* who were incredibly strong defenders of the golden liberties as well as a "training ground" that would prepare its participants for impactful political careers on the national stage. Not only are the Sejmik records excellent, but by looking at a region with arguably the strongest support for *szlachta* freedom from the times of the executionist movement through the Rokosz Zebrzydowskiego into resisting the Waza and then Saxon dynasties, the political trends of the country are more pronounced and clearer to recognize. Thus, while it is unwise to unequivocally generalize the Sandomierz region to the entire Crown—let alone the entire nation—it does serve as something of a bellwether and is largely consistent with what we would expect from theory. In his own words: "With the fall of the Seym, the importance of the sejmiki, which was still important in the first half of the 17th century, also declined. We allow ourselves to present this process in fragmentary terms with the example of the Sandomierz Province, considered a nursery for *szlachta* politicians, a province in which the traditions of landowners' involvement in politics — dating back to the period of the struggle for the "execution of rights" — were undoubtedly the strongest in the Crown," Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pg. 98.

[1273] *Ibid*., pg. 84.

> back at least to the times of Sigismund III and Zebrzydowski, when the opposition saw excellent a remedy for the absolutist attempts of the royal court […] During the Northern War, local governments went even further and allowed themselves to conduct foreign diplomacy. We know examples of sejmik messages sent directly to the King of Sweden, Charles XII and Minister Piotr I. They presented, admittedly, local matters, asked for relief and protection against armies "managing" *szlachta* estates.[1274]

> Reading the letters could be accompanied by listening to the messages. They came to the sejmiki most often from neighbors debating in the neighboring lands, they were also sent by cities, clergy and the army - most often in the matter of outstanding pay. This sejmik diplomacy reached its heyday in the first half of the 18th century, when local governments tried to develop a common position against various threats.[1275]

It is not surprising that a push toward more self-government occurred during the Rokosz Zebrzydowskiego against Zygmunt III Waza and persisted in its wake: not only did a king of partially foreign blood arguably put his desire to reclaim his foreign throne over his duties to the Commonwealth, but he also attempted to pass reforms that would move the country toward absolutism. In many ways, Jan II Kazimierz was an echo of his father, though his more beloved brother Władysław IV's reign was too brief and much more favorable toward upholding the *szlachta*'s rights. This period of seymik diplomacy provides another layer of complexity to the question of centralization vs decentralization of political power in the 17th century, in that the more powerful—i.e. larger, wealthier, etc.—województwa would have had seymiki with disproportionately greater power and influence on the surrounding lands. In this sense decentralization was not equal as in the case of German or American federalism that attempts to balance out the power across the geographical subunits.

After a fierceful political struggles during the short reign of Michał I Korybut Wiśniowiecki, the beginning ofJan III Sobieski's was marked by the popularity of the victorious commander of the Chocim battle, though Sobieski's relationship with the *szlachta* significantly deteriorated at the end of his rule. The result was that the seymiki's attempts at self-governance were not always specifically opposed to the policies of a king. When the next king, August II Mocny came to power, even though he shared many strong parallels with the worst of the Waza kings, Kriegseisen explains that: "The illegal conventions from the times of Augustus II the Strong were convened under the pressure of circumstances and were not always behind the political intrigues of the anti-Saxon opposition."[1276] Over time, however the seymiki themselves began to break down.[1277] What made the issue worse was that as the Seym and then the seymiki became increasingly dysfunctional, more and more

[1274] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej.*, pgs. 245-246.
[1275] *Ibid*, pg. 58.
[1276] *Ibid.*, pg. 99.
[1277] "In the second half of the 17th century, the progressive anarchization of political life in the country reached the deputy seymiki. Applying the principle of unanimity in the selection of tribunal judges, in some województwa, it was allowed to break the regional council by one person, dissatisfied with the majority decision. Cases of breaking off parliamentary assemblies in the 17th century were still quite rare and had little impact on the work of the supreme court. The lack of one or even several judges deprived the województwo of its own representative in the tribunal but did not hinder its normal functioning. As time passed, the phenomenon of breaking deputies' assemblies became more and more common, and it reached its peak in the Saxon era," Waldemar Bednaruk. 2008. Trybunał Koronny: szlachecki sąd najwyższy w latach 1578-1794. Towarzystwo Naukowe KUL: Lublin., pgs. 209-210.

duties had to be taken up by the courts, the Senat, or other administrative agencies, which only made the *szlachta* more wary of collusion between the king and the *magnaci* to threaten their rights.[1278]

It is hard to clearly pin down why the seymik opposition became more interested in praxis and poietic, but a possible partial explanation is that the *szlachta* had become so divided amongst themselves that no one faction could produce enough support for their vision of reform. Local rivals could more easily put aside their differences and work together on issues of governance and policy because the stakes were simply lower than at a higher level. Evidence for such an approach is the fact that, over time, the usage of *liberum veto* would even begin within the seymiki and that they became more interested in ceremony rather than effective governance.[1279] Throughout Polish-Lithuanian Constitutionalism, the seymiki were known to be places where political passion could sometimes erupt into physical violence or threats of physical violence, with their being a famous provision banning weapons at political gatherings, which were usually held at churches as they were neutral locations and in the hopes that sacred ground would deter violence.[1280] Borucki notes that even though the early Saxon period was when the seymiki had risen to great importance, this was more so due to the abysmal state of the Seym, rather than any merits of the seymiki *per se.*[1281]

When the nation was at peace and prospering, the *szlachta*'s individualist political tendencies served as a check against abuses of the king, the Church, the *magnaci* and against the excesses of the *szlachta* themselves. When the nation was under political or economic stress or at war, the *szlachta* were not given over to the *better angels of their nature*, but instead toward pettiness, anarchy, and obstruction. Thus, the period of seymik rule was not a new invention but rather part of the natural political cycle that the *szlachta* inhabited that ebb and flowed between regional and central political power. The beginning of the Saxon period saw the formation of multiple *konfederacje* with August II Mocny being forced to abdicate before regrouping and successfully relaunching a civil war to regain his throne. Despite this, there was no active *szlachta* consensus either for or against August II Mocny and thus no unified political will to bring the *szlachta* together. Thus, a reasonable explanation is that the *szlachta* returned to their historical center of gravity both during the conflicts and after August II Mocny returned to power: with there being no way to dislodge him and with the king having insufficient political power to completely enforce his will, the *szlachta* turned to local affairs and only occasionally met to obstruct the king, a *magnat*, or any other one party from achieving total political power.

The final piece to examine during the period of seymik rule is the role played by *instrukcje* and the *Seymiki Relacyjny*. Kriegseisen argues that to a certain extent the rise of the seymiki and the decline of the Seym were natural consequences of *szlachta* democracy given that both *magnaci* and *szlachta* had a common interest in trying to prevent absolutism, the 17th century also witnessed the importance of *instrukcje*. In the past the *instrukcje* were

[1278] Borucki, *Seymy i seymiki szlacheckie*. Książka i Wiedza: Warszawa, pgs. 229, 237.
[1279] Kriegseisen, *ibid*, pg. 101.
[1280] *Ibid.*, pg. 186.
[1281] Borucki, *ibid.*, pg. 270.

considered to be binding according to tradition,[1282] and in the 17th century this was still largely intact but it had become clear that the lack of a stronger enforcement mechanism on the representatives' votes could be problematic.[1283] What was particularly problematic was when the attendees chose to ignore the *instrukcje* because they prioritized reaching unanimity to pass *konstytucje*, which specifically became important after 1652 when the *szlachta* had strong negative reactions against those who threatened to break up the Seymy. To a certain extent, the institution of *instrukcje* actually provided some limitations to the power of the seymiki, since an individual representative could find various reasons to support going against the will of the seymiki in order to secure the good of the nation. According to Edward Opaliński, this was particularly important through the first half of the 17th century.[1284] However, as Kriegseisen notes, throughout the Saxon period into the reign of August II Mocny's son August III, the number of pre-Seym seymiki decreased as well as the king's representatives would reach out to them and attempt to manipulate them less and less, precisely because influencing the seymiki *instrukcje* was less and less reliable way of getting through the king's proposed reforms.

> Well, from the years 1572-1696 (the 17th century was somewhat shifted and extended here), information about 223 noble assemblies of the Sandomierz province has been preserved. In the years 1572-1649, i.e., within 77 years, 97 sejmik congresses were held, 42 of which were sejmiki. In the years 1659-1696, in just 46 years, the number of sejmiki in Sandomierz increased to 124, but only 32 pre-Sejm Sejmiki were held in that period. Perhaps less important is the decrease in the number not even during the reign of Augustus III, when the Seym practically did not work - how much is the increase in the number of assemblies of a different type, convened on matters loosely or not at all related to state politics. The royal envoy would come to the regional assemblies less and less frequently with *instrukcje* that were really important in the understanding of landowners, and less and less often they hoped that the postulates expressed by them in the envoy's *instrukcje* would be implemented.[1285]

[1282] *Supra*, n 553-554.

[1283] Bardach, Leśnodorski, and Pietrzak, *Historia państwa i prawa polskiego*, pgs. 200-203; Borucki, *Seymy i Szlacheckie*, pg. 136.

[1284] "An important problem for the functioning of the Polish parliament was the binding force of the deputies' *instrukcje*. While the king always asked the sejmiki to send parliamentary representations with unlimited powers, the sejmiki rarely complied with the royal wish. The problem of conditional consent to the parliamentary agenda proposed by the king has a long history, reaching at least to the executionist movement. It was precisely on the basis of a conditional mandate that the deputies could demand Zygmunt August's consent to their own demands for many years, while at the same time, on the basis of the *instrukcje* of the sejmiki, they could refuse it to the king, blocking the satisfaction of the monarch's needs. Despite the important political functions fulfilled by the deputy's *instrukcje*, it was treated very loosely. The analysis of parliamentary diaries from 1587-1652, as well as numerous monographs of individual parliaments, now allow us to formulate a thesis that also in the period of interest to us, the attitude of deputies to their own *instrukcje* was very flexible. They did not have to be overly afraid of the negative reactions of voters gathered at relational assemblies. [*Sejmiki relacyjne*] They could always explain that they departed from the *instrukcje* so as not to spoil the general consent of the Seym. The very institution of parliamentary sejmiki created quite a comfortable situation for the deputies, because on the one hand, they took an issue to the brothers, although the *instrukcje* ordered them to object, they transferred the final decision to the *szlachta*, while on the other, they could take it to their brothers, if it was convenient, even those matters where the manual was neutral or positively recommended. The possibility of appealing to voters strengthened, in our opinion, the position of the deputies against also individual persons, and, contrary to appearances, made them more independent in the face of Sejmik *instrukcje* Opaliński," *Sejm srebrnego wieku*, pgs. 159-160.

[1285] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pgs. 98-99.

Overall, there was widespread support for the institution of *instrukcje*. Fredro himself was a strong advocate for *instrukcje* in his work *Poparcie Wolności*,[1286] which was overall consistent with his defense of the *liberum veto* as both were counter-majoritarian mechanisms that served as a break on the Seym. Bednaruk cites an anonymous 1668 letter—whose authorship is now believed to be Fredro's[1287]--that argued that deputies who explicitly went against their *instrukcje* should lose their voting rights for four years and face imprisonment for up to two weeks.[1288] How binding the *instrukcje* really were and the punishments for breaking them varied greatly based upon the political culture of each województwa and the political situation of the country at the time. However, the problem came to a head in 1716-1717 and the infamous "Silent Seym" (Seym Niemy), which had devastating consequences throughout the remaining life of the Commonwealth. To this we now turn.

II. The Death of Parliamentarianism: The 1717 Seym Niemy (Silent Seym)

The years 1700-1717 were almost one large period of continual civil war within the Commonwealth. To make matters worse, it roughly overlapped with what is now referred to as the Great Norther War (1700-1721), which pitted a coalition led by Peter I the Great of Muscovy with Saxony, Prussia, *inter alia*, against a coalition led by Charles XII of Sweden. The Poles-Lithuanians loyal to August II Mocny sided with Saxony and Peter I whereas those who favored Leszczyński or otherwise opposed August II sided with the Swedes. The war was disastrous for Sweden and led to the irreversible decline of the Swedish Empire whereas Muscovy transformed into the Russian Empire and the dominant political force in Central-Eastern Europe. It was also a pyrrhic victory for Poland-Lithuania: August II Mocny and Saxony were weakened to the point that he could never impose absolutist rule on the Commonwealth, but the Commonwealth was in turn so devastated that it essentially became a protectorate of Russia.[1289]

By 1713 August II Mocny had finally defeated Leszczyński and his supporters and felt confident in pushing through his own reforms, including abolishing the *liberum veto* and ensuring dynastic succession of his son. The *szlachta* began to fear that August II would impose absolutism by force and rose up against him when he moved the Saxon army into the Commonwealth, under the guise of supporting the war effort. In November of 1715 the *szlachta* rose up in the Konfederacja Tarnogrodzka (the Tarnogród Confederation) to oppose August II's illegal taxation to support his army as well as illegally placing his army in the Commonwealth without permission of the Seym. Neither side was able to achieve a decisive victory and the rebels continued a long campaign. A series of negotiations took place throughout 1716-1717, [1290] with Peter I sending his representatives to help broker a peace

[1286] Tracz-Tryniecki, "The Principle of *necessitas frangit legem*," pg. 324.
[1287] Tracz-Tryniecki, "Andrzej Maksymilian Fredro na sejmie zwyczajnym 1652 roku", pg. 53f.
[1288] Bednaruk,*Trybunał Koronny*, pg. 88.
[1289] For a more in-depth view, particularly giving the nuances of the events in Poland-Lithuania, see: Stone, *The Polish-Lithuanian State*, pgs. 245-256; Davies, *God's Playground*, pgs. 371-380.
[1290] Robert Kołodziej. 2019. "Sejm Niemy na tle praktyki funkcjonowania staropolskiego parlamentaryzmu." In: Zwierzykowski, Michał, ed., *Sejm Niemy: Między mitem a reform państwa*. Wydawnictwo Sejmowe: Warszawa, pgs. 149-155.

that he knew would give him a permanent foothold in the Commonwealth.[1291] Eventually a deal was struck, the Traktat Warszawski on 3 November, 1716[1292]: the Saxon army would leave Poland-Lithuania except for 1,200 men as a royal guard, Saxon ministers could not play any role in the Commonwealth's affairs, and the union between Poland-Lithuania and Saxony would be a personal union only. Peter was pleased by the terms, because it ensured that Poland-Lithuania and Saxony would remain weak and dependent on him.

A Seym was scheduled for February, 1717 to confirm the agreement. The infamous Silent Seym lasted only one day, with no debate or discussion allowed whatsoever.[1293] Despite its imposition by force, the Silent Seym shaped the Commonwealth's constitutional order for the next 74 years, especially the period 1633-1664 during which the Seym only met twice, which shall be referred to as the Saxon Silence. The Traktat Warszawski is summarized in Table 4.10, which also presents a *konstytucja* from the same Seym, though it is technically not part of the Traktat Warszawski.

[1291] Davies, *God's Playground*, pg. 375.
[1292] "Traktat Warszawski," 3 November, 1716, *Volumina Legum*, pgs. 113-133.
[1293] Though the term "Sejm Niemy" (Silent or Mute Seym) was because there was to be no debate, Kołodziej argues that this has been somewhat overstated and that there were attempts to protest, though they were ultimately unsuccessful. See: Kołodziej, *ibid.*, pgs. 172-173.

Table 4.10 Traktat Warszawska Approved by the Silent Seym, 1 February, 1717, Selections[1294]

Article #	Text	Outcome(s)	Constitutional Archetype(s)	Constitutional Archetype-as-Such
II	—	Limitation of the Saxon Army to 1,200 royal guards	N/A	N/A
III	With the unanimous consent of His King of Majesty and of all Estates of the Republic of Poland, it was passed and it was decided that, in order to clear away all the things that had been mixed due to the anger of these restless times, that the ancient laws and privileges, the *konstytucje* and fundamental statutes of the Rzeczpospolita be restored to their former form and custom, and that true and proper liberty in all councils, courts, seats, dignities, ministries, (healthily within the boundaries of the articles that particularly regulates each of them) and to preserve all restored public acts, and then to holily preserve them from His Majesty as well other Offices and Estates, that is senators and the knights [*szlachta*].	The King and the Other Parliamentary Estates Agree to Restore all Previous *Konstytucye*, Law, and other Privileges. The King and All Parliamentary Estates Agree to Protect and Preserve Them.	Consent and Legitimacy	Ontology
			Sources of Law	
			Purpose of the State	Teleology
	Konfederacja Tarnogrodzka Dissolved		Consent and Legitimacy	Ontology

[1294] Traktat Warszawski," 3 November, 1716, *Volumina Legum VI*, pgs. 113-133.

III	New Konfederacje are Forbidden and Punishable by Law		Legitimate Processes of Constitutional Change	Praxis
IV	No Mass Celebration of Dissenters Permitted other than those Religions Established Before the Legal Acts of 1632, 1648, 1668, and 1674; The Cities and some Parts of the Grand Duchy of Lithuania are Exempted from this Rule		Individual Rights (Removed)	Ontology
	Dissenters are to be Punished first with Fines, then Imprisonment, and then with Exile according to the Legal Acts of 1632, 1648, 1668, and 1674		Criminal or Judicial Procedure	Poiesis
	The City of Gdańsk is to Return the Catholic Church that was Seized by Protestants		N/A	N/A
	Gdańsk and other Prussian Cities Granted More Autonomy in Religion		Individual Rights (Limiting State Power)	Ontology
Seymiki Relacyjny	We abolish, and forbid, all private assemblies [Seymikowanie] [Seymiki parliamentary activities] without our universals as well as extensions [limitations] of these seymiki, we forbid and abrogate the continuity of the Marszałek's directorship in the future [beyond the seymiki] except for ordinary seymiki, determined by law, in order to not transgress their sphere of power and action defined by law, we seriously guard under the nullification of contradictory acts and under the punishments expressed in law.	Seymiki are Forbidden from Transgressing their Sphere of Action According to Law	Hierarchical Organization of Institutions	Ontology
			Sources of Law, Legal Interpretation	

The third article of the Traktat Warszawska did not introduce any new ideas, but instead established continuity of law and presented the duty of the king, the Senat, and the Izba Poselska as defending and preserving the rights and privileges that had come before. While this was par for the course in terms of Polish-Lithuanian constitutionalism, having been presented at many different Seymy, pacta conventa, *inter alia*, it is notable for effectively spelling the end of August II Mocyn's absolutist ambitions. The "anarchy" of the *szlachta* was well-known at the time, and the absolutist rulers clearly saw it as a sign of weakness. The message that the king—who himself had harbored more absolutist ambitions—would publicly acknowledge and agree to uphold the previous *konstytucye* and privileges of the *szlachta* was a clear reverberation of the echoes of the executionist movement, following the reform period around the Rokosz Zebrzydowskiego and the earlier 1550s-1560s under Zygmunt II August.

The fourth article is noteworthy for the continuing trend of declining religious toleration, specifically freezing the number of acceptable non-Catholic denominations. As with the attempts to exile the Arians nearly half a century earlier, there are some clearly outlined criminal and juridical steps. What is notable is that the Protestant nature of Prussia and significant parts of Lithuania are implicitly acknowledged and accepted, though the city of Gdańsk had to restore a Catholic church. In this sense, the religious toleration of the Konfederacja Warszawska is now effectively lost, though its last bastions are arguably in the semi-autonomous regions of Gdańsk and Prussia.

The real constitutional innovation begins with the *konstytucja* "Seymiki Relacyny", which significantly alters the role played by the post-Seym seymiki. The seymiki were forbidden to gather unless it was specifically in response to a universal summon given by the king, i.e., it was a return to standard practice where the king would call a Seym and then six weeks or so before the Seym the local *szlachta* would gather at their seymiki to elect their representatives tothe Izba Poselska, respond to the king's petitions, and propose their own legislation. The local seymiki were essentially stripped away of their expanded influence and increased local autonomy they had enjoyed in the period of seymik rule. It also changed the post-Seym seymiki in that if a decision was not able to be made at the Seym, the local seymiki could not continue to debate it amongst themselves in preparation for a resuming a national Seym under the Seym Marszałek. This provision appears to have multiple goals. First, it clearly weakened the seymiki and removed their legislative initiative, making them essentially dependent on the Seym and the king.

This much-neutered state of the seymiki and the Seymy would persist in part through the remaining lifespan of the Commonwealth.[1295] Internal relations were pacified, control was restored over the army, and the seymiki were stripped of any competence in fiscal or military matters.[1296] The Commonwealth was at peace, but it was a stillness akin to death. For August II Mocny, it was a pyrrhic victory, with his absolutist ambitions and his reforms

[1295] "The direction of changes initiated in 1717, consisting in limiting the self-government, was thus maintained up to the threshold of the Great Seym, and only bans and orders were operated, without creating an equivalent system for the limited local self-government," Adam Lityński. 1992. "Samorząd szlachecki w Polsce XVII-XVIII wieku." *Kwartalnik Historyczny* 99(4), pg. 28.
[1296] Wrede, *Sejm i dawna Rzeczpospolita*, pg. 163.

almost completely stunted: for the rest of his kingship, he was effectively reduced to an administrator of a nation devastated by a century of intermittent warfare. The Seym almost never met under August II Mocny again, since all parties knew that serious reform or agreement was impossible and that would be useless under the Russian shadow. August II passed this pessimism onto his son, August III, under whose 30 year reign the Seym would meet only twice, one of them being his own coronation. The Silent Seym was the death of parliamentarianism in the Polish-Lithuanian Commonwealth.

VIII. The Second Turn of the Hermeneutic Spiral: What can Constitutionalism Learn from the Polish-Lithuanian Experience of Constitutional Maintenance?

The time has come to ask ourselves the question: what are the achievements of this long period of constitutional maintenance? What can we learn from 17th century Polish-Lithuanian Constitutionalism, i.e., how does its institutional, practical, and ideational production—as evidenced and elucidated through texts—reflect upon our understanding of constitutionalism per se? 17th century Polish-Lithuanian constitutionalism contributes to broader, transhistorical, comparative constitutionalism in three significant ways: first, it demonstrates a qualitative shift in constitutionalism toward praxical and poietic approaches due to external pressures and internal fissures that the *szlachta* could not overcome. Secondly, it allows for more precise specification and clarification between poesis and praxis as "flavors" of constitutionalism. Finally, it offers significant grounds for reflection on periodization of the Commonwealth's constitutional development, particularly the difficulty in dealing with the Wettin era. All three follow in turn, followed by a brief reflection upon the spirit of 17th century Polish-Lithuanian constitutionalism in general.

To address the first question concretely, it is important to remind ourselves of the distinction between the *constitutional archetypes-as-such* of praxis and poiesis. In some sense, both are "secondary" in that they can only proceed after the ontological (what, who) and the teleological (why) questions can be answered, with praxis satisfying the question *in what way* we are to achieving that which is determined by ontology and teleology, whereas poiesis address the question *by which means* are we to achieve this goal concretely. In some sense, poiesis could be thought of as "tertiary" in that it helps to facilitate praxis, but it is possible if a constitutional system—*any* system, really—has become overly ceremonial, formulaic, or traditional it may be what is addressed first or to which a disproportionate amount of energy is given to relative to the practical results. For example, one may think of as monarchies that spend more time on formalities, manner, and ritual than on actual governance, in bureaucracies that have lost their original purpose and exist for nothing more than to propagate themselves, or scientific disciplines that are more interested in the credentials of scientists or the journals in which they publish than the novelty of the experiment or research being conducted.

When discussing a shift away from primary constitutional questions to secondary or tertiary constitutional questions, it is important to address two further questions: *what* does this mean particularly and *why* is this particularly happening. Both of these hinge upon the evidence taken in. Nor are the questions of what and why completely separable, but rather they are dependent upon each other. The 17th century witnesses a decrease in what we may

refer to as constitutional acts as well as acts with constitutional implications, that is to say select acts that serve as significant foundations for the subsequent organization and meaning of both the political and legal systems, as well as legal acts that in whole or in part grant further clarification upon themes introduced by the former. There was no equivalent of the Henrician Articles or the Konfederacja Warszawska when the *szlachta* gathered in consensus. There was no executionist movement that provided the political concepts that facilitated such a consensus. Even though the Rokosz Zebrzydowskiego failed in practical terms, it established a political consensus of the *szlachta* that significantly diminished the power of the king. The 16th century established the Trybunał, we introduced the wholly new concept of a court that replaced the king as the supreme judge of the land. The 16th Konfederacja Warszawska elevated the practice of religious toleration and elevated into the law of the land.

There simply were no equivalents to these watershed moments in the 17th century. Whereas the creation of the golden liberties was a series of compromises wherein the king granted privileges to the *szlachta* in exchange for military and economic support, the "reform" attempts by Zygmunt III, Jan II Kazimierz, and August II Mocny were made in opposition to the Seym, rather than by compromise. The very advent of the *liberum veto* and the *liberum rumpo* was to break up the Seym, whereas the executionist movement gradually won over most of the *szlachta* to bring them closer together in one political culture. When Lubomirski rose up against Jan II Kazimierz, it prevented the king's ambitions for *vivente rege* election but did not produce any new consensus to bring the country forward: it destroyed both men. When the Ruthenian and Cossack *szlachta* demanded more rights and rose up against the *szlachta*, the *szlachta* did not seize upon the moment to expand the citizenship of the country, but instead engaged in a series of bloody wars. When Khmelnytsky had the chance to make peace with the Commonwealth and facilitate the Cossacks transitioning in to *szlachta*, he instead chose civil war. Within fifty years both the Cossacks and the Commonwealth were reduced to vassals of imperial Russia. When radical theologians and statesman defended religious freedom as individual freedom and part of what made the *szlachta* love their country and rise up against it, they were sacrificed on the altar of intolerant political convenience: the backstabbing mainline Protestant churches reaped what they had sown when August II Mocny converted to Catholicism and then imposed it as the dominant religion. Rather than be content with ruling over the largest territory in Europe, the Waza dynasty greedily gambled their crown to regain the throne of Sweden: provoking Muscovy and Sweden in devastating wars that destroyed the Commonwealth, leading to Jan II Kazimierz abdicating in total defeat and shame.

Time and time again, when the opportunity for systematic renewal and change arose, the ambition of the king, the rivalry of the *magnaci*, or the shortsightedness of the *szlachta* dashed these chances. In short, no major institutions were added, no major new constitutional agreements were reached, and the positions of the Eastern Orthodox and radical Protestant communities declined, with many Eastern Orthodox *szlachta* breaking away in a series of bloody civil wars and the radical Protestants being illegally expelled. Rather than a period of constitutional construction, the disastrous 17th century was instead a period of constitutional deconstruction, eroding the rule of law, individual rights, the power of the king, the power of the Seym, and the power of seymiki. In short, the institutions of the Commonwealth were

more or less fixed, and to a very real degree many of them were even lessened. This was despite the best efforts of Polish-Lithuanian statesmen to introduce reforms or to revive their country.

All was not entirely lost, however, and some alterations and reforms to the Seym were made, though they focused on more local affairs. If the *szlachta* could not control the historic destiny of their country at the macroscale, they could certainly attempt improvements on the margins, hence the shift toward "secondary" and more practical issues. To put it another way, the *szlachta* lost the ability to make ontological or teleological changes, but they were able to have some effect on the organization of the political system, particularly around the ordering of judicial or parliamentary bodies, i.e., praxical changes, whilst they made significant attempts to reorganize what occurred within those same judicial or parliamentary bodies, i.e., poietic changes. Further analysis of the particular innovations reveals that a more sophisticated conceptual model of praxis and poiesis is needed. As in the preceding chapter, several phenomena emerged that simply did not fit prior constitutionalist categories, necessitating the invention of new constitutionalist subcategories. No more is this more clearly indicated than in the balancing act between the seymiki and Seymy and their relative authorities, powers, and prerogatives.

Whereas our reflection at the end of the period of constitutional construction necessitated the distinction of praxis and poiesis in the first instance, the 17th century revealed that both categories had to be expanded to reveal the wide array of sub-phenomena contained within them. For example, when the Seym reached a legislative impasse, it was determined that it would be necessary to divide the parliamentary labor with the seymiki, which required the praxical creation and organization of special seymiki that would serve as intermediate points between Seymy. At the same time, these new seymiki would require their own specific, poietic provisions for how to set their relative parliamentary agendas. Similarly, there were great strides made in the creation and management of parliamentary subcommittees to deal with various topics in greater depth. Finally, there were numerous penalties established for those who abused their offices or the regular parliamentary order, which the Seym establishing specific judicial processes to take care of them.

These revelations demand some recalibration of the constitutional archetypes, with the newer categories bolded, as expressed in Table 4.11.

Table 4.11 Elucidation of Constitutional Archetypes 3.0

Constitutional Archetype-as-Such	Constitutional Archetype(s)	Phenomena (Examples)
Ontology (What and Who?)	Representation, Participation, and Citizenship	Naturalization
		Role/Rights of Foreigners
		Defining Political Estates
	Sources of Law	Constitutional Continuity with Proceeding Legal Systems
		Engagement with Other Legal Systems
		Religious or Other Legal Doctrines
		Supremacy of a Central Constitutional Text
	Horizontal Organization of Institutions	Separation of Powers
		Personal Union of Kingdoms
		Confederation
	Hierarchical Organization of Institutions	Federalism
		Devolution
	Individual Rights	Enumerated Rights (Positive Freedom)
		Limiting State Power (Negative Freedom)
	Consent and Legitimacy	Will of the People
		Transparency
		Rule of Law
Praxis (In what way?)	Decision-Making	Majoritarian Voting
		Supermajoritarian Voting
		Veto Processes
	Requirements of Legal Interpretation	Narrow vs Loose Constructivism
	Division of Parliamentary Labor Among Multiple Parliamentary Bodies	**Electing Members of Parliamentary or other Political Decision-Making Bodies**
		Creation of Parliamentary Sub-Bodies
		Transferring of Parliamentary Business

		from One Parliament to Another
	Organizing Judicial or Parliamentary Bodies	**Calling up Special Parliamentary Sessions**
	Legitimate Processes of Constitutional Change	Amendment Processes
		Constitutional Convention
Poiesis (With what tools?	Parliamentary Procedure	Rules of Parliamentary Debate
		Setting Parliamentary Agenda
		Rules of Counting Votes
	Criminal or Judicial Procedure	**Enforcement of Laws**
		Impeachment or Other Punishments of Public Officials
Teleology (Why?)	The Purpose of the State	National Defense
		Justice
		Facilitate Community
		Equality

The final difficulty is not with the elucidation of constitutional archetypes, but rather one of their theoretical conceptualization. Throughout the literature, several authors have expressed the difficulty in dealing with the conclusion of the 17th century and the first half of the 18th century, particularly the Wettin period. For example, there is broad consensus that the Henrician Articles through the advent of the *liberum veto* circa 1652 is a period where the constitutional order of regular, six-week Seymy was stable, even during the Rokosz Zebrzydowskiego and campaigns against Muscovy. However, a more difficult question is when the system collapsed altogether, versus when there was merely a shift toward the seymiki as the locus of political life. Should one draw the line in 1717 with the Silent Seym, or with the interregnum following the death of August II Mocny and the election of his son in 1733? Should one extend the period of political collapse from 1717 to 1733 or to the 1763 interregnum after August III's death and before the 1764 election of Poland-Lithuania's last king, the reformer Stanisław August Poniatowski?

Kriegseisen distinguishes the periods 1572-1648 when the *szlachta*'s ambitious were constrained by the king as well as by other *szlachta* via the Seym, 1648—1717 as the period where the seymiki expanded as the Seymy lost importance, and the period 1717—1764 where there was no parliamentary activity in wake of the Silent Seym. However, he acknowledges that it could also be argued that the Silent Seym was not perfectly enforced and that the period of seymik rule effectively extended from 1648-1764.[1297] On the other hand, Stolicki agrees that 1572-1648 should be its own period, though he notes that the year 1696 is important as

[1297] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pg. 44.

the beginning of Saxon rule and that 1696-1717 was one coherent period, though there is a case to be made to extent it from 1696-1763. [1298] What we have presented here is in slight disagreement with either approach, but this results from differences in perspective and emphasis on the constitutional level as specifically that of the entire Commonwealth. Thus, we defend our insistence of the Rokosz Zebrzydowskiego as the boundary between constitutional periods and see no reason why the year 1696 should be of particular constitutional significance, given that at the end of his reign Sobieski III had also entertained absolutist ideas, attempted military reforms, and ultimately met with the brick will that was *szlachta* obstruction in the seymiki. What is debatable for our analysis is whether the year 1733 or 1763 is of particular significance, that is whether August III differed significantly in the policies of his father or not. As we shall see in the preceding chapter, our claim is that the answer is essentially "no": while the Seym met a few more times following the Silent Seym,[1299] very little actually happened to significantly alter the arc of constitutional development and August II Mocny's continual diminishment and retreat from politics over the last two decades of his reign was not substantially different than August III's desire to refrain from politics altogether.

IX. Conclusion

Historisophically speaking, the 17th century is remembered for the failures of the Waza dynasty to maintain the Golden Age they inherited from the last of the Jagiellonians, the pains of the Deluge and the Cossack Wars, and the evil unleashed by the *liberum veto*, ushering in an age of political anarchy and a culture of *szlachta* self-indulgence where powerful *magnaci* or foreign powers bribed or cajoled the short-sighted, ignorant *szlachta* into destroying their nation from within. However, while this fits into the neat narrative of how and why the Commonwealth collapsed so spectacularly in the 18th century, it does not explain how an entire culture of political egalitarianism, support for the rule of law, religious toleration, and high levels of civic participation and patriotism collapsed within the span of one generation. Indeed, few historians have asked how the well-educated *szlachta* suddenly became so foolish and selfish, i.e. few historians examine the case for *how and why* the *liberum veto* would have made sense for its particular time and place.[1300]

[1298] Stolicki, "O modelu monografii," pgs. 180-181.

[1299] For a brief overview of these Seymy, see: Władysław Konopczyński. 1948. *Chronologia sejmów polskich 1493-1793.* Nakładem Polskiej Akademii Umiejętności. Archiwum Komisji Historycznej: Kraków, pgs. 161-166.

[1300] "When discussing the Polish parliament, historians from other countries, and especially the West, frequently confine themselves to stating that the Polish Sejm was an inefficient institution because it was hampered by the insane principle of the *liberum veto*. They maintain that as a result of this principle, which enabled one man to invalidate the decisions of the entire Sejm the enactment of any reasonable bill was extremely difficult.

"This is a simplified view and, to a certain extent, it is false. What should be discussed first and foremost is not so much the *liberum veto* as the fact that the principle of unanimity was to a degree binding in the Polish parliament. Secondly, the practice whereby one deputy brought to naught the bills adopted throughout a Sejm only prevailed for about 100 years, whereas the Sejm existed for at least 300 years as a fully developed institution.

Instead, when the *liberum veto* and the other historical institutions of the 17th century, when placed in a proper context, reveal a much more complicated and compelling story. The reality was that the *szlachta* had a long history of using the Seym to block the ambitions of kings to become more powerful that long predated the *liberum veto*. The *liberum veto* did not precipitate the Deluge, but rather the disastrous intersection of the Waza foreign policy and dynastic ambitions and domestic turn toward Catholicism: their attempts to reclaim the Swedish Crown, their desire to support or even join the war on behalf of Catholic nations, their persecution of religious minorities and undermining of the Konfederacja Warszawska, and their ambiguity toward the political rights of the Eastern Orthodox Church and the *szlachta* in Ruthenia. The *liberum veto* only fully matured under the reign of Jan II Kazimierz who harbored explicitly absolutist dynastic ambitions. In general, the *liberum veto's* increasing regularity in the latter half of the 17th century reflected the continuing degradation of political consensus, rather than instigated it. The *liberum veto* only became commonplace during the first half of the 18th century, under the Saxon regime which was essentially a coup by a German prince who used his own personal army and finances from his German holdings as well as powerful political alliances with foreign powers to shore up his rule in a series of civil wars and rebellions within Poland-Lithuania.

Despite over a century of political and social chaos throughout Europe, the Polish-Lithuanian constitutional system was relatively stable thanks to, rather than despite of, the *liberum veto*, in that it became a kind of permanent parliamentary rokosz that froze the political and legal system in place. While many of the *szlachta* were overall frustrated by the situation, they also saw it as the lesser evil and the only real pragmatic alternative to check the power of ambitious or even outright illegitimate kings who would not heed the rule of law, aside from outright rebellion and civil war. Despite what historicist pessimists claim, further centralization of political power, further closeness of Church and state, and the establishment of a hereditary monarchy would have perhaps allowed for some short-term stability in terms of organizing and financing the military, but they would not have been long term solutions given that it was the attempt to create these "reforms" that undermined the constitutional system in the first place. The evidence for this is the expulsion of the Arians: rather than shoring up religious toleration and building true political by removing the most offensive element, instead the Protestant *szlachta* undermined their own rights: once it was possible for the majority to remove the political rights of a minority in the name of national

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Whatever the situation may have been, one cannot but admit that this way of adopting laws was not an easy one and that it differed from the majority principle accepted in other general assemblies at that time. The question that keeps coming to mind is why the Polish gentry stuck to that principle for such a long time, and even more, why they regarded total consent as 'the gem of their liberty', considering a majority vote as a pernicious practice which could destroy their freedom. After all, we cannot assume that the gentry—a class which was quite well educated in the 16th and the first half of the 17th century—would insist on maintaining this principle out of unreasonableness or downright stupidity," Czapliński, "The Principle of Unanimity in the Polish Parliament", pg. 111; "Why was the principle of unanimity upheld for so long, despite frequent criticism of the Diets working under it? Why did an enlightened gentry, conscious of the demands of political life and well acquainted with the procedures of the deities and Diet, treat that principle as unalterable? As has been stated above, contemporaries did not equate the theory unanimity with the ease with which diets could be dissolved. It would be a mistake to claim that there was a cult of interrupting the Diet among the deputies. Quite the opposite, they felt that dissolving the Diet showed their failure to carry out their commissions as deputies," Sucheni-Grabowska, "The Origin and Development of the Polish Parliamentary System," pg. 41.

security or political expediency, the whole principle of individual, protected rights became hollow and arbitrary.. These dangers were precisely what Przypkowski warned against, and what his vision of the Commonwealth where freedom of religion would both secure political stability as well as motivate citizens to defend their country would oppose.

Due to external pressures and the self-inflicted wounds of the Waza and Wettin dynasties, the Commonwealth was never able to make any systematic changes—i.e., "major reforms"—to the constitutional and political system. But this did not mean the end of Polish-Lithuanian constitutionalism—far from it. In fact, given that the Seym or seymiki continued to regularly meet, including through the Deluge, multiple Rokosze, and the breakaway of both Prussia and parts of Ruthenia, the density of constitutionalism in reality increased as the seymiki met more frequently, both on their own and as extensions of the Seymy. In fact, the first instance of the *liberum veto* was used to check a Seym that was going to be extended beyond the six-week requirement established in the Henrician Articles, so lack of parliamentary activity was not the problem. In this sense, the first usage of *liberum veto* in 1652 was purely poietic in nature, and only transformed into a coherent mechanism over Jan II Kazimierz's reign. There were multiple achievements in parliamentary procedure, establishment of committees and other *ad hoc* legislative and administrative bodies. Significant sections of the writings by Opaliński and Fredro were dedicated to praxical and poietic concerns: *egzorbitancje*, *liberum veto*, the interpretation of law, the order of parliamentary business, *inter alia*. Even Siemek, who was by far the least practical of the great thinkers that we briefly studied, was concerned with economic inequality and its consequences on the political life of the Commonwealth.

The complete death of parliamentarianism following the Silent Seym was so pyrrhic an event that the only winner was imperial Russia. The *liberum veto*–as imperfect as it was—was an evolution of centuries of the *szlachta* asserting their rights against a king. In the age of absolutism, where powerful kings could rely on smaller, better equipped armies to secure their rule or rely on powerful armies of foreign patrons, the counter-majoritarianism in both the *liberum veto* as well as the rise of the seymiki was the only viable political response that the *szlachta* could wield. In fact, though the *liberum veto* effectively shut down most Seymy during August II Mocny's reign, parliamentary and political life continued quite healthily at the local level. In this sense, the *liberum veto* was ultimately not extreme, nor did constitutional and political practice in 17th century Poland-Lithuania suddenly collapse into chaos anarchy. Rather, what was extreme was the complete death of parliamentarianism in the Commonwealth during the Saxon era, when the Commonwealth was reduced to a protectorate of Russia. This was a fate that the *szlachta* tried to prevent but ultimately failed, though it was not a domestic king, but a foreign king who came to rule over them. An unsuccessful cure is not the same as the disease that it aims to cure. It is both a gross historical oversimplification as well as a historiosophical error to merely conflated them with each other.

CHAPTER FIVE

The Period of Constitutional Renaissance
Between a Rock and a Hard Place (1764-1791)

"In this century we had two outstanding republican governments – the English and the American … our constitution, which we are to establish today, surpasses both of them; it guarantees liberty, security and all freedoms." – Stanisław Małachowski, Marzałek of the Seym, 3 May 1791[1301]

"In such disorders always in the present day
The Citizenry's Principles Peel Away
And the most miserly are in the release of this adventurism,
Then these great men appear,
In Whom are constituted the nations' eternal destiny,
Show her new paths to fame, to happiness.
There, if sometimes Cromwellians lie,
It is equally there that the Tells are most often born
If they grieve the land with bloody Robespierres
There they will point the peoples to true and virtuous Franklins
Will exemplify in citizenship the bravery of the Washingtons.
And there, the greatness of the heroes' work will surprise the world[1302]

I. The Nearly Silent Saxon Seymy in a Cacophonous World (1717-1764)

The devasting, pyrrhic victory of August II Mocny only deepened the fault lines within the Commonwealth, but, unfortunately for the battered nation, the world simply did not leave them to lick their wounds in peace. The 18th century was one of great upheaval and crisis. The rise of England, Prussia, and Russia and the decline of France, the Ottomans, Sweden, and Spain had far-reaching consequences. Colonialism and the acceleration of the slave trade increased conflicts in the New World, Africa, and Asia. The War of the Austrian Succession (1740-1748) and the Seven Years' War (1754-1763) were arguably the first global conflicts, with armies engaging both at home in Europe and in their colonies abroad. It was also an era of great progress in science and technology, yielding the Age of Reason: in France there were the physiocrats and the *philosophes*, while Britain produced the Scottish Enlightenment, Deism, Freemasonry, Emperor Joseph II named Josephism after himself, the American colonies produced Benjamin Franklin and the Great Awakening. The 18th century gave birth to the Industrial Revolution, the Age of Sail, the urban bourgeoisie, and small countries like the United Kingdom and the Dutch Republic demonstrated that economic power supported by naval power and science was the key to prosperity.

The Poles-Lithuanians were certainly aware of these great marvels, but unfortunately chose—or perhaps more accurately to say, were given little choice but to accept—to turn

[1301] Franciszek Siarczyński. 1891. *Dzień Trzeci Maja 1791.* Nakładem Księgarni Spółki Wydawniczej Polskiej: Kraków, pgs. 41-42. The translation is given by: , Zofia Libiszowska. 1985. "The Impact of the American Constitution on Political Opinion of the Late Eighteenth Century." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 233.
[1302] Stanisław Staszic. *Pisma filozoficzne i społeczne*, t II, pg.155.

inward, with their external affairs essentially given over to Russia. Davies summarizes what has been a dominant thread in Polish-Lithuanian historiography: that this disastrous period was essentially one of *magnat* rule:

> The Saxon connection was not in itself prejudicial to Poland, therefore. The fault with the Wettins was that they themselves had fallen into the hands of Russia at an early stage. As a result, far from strengthening Poland's position in the European arena, they served only to lead the Polish Republic into the Russian camp by the nose, and thus to initiate that political bondage from which the Poles have never fully escaped.
>
> The powerlessness of the King, and the collapse of the Sejm, left the government of the country in the hands of the magnates. The management of the dietines, of the Tribunals, of the Army, and of the Church hierarchy, fell by default to a narrow oligarchy of magnatial patrons, who monopolized all the great offices of state and treated with the Saxon Resident as with an equal. Each member of the oligarchy ruled in his own domains like a princeling in his own *panstewko*, his own 'state within the state'. He maintained his own clientele of nobles who defended his interests in the dietines or the courts, and who staffed his own private army. He conceived his own alliances both domestic and foreign, following one of several alternate 'orientations' - Russian, French, Prussian, or Austrian — according to the dictates of his own finances and inclinations. From the early eighteenth century onwards, the power of the magnates burgeoned. Political life was reduced to the feuds, fortunes, and the follies of a few families.[1303]

Of course, it is oversimplistic to think of the 16th and 17th centuries as some era where there was perfect harmony amongst the *szlachta* and that the second half of the 17th century were an era of pure collapse and stagnation,[1304] given that the *szlachta* had a long history of being tempted by foreign powers' interference, just as the kings had a long history of being tempted to overstep their powers in ambitious—and ultimately foolhardy—expansive foreign policy. What made the 18th century so different was that by its second half there had been significant erosions of the constitutional and political institutions that there was insufficient gravitational force to hold these centrifugal forces that threatened to rip the Rzeczpospolita apart. Whereas most kings had been tempted with too much centralization and consolidation of political power, much of the internal weakness of the stuff was in fact driven by the Wettins themselves. August II made great strides in administrative reforms, establishing a growing bureaucracy to manage the royal estates, mines, and saltworks, but he was unable to raise taxes or an army within the Rzeczpospolita because the Seym refused to agree to any of his proposals. He largely abandoned any day-to-day governing of the Commonwealth and increasingly focused solely on Saxony. On his death bed he "neither recommended nor refused permission for his son to seek the Polish-Lithuanian crown, saying that he had found it more trouble than it was worth."[1305]

[1303] Norman Davies. 2005. *God's Playground: A History of Poland. Volume I: The Origins to 1795*. Revised Edition. Oxford University Press: Oxford, pgs. 378-379.

[1304] "Of course, it would be false to say that the sixteenth century and the early seventeenth century were the era of perfect compromise, resulting from the *szlachta* understanding the superiority of general matters over particular matters, and the second half of the seventeenth and eighteenth centuries were the times of a complete loss of the ability to make a rational political compromise," Wojciech Kriegseisen. 1991. *Sejmiki Rzeczypospolitej szlacheckiej w XVII i XVIII Wieku*. Wydawnictwo Sejmowe: Warszawa, pg. 160.

[1305] Daniel Stone. 2001. *The Polish-Lithuanian State, 1386-1795*. The University of Washington Press: Seattle and London, pgs. 256-258.

The royal election of 1733 quickly erupted into bloodshed, with August II's son Fredrich August being incredibly unpopular, and his marriage to a Habsburg did not help assuage the *szlachta* that he did not have absolutist tendencies. Many *szlachta* championed the cause of the elder Stanisław Leszczyński who was living in exile in France. Russia, Austria, and Prussia backed Fredrich August. Friedrich August was crowned as August III under contested circumstances in 1734 in the middle of the War of Polish Succession (1733-1735) that was largely a proxy war between Russia and its allies against France. Again, Leszczyński was defeated and fled to France, where he remained.[1306] August III's election came at great cost for the Commonwealth: at the 1733 *konfederacje* and the 1736 pacification Seym to end the civil war passed *konstytucje* depriving non-Catholics of the right to participate in the Seym.[1307] This continued the trend of "re-Catholicization" of Małopolska and Wielkapolska that gradually spread throughout the rest of the nation. It was no longer associated with only the Jesuits and their strengthening of the court, but rather increasingly became part of the national identity. This directly strained relationships in areas where Catholicism was not very popular: Courland, Belarus, Ukraine, Royal Prussia. In 1717 and 1733 "heretics" (non-Catholics) were not allowed to hold office or sit on the Trybunał.[1308]

Though he was a reasonably competent and intelligent person, August III had no interest in ruling himself, and left affairs over to the powerful Czartoryski *magnaci* family, who managed the government with a coalition of other *magnat* families while he pursued mostly cultural projects such as introducing opera and supporting artists and architects across his realms. The Commonwealth was fortunate in the fact that though Saxony had a powerful army they did not have a strong navy and was geographically separated from Poland-Lithuania with several nations—including Habsburg Silesia—between them. Thus, the Saxon army could not easily come to the Commonwealth to coerce the *szlachta* into adopting more absolutist policies.[1309]

While the Wettins were either unable or unwilling to assert their power to make any reforms, the other political institutions of the Commonwealth were slowly decaying. As mentioned in the last chapter, there was already the trend where the seymiki were becoming less and less interested in political decision-making on the national level. However, the disagreements at the inter-regional level that plagued the Seymy soon began to affect the seymiki, where the *liberum veto* saw more frequent use:

> But the Saxon era is the period of the greatest fall of the Seymy, notoriously broken up by deputies using the *liberum veto* formula. At the beginning of the 18th century, the principle of unanimity was more and more commonly used in the election of deputies, and in the

[1306] Stone, *The Polish-Lithuanian State*, pgs. 259-261.
[1307] Juliusz Bardach. 1985. "Elections of Sejm Deputies in Old Poland." In: Władysław Czapliński, ed. 1985. *The Polish Parliament at the Summit of Its Development (16th-17th Centuries) Anthologies*. Ossolineum: Wrocław, pg.135.
[1308] Andrzej Sulima Kamiński. 2000. *Historia Rzeczypospolitej wielu narodów: 1505-1795: obywatele, ich państwa, społeczeństwo, kultura.* Instytut Europy Środkowo Wschodniej: Lublin, pgs. 174-176.
[1309] Juliusz Bardach, Bogusław Leśnodorski, and Michał Pietrzak. 1987. *Historia państwa i prawa polskiego.* Państwowe Wydawnictwo Naukowe: Warszawa, pgs. 170-171.

> absence of it, the sejmik was broken, often contrary to the earlier dictates of the parliamentary constitution for a given województwa.[1310]

Eventually, seymik life became more of a social club for the elites than a functional institution:

> And so we have come to a time when sejmiki deviating from political interests - slowly turning into the arena of personal fights replacing political rivalry, limited to the problems of local government - became a forum where attempts were only made to deal with the most necessary and most important matters, and they were often dominated by private wars of greater and lesser local matadors […]
>
> Slowly the sejmiki became a caricature of themselves, despite loud declarations about their interest in the fate of the Motherland, the real activity of their participants was often limited to drinking and eating at the expense of the "gentlemen".[1311]

It was not just the seymiki that became dysfunctional, but also the Trybunał. As various reformers such as Modrzewski pointed over one hundred years earlier, one of the major difficulties that the Commonwealth faced was the lack of training in affairs of statecraft: there was very little training in politics, law, or other competencies of governance. There were no formal requirements to be judges, only for a local *szlachcic* to convince his fellows at a seymik to elect him. As the executionists had realized persons who were often selected for administrative offices due to favor from the king or popularity with the *szlachta* led to overall poor governance. Thus, this lack of a permanent, bureaucratic class led to a system that was overall relatively inefficient, and constantly prone to political favoritism, bribes, or corruption. As a result, as the only part of the government that was still functioning even if neither the Seym nor the seymiki could function, the courts—especially the Trybunał—gradually expanded their sphere of activity to places where it did not properly belong, such as economic questions or setting prices.[1312] This—and the fact that the members of the Trybunał were not paid for their services—had a strong tendency toward corruption or excessive fees. This garnered the Trybunał a generally negative reputation, though in many ways it was the most reliable part of the system, though it also declined over time during the Saxon era.[1313]

Another area where there was strong stagnation was that there was crystallization of republican defense of "freedom" to the extent that there was no room for other values. Similar to toleration, when the Rzeczpospolita was in a period of relative peace and prosperity and political stability, dissenting opinions, whereas when there was a period of conflict it was often religious toleration that was one of the first elements to be discarded, as was the case with the expulsion of the Arians and the treatment of the Eastern Orthodox.

> The republican concept of freedom that had been adopted by Polish political thinkers in the 16th century concealed certain dangers. They did not make themselves manifest as long as the political system of the Commonwealth functioned efficiently and freedom was a

[1310] Waldemar Bednaruk, 2008. *Trybunał Koronny: szlachecki sąd najwyższy w latach 1578-1794*. Towarzystwo Naukowe KUL: Lublin, pgs. 209-210.
[1311] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pg. 101.
[1312] Bednaruk, *Trybunał Koronny: szlachecki sąd najwyższy w latach 1578-1794*. Towarzystwo Naukowe KUL: Lublin, pg. 159.
[1313] *Ibid*, pgs. 7-8.

> vigorous idea, thoroughly analysed and developed through political disputes and discussions. But with the coming of the crisis of state institutions in the latter half of the 17th century, the Polish vision of freedom became increasingly static, if not to say fossilized. Not only did new Western proposals for understanding freedom remain unadopted, but even the old republican tradition became impoverished, in places deformed. We might say that at the turn of the 17th and 18th centuries, freedom was already more an object of unreflective adoration than a subject of analysis and discussion, a kind of political myth rather than a vigorous idea.
>
> It was only then that freedom was recognized as not just the supreme value, but as the sole value, the most precious commodity supplanting all others.[1314]

Though the Wettin dynasty had converted to Catholicism in exchange for the Polish-Lithuanian Crown and the Wazas had pursued a policy to reduce the importance of Protestantism, Protestants persisted in political and public life, particularly in Royal Prussia. As we shall see later, this tension between a king who was Catholic and with public institutions including Seymy that were blessed by the Church or officially held Catholic mass as well as the principle of religious toleration would remain complex throughout the remainder of the Commonwealth's life. The Protestants persisted during the Wettin times, despite efforts to remove them from power by *konstytucje*.[1315] However, whether or not a country is truly tolerant if its laws seek to exclude one religious group, though those laws are not fully enforced or ignored, will have to remain an open question.

One thing was clear: the Poles-Lithuanians were very concerned that their country could be gobbled up by one of its more expansionist neighbors. While this had always been recognized as a possibility throughout the lifespan of the Commonwealth, [1316] in the 18th century it increasingly became a concern. Afterall, the Commonwealth had done this itself and had been both a victim as well as a benefactor of the fluid political and ethnic boundaries of Central-Eastern Europe since its inception. During the second half of the 17th century the Rzeczpospolita had lost significant territories: Ducal Prussia, parts of Ruthenia and Ukraine,

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[1314] Anna Grześkowiak-Krwawicz. 2012. *Queen Liberty: The Concept of Freedom in the Polish-Lithuanian Commonwealth*. Translated by Daniel J. Sax. Brill: Leiden, pg.85.

[1315] "One reason for the venom with which Protestant nobles were attacked was their persistent survival. The laws against them in 1717 had been deliberately vaguely framed because one of their architects, Konstanty Szaniawski, bishop of Brześć Kujawski, hoped to enable judicial tribunals and officials to interpret them in the narrowest and most disadvantageous way to the Protestants. But it could work the other way around. In practice, especially under King Augustus III, dissenters continued to be appointed to officerships in the army (several reached the rank of general) or to offices in the customs or postal administration, prompting much grumbling from the sejmiki. Some of the most lucrative crown land leaseholds were awarded to dissenters. In the province of Royal Prussia they continued to enjoy a special status, guaranteed them by the treaty of Oliva of 1660 (the treaty had been formally incorporated into Polish law), in that it had stipulated that the places of worship which they had held in 1655, the year of Charles X of Sweden's invasion, were to be retained intact in perpetuity. The town councils of the 'three great cities' of the region, Danzig, Thorn and Elbing, were dominated by Protestants – in Royal Prussia, it was Catholics who were more likely to complain of discrimination by Protestants. The Sejm of 1733, which confirmed the laws of 1717, and went on to specify the exclusion of dissenters from the Chamber of Envoys and the Tribunals, did not prevent the return of dissenter envoys (by Catholic electors) to the Sejm of 1735 or their participation in the royal elections of 1733 or 1764. Protestant nobles continued to attend and be active in their local sejmiki. The 1726 Sejm actually rejected proposals for the destruction of all dissenter churches repaired over the previous decade," Jerzy Lukowski. 2010. *Disorderly Liberty: The political culture of the Polish-Lithuanian Commonwealth in the eighteenth century*. Continuum Books: New York, pg. 64.

[1316] Grześkowiak-Krwawicz, *Queen Liberty*, pg.81.

and Livonia, *inter alia*. Although August III himself harbored no personal ambitions, the very nature of his installation to the throne on the tip of Prussian and Russian bayonets was an escalation: no longer was there a debate about the expansion of the Commonwealth, the recovery of lost lands, or the shifting of borders, but rather the very existence of the state itself.[1317]

Lukowski aptly summarized the Saxon era:

> But no political tract of the Wettin era achieved anything positive, beyond providing inspiration from one author to another. These various writings did not build up anything like a head of steam for reform: the very nature of Polish politics vitiated any impact they might have had in that direction. They were scripts in a vacuum. All who dared seek change were mortally handicapped by
> the near complete absence of any supporting framework. Failed Sejmy, whether disrupted or filibustered, were the norm. Political life was based on two-year cycles of parliamentary ineffectiveness, an endless present of a non-functional status quo. Political and constitutional non-achievement was the norm, no matter how much individuals might lament parliamentary disruption. For change to occur, for its desirability to be appreciated, at least a critical mass within the szlachta had to be won over. If the old order was blessed not only by ancestral sacrifice, but also by divine approval, or even afflicted by divine punishment, then there was little that mere men could do to bring about change, or indeed, even contemplate what kind of political change might be made, beyond a return to some mythologised past.[1318]

As we shall see, the reign of August III was indeed the nadir of Polish-Lithuanian Constitutionalism. In terms of constitutional and political thought, Polish-Lithuanians looked outward out of desperation, finding both desperation and inspiration in the intellectual, institutional, and practical achievements of France, the United Kingdom, and the British colonies in America. It was a time for a desperate gamble, a last throw for the future of the Rzeczpospolita.

[1317] "The fact that not just the political system, but the very sovereignty of the state was in crisis was clearly confirmed by the election which followed the death of King Augustus II (1733), when the neighbouring powers, Russia and Austria, took armed action to force the Saxon Elector, Frederick Augustus II, onto the throne (crowned as King Augustus III of Poland), even though the szlachta had legally elected Stanisław (Stanislaus) Leszczyński, an extraordinarily popular magnate from Wielkopolska (the father-in-law of Louis XV of France). This came as a huge shock for the noble society, although positive lessons would not be learned from it for several more decades. The epoch of King Augustus III was a time of great political stagnation, but it was then that timid discussion began about the need to reform the political system of the Commonwealth," Grześkowiak-Krwawicz, *Queen Liberty*, pg. 21;"Lurking behind such preoccupations, and occasionally coming to the fore, lay concern at the decline of Poland's international standing. Since the 1670s, all of the Commonwealth's neighbours – Sweden, Brandenburg-Prussia, Russia, Austria, the Ottoman Porte – had made periodic agreements among themselves to preserve its liberties intact. Jerzy Dzieduszycki feared that foreign powers would have come together to partition Poland, if only they could agree among themselves. Instead, they encouraged its 'disorderly liberty'. 'We are the subjects of all other powers and citizens of all Europe, for without a ruler, we are neither at liberty nor in thrall, yet we serve whoever pays us.' If others were not prepared to go so far as to warn of Partition, they had little doubt that neighbouring powers found the *Rzeczpospolita*'s disorderly liberty highly congenial. In 1733, the Commonwealth did indeed experience a massive humiliation at the hands of those neighbours. On the death of Augustus II in February 1733, in an astonishing degree of unity, the overwhelming majority of nobles rallied to Augustus' old opponent, and now father-in-law to Louis XV of France, Stanisław Leszczyński. But with no effective Polish army, his supporters were unable to prevent his expulsion from Warsaw by Russian troops and the election, by a small rump, of Frederick Augustus of Saxony as Augustus III," Lukowski, *Disorderly Liberty*, pg. 20.

[1318] Lukowski, *Disorderly Liberty*, pgs. 52-53.

II. A New Form of Constitutionalism (1764-1791): Renaissance

The Last King of Poland-Lithuania

Even though August III had no real intention of ruling either Poland-Lithuania or his Saxon lands, and though he himself was interested in peace and promoting the arts, the restless 18th century would not permit the Commonwealth to merely live in peace. August III's death in 1763 led to another interregnum. During this period, the two broad political factions of the Wettins and the Czartoryski family were content to see numerous seymiki interrupted[1319] and were content to let the interregnum draw out as long as possible to consolidate their own power. The *szlachta* had no appetite to elect August III's son, and both Fredrick the Great of Prussia as well as Catherine the Great of Russia had other plans for the Commonwealth. Frederick the Great desired to weaken his main German rivals, the Wettins as well as to keep the Commonwealth weak. Catherine the Great wanted to appoint Stanisław-August Poniatowski to the throne, who hailed from the Czartoryski faction and had been one of her subservient lovers while he lived as the Commonwealth's representative in St. Petersburg from 1755-1756. Eventually, with the backing of both, Poniatowski ascended the throne in 1764 as the last kind of Poland-Lithuania.[1320]

Stanisław August surprised both of his patrons when upon receiving the throne he revealed himself not as so pliant a puppet as they wanted, but rather as a schemer and reformer in his own right. While he was at the Russian court, Stanisław August had been appointed as secretary to Charles Hanbury Williams, the British ambassador to Russia in 1755-1756. This not only more deeply introduced him to the English world and ideas, but also to the British way of thinking, which saw Russia as a rival and against which it sought to build alliances. Both before he was officially Crowned and during the first few years of his reign (1764-1767), the political alliance of Chancellor Andrzej Zamoyski, Stanisław August, and the Czartoryski family pushed through several reforms that intended to strengthen the central government by making the Seym more efficient, reducing the power of the Senators and *magnaci*, and to remove Rome as the highest appellate court for Church affairs for a court within the Commonwealth. At the same time, the 1764 Seym konwokacyjny established the Komisja skarbowa (the Finance Commission) and the Komisja Wojskowa (the Military Commission). These commissions also played an active role, giving its members real political power, which limited the power of the king. At the same time, traditional political institutions also lost power to the Komisje, with the hetmans, the Senat, and the seymiki *instrukcje* also severely limited.[1321] . In 1765 the king sponsored a new publication, the *Monitor*, which was itself based on the British *Spectator*.[1322] The *Monitor* was important, as it was the king's way of educating the *szlachta* to his vision of what an

[1319] Kriegseisen, *Sejmiki Rzeczypospolitej szlacheckiej*, pg. 209.
[1320] Davies, *God's Playground*, pgs. 385, 388-390.
[1321] For a thorough history of the 1764 Seym and its aftermath, see: Henryk Schmitt. 1868. *Dzieje Panowania Stanisława Augusta Poniatowskiego.* T I. Drukarni Narodowej W. Manieckiego: Lwów, pgs. 233-277.
[1322] Davies, *ibid*, pg. 400; Stone, *The Polish-Lithuanian State*, pgs. 269-270.

Enlightenment man should be.[1323] Another critical reform was the attempt to significantly curtail the power of the *liberum veto*.[1324]

Though these attempted reforms made by Stanisław August in the beginning of his reign were largely unsuccessful, it is worth briefly commenting upon them, as they largely set the tone for the period of constitutional repair and renovation. Towards the beginning the largely focused on narrow issues, but as we shall see, as the king's position gradually improved and his public support increased, his reforms' scope became greater and greater. The difficulties of Stanisław August's reign began even before his election at the May 7th, 1764 Seym konwokacyjny (Convocation Seym). His patrons, the oligarchic Czartoryski family, supported by their Russian and Prussian allies, actively manipulated the Seym to ensure that the interregnum would enact "reforms" and elect a king that would be essentially their puppet. Both Czartoryski and Russian troops occupied the buildings where the Seym was held in order to ensure compliance. When several *szlachta* attempted to protest, the Seym konwokacyjny was declared konfederowany (confederated) in order to prevent the usage of the *liberum veto* and allow for simple majority voting.[1325]

The Seym konwokacyjny was incredibly important as it essentially set the stage for other reforms at the time. It was clear that *liberum veto* would only get in the way of the heavy handed changes proposed by Poniatowski and the Czartoryski and their foreign backers. Schmitt discussed a draft submitted by Józef Ludwik Wilczewski who proposed a more sophisticated approach to reconcile *liberum veto* and plurality of votes, which in the end significantly diminished the *liberum veto*. The Marszałek would ask for consent three times, and then if there was still opposition to legislation its opponents had to submit an official opinion within a specific deadline. It was also incumbent upon the opponents to find other deputies who would join in their dissent. If they did not want to submit an official opinion, then the Senat would simply make the final decision. There would be a few exceptional circumstances where the *liberum veto*'s usage would be preserved such as matters of war and proposals regarding the king and his royal household.[1326]

While only the Seym konwokacyjny was officially confederated, it set the stage for the rest of the election process. On August 27th, 1764 the Seym set the terms for the new election, passing the "Akta Seymu Walnego Elekcyi Nowego Krola" (The Act of the General Seym for the Election of the New King) establishing that: "[f]or the election of the new Lord […] *adhering in totality* to the Konfederacja of the newly passed General

[1323] Lukowski, Jerzy. 2010.*Disorderly Liberty: The political culture of the Polish-Lithuanian Commonwealth in the eighteenth century*. Continuum Books: New York, pgs. 103-104.
[1324] Hubert Izdebski. 1990. "Political and Legal Aspects of the Third of May, 1791, Constitution." In: Michał Rozbicki, ed., *European and American Constitutionalism in the Eighteenth Century*: American Studies Center: Warszawa, pg. 105.
[1325] For a Fuller account of the Seym konwokacyjny, see: Henryk Schmitt. 1868. *Dzieje panowania Stanisława Augusta*. Tom I. Drukarni Narodowej W. Manieckiego: Lwów, pgs. 238-242, 262-264, 271-274; Władysław Czapliński. 1984. *Dzieje sejmu polskiego do roku 1939.* Wydawnictwo Literackie: Kraków, pgs. 65-67; *Volumina Legum*, Tom VII, pgs. 7, 138.
[1326] Schmitt, *ibid.*, pgs. 271-274.

Assembly of Warszawa, we reassumed the order and securing of this noble act."[1327] Thus, the election Seym itself did not need to be confederated because only those *szlachta* who were allied with the Czartoryski family were allowed to attend.[1328] When the coronation Seym finally occurred on December 3rd, 1764, one of the first *konstytucje* formally joined Poland and Lithuania into a General Konfederacja.[1329]

While the coronation Seym elected a Marszałek unanimously, after the king was crowned there were some debates as to whether or not the Czartoryski Confederation should continue, and whether Seymy could continue to be confederate indefinitely. This signaled some opposition by the *szlachta*.[1330] Despite this, the Konfederacja was extended until the next Seym in 1766. This struggle is captured in Table 5.1 below. Stanisław August himself tried to return to some semblance of parliamentary order, with the first Seym after his coronation being the ordinary Seym of October 7, 1766, summarized in Table 5.1 and Table 5.2 below.

[1327] "Na elecya nowego Pana […] *inhaerendo in toto* Konfederacyi świeżo przeszłey Generalney Warszawskiej, reassumowaliśmy porządek y *securitatem* aktu tego tak zacnego," "Porządek Elekcyi," Akta Seymu Walnego Elekcyi Nowego Krola, 27 August, 1764, in *Volumina Legum*, Tom VII, pg. 94.
[1328] Schmitt, *Dzieje sejmu polskiego*, pg. 298.
[1329] "Złączenie Konfederacyi oboyga narodow," Konstytucye Seymu Walnego Koronacyi Krola IMCI, 3 December, 1764, in *Volumina Legum*, Tom VII, pg. 138.
[1330] Schmitt, *ibid*., pgs. 312-314.

Table 5.1 Enumeration of Constitutional Archetypes of the 1764 Interregnum Konfederacyjny (Confederated)

Text	Outcome	Constitutional Archetype	Constitutional Archetypes-as-Such
Sprawiedliwość (Justice)[1331]	How to improve justice, make it quicker and more efficient for all cases, relationship between the Trybunał and regional courts more clearly defined	Court Procedure	Poiesis
And although at the present Convocation Seym under a Konfederacja some *egzorbitancje* were corrected and facilitated, but all the corrections requested by the Województw could not be made at the current time; so we postpone these to the Seym of God's choosing, and wanting to repair and pacific, we are renewing the former Confederations before the election of the new Lord.[1332]	Some Issues delayed to Next Seym	Parliamentary Procedure	

[1331] "Sprawiedliwość," Generalna Stanow Wielkiego Xięstwa Litewskiego Konfederacya, 7 May 1764, in *Volumina Legum*, Tom VII, pg.88.
[1332] "Exorbitancye do Seymu Elecionis odłożone," Konfederacja Generalna, 7 May 1764, in *Volumina Legum*, Tom VII, pg.56.

Table 5.2 Enumeration of Constitutional Archetypes at the 6 October, 1766 Seym

Text	Outcome	Constitutional Archetype	Constitutional Archetypes-as-Such
When the importance and number of public interests have so exhausted our time; that, at the end of the Seym, w that at the end of the Seym we find ourselves in inevitably in need of the same contribution, so that we can completely finish the fiscal matters, as well as in the juridical and other wax matters at least what is necessary; therefore, with the consent of all states, we extend the present Seym to 29 November inclusive of the present year 1766.[1333]	Some Issues delayed to Next Seym	Parliamentary Procedure	Poiesis
Wishing to insure as firmly as possible our Holy Roman Catholic Faith against the Nonunites and Dissidents, we renew all the national laws, particularly those of former years 1717, 1733, 1736, and the last Convocation Seym of 1764, together with the punishments against the transgressors the state and conditions of each in the whole, and through everything.[1334]	Establishment of Roman Catholic Faith	N/A	
We guard the pupil of freedom, and *liberum veto* by empowering the law that no words would weaken with indifference in any provision of the law.[1335]	Protection of *Liberum Veto*	Individual Rights	Ontology
	Laws Cannot be Interpreted in a Manner Indifferent to Individual Freedom	Requirements of Legal Interpretation	Praxis
First, as our brightest Predecessor, and we ourselves have promised, per pacta conventa of the Republic, to plurality, in all councils and courts, to join our opinions, so in our own judgment we wish: that every decision made by a plurality of votes is passed, except for cases under appeal from the City Court coming to him, also those who would have taken any kind of city rights and privileges, between the townspeople and the *szlachta*. [1336]	Establishment of Plurality of Votes in Local Court	Individual Rights	Ontology
		Parliamentary Procedure	Poiesis

[1333] "Przedłużenie Seymu," Konstytucye Seymu Walnego Ordynarinego w Warszawie, 6 October, 1766, in *Volumina Legum*, Tom VII, pg. 200.
[1334] "Wiara Swięta Katolicka," Konstytucye Seymu Walnego Ordynarinego w Warszawie, 6 October, 1766, in *Volumina Legum*, Tom VII, pg. 192.
[1335] "Ubespieczenie wolnego głosu," Konstytucye Seymu Walnego Ordynarinego w Warszawie, 6 October, 1766, in *Volumina Legum*, Tom VII, pg. 200.
[1336] "Decyzya per pluralitatem," Konstytucye Wielkiego Xięstwa Litewskiego, 6 October 1766, in *Volumina Legum*, Tom VII, pg.238.

The Confederated Seym introduced several provisions on how to improve the judicial process, which was par for the course for late 17th and early 18th century thought. There were also several issues that could not be immediately dealt with and were therefore delayed to a later Seym. The establishment of the Roman Catholic Church is continued in the 1766 Seym, with the Seym reviving political acts that were explicitly against "dissenters", i.e., those who did not follow the official Roman Catholic, Eastern Orthodox, or mainline Protestant churches. This was a natural continuation of the religious crises and the decline of toleration in the previous century. By this period the meaning of the Konfederacja Warszawska had been lost: rather than total freedom of conscience and toleration, there was now an established pluralism of accepted religious institutions. While this was vastly more accepting than accepting the principle *cuius regio, eius religio*, it was still a noticeable decline from the 16th and first half the 17th century.

Unfortunately, the political changes that Stanisław August pushed for angered his backers on all sides. His political relationship with Zamoyski was too liberalizing for his the conservative Czartoryski family who were more interested in using reform to centralize their control of the nation, rather than reform for its own sake. Catherine the Great's representative Nikołai Vasilyeich Repnin sought to block many of his reforms and remind him that it was truly Russia who was ruling the Commonwealth. Catherine the Great effectively weaponized religious fractures within the Commonwealth, backing Protestant and especially Orthodox *szlachta* against the mostly Catholic, Polish *szlachta* and, of course, the Church. [1337]

During his first Seym after his coronation in 1766, the king proposed ending the *liberum veto*, which led to an explosion within the country. 1767 was marked by several armed *konfederacje*, which then merged into a General *Konfederacja*. However, the *Konfederacja* could not decide what it wanted: some wanted to overthrow the king, others to restore the rights of the Church, others with a more limited plan of simply blocking any reforms. It was eventually revealed that Repnin himself was the puppet master, directing and coordinating several different sides in the debate. Once the chaos reached its fevered pitch, Repnin organized a Seym in October 1667 to negotiate among the parties only to forcefully arrest and then imprison the leaders of the "opposition." His appointees suspended the Seym and then appointed a special "Commission" by which he rewrote the laws of the Commonwealth, which essentially restored the 1717 status of *szlachta* "Golden Freedom" – *liberum veto*, free election of the king, etc.—albeit only under the thumb of the Russian Empire.[1338]

It was only a temporary Russian victory. In February of 1768 a new *Konfederacja* was formed known as the Confederacy of Bar, after its creation at Bar, Podolia (today's Central-Western Ukraine). Its goals were to dethrone Poniatowski, expel the Russians, and repress Dissident *szlachta*. The rebels allied with Turkey and received material and financial support as well as military training from France and Saxony. Turkey also fully declared war on Russia, embroiling the Russian army into two conflicts at once. Frederick the Great waited until the Russian troops had worn down before suggesting that he would join Catherine if she

[1337] Stone, *The Polish-Lithuanian State*, pgs. 270-271.
[1338] Davies, *God's Playground*, pgs. 390-391.

would divide the Commonwealth with him. Eventually, they convinced Maria Theresa of Habsburg Austria to agree, and after a brutal war, in February 1772 the Confederacy of the Bar had been soundly defeated, though Poland-Lithuania lost approximately 1/3 of its territory and about 35% of its population.[1339] Afterward, a long confederated Seym was continuously held from 19 April 1773 until April 1775 under the watchful gaze of the Russian army.

Lukowski summarized the disaster of the Confederacy of Bar:

> The upshot was an anti-Russian, anti-dissenter, even anti-royalist backlash in the shape of the Confederacy of Bar. Between 1768 and 1772, Poland was gripped by a widespread, if often confused, guerrilla action against Russian control. From October 1768, Russia found itself at war with the Ottoman Porte, alarmed at the intensity of Russian activity in Poland. Against Turkey, Russia's military performance was spectacular, but the distracting conflict meant it was unable to regain control in the Rzeczpospolita. There were moments when it seemed the Austrian Habsburgs would get sucked into the conflict, perhaps even Prussia and France. Russia, Prussia and Austria finally resolved the difficulties between them – at Poland's expense. In August 1772, by the conventions of St Petersburg, the three powers deprived Poland of approximately a third of its population and territory – the blow, which had for so long been a stock jeremiad in the armoury of political hand-wringing over the Commonwealth's prospects, had become a reality […] . The strife-torn, debilitated state could neither resist nor recover from such losses. Between April 1773 and April 1775, a cowed confederated Sejm ratified the partitions and endured the mammoth task of enacting the constitutional settlement on which the three partitioning states, in practice mainly Russia, insisted. A further confederated Sejm had to be called in 1776 to complete the task.[1340]

The Seym Rozbiorowy (Partition Seym) was extensive, and compromises almost the entirety of *Volumina Legum*, Tom VIII.[1341] Some "reforms" were made: the Permanent Council (Rada Nieustająca) was established to rule the country while the Seym was not in session. Though it was supposed to limit the king's power, just as the senatorowie rezydenci before it the king stacked it with his followers and allies. Commerce, taxes, and court processes were made easier, though no significant changes to serfdom were made. The National Education Commission was established that largely managed the schools and the estates of the Jesuits after the order was disbanded in 1773. Many ex-Jesuits remained employed at the commission.[1342] In fact, much of the *Volumina Legum*'s pages deal with the minutiae of establishing court jurisdictions, tax policy, and managing formerly Jesuit-owned property.[1343]

Ultimately, the power of the Czartoryski family decreased while Stanisław August and his allies made creeping reforms under the Russians' watchful gaze, but Russia was increasingly distracted by Prussia, the Swedes, the Ottomans, and competition with the British to keep the Commonwealth on as tight a leash as Catherine the Great supposed. Though the circumstances of 1768 were not ideal, the principle of *liberum veto* had

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[1339] Davies, *God's Playground*., pgs. 392-395; Stone, *The Polish-Lithuanian State*, pgs. 271-274
[1340] Lukowski, *Disorderly Liberty*, pg. 95.
[1341] Konstytucje Publiczne, Seymu Extraordynaryinego, Warszawskiego, 19 April 1773—11 April 1775, *Volumina Legum*, Tom VIII, pgs. 5-526.
[1342] Davies, *ibid.*, pgs. 397-98; Stone, *ibid.*, pgs. 274-275.
[1343] *Volumina Legum*, Tom VIII, *passim*.

effectively run its course and been abandoned at least at the level of the seymiki,[1344] though it was reestablished at the level of the Seym itself. Though it was created during the time of the rebellion, 1768 Seym proposedmore adjustments to the judicial system which were eventually adopted either during the 1771 partition Seymy or during the Stanisław August era more generally. For example, sentences and decrees were to be written down and signed, even if the judges disagreed with the final decision.[1345] Other systematic reforms were attempted.

Grześkowiak-Krwawicz explains how the Confederation of Bar was a political watershed:

> The efforts made by King Stanisław August (Stanislaus Augustus) Poniatowski (1764–1795) to curb the *liberum veto* principle and to streamline the organization of the central institutions to some extent were initially received very badly by a significant portion of the *szlachta*, as an endeavour striving towards *absolutum dominium*. This mood of discontent was taken advantage of by the magnates on the one hand, anxious to preserve their own influence, and by Russia on the other, not eager to see any reforms that might strengthen the Commonwealth. This triggered the Commonwealth's last noble "confederation" formed against the king, known as the Confederation of Bar. The resulting bloody civil war, which at the same time was a war against an external enemy because Russian troops played a large role, lasted four years (1768–1772) and ended in the First Partition of the Commonwealth and its complete subjugation to Russia. These dramatic events triggered a revival in political interest among the gentry.[1346]

Stanisław August tried to be pragmatic in making incremental changes that would not draw the immediate wrath of his Russian oversees upon him and even engaged in a form of "cultural diplomacy" to raise the Commonwealth's stature with those who he hoped would be potential allies in Western Europe such as Britain and France. Though the king was a great admirer of the *philosophes* and a student of the Enlightenment, Poland-Lithuania was considered in the Russian sphere of influence and political rivalries between Britain and Russia as well as France and Russia hampered much of his efforts.[1347] At the same time, the latter half of the 18th century witnessed a global explosion in both political literature and political literacy as publics in the 13 American colonies, Britain, Scotland, France, and all throughout Europe exchanged ideas by way of political pamphlets, speeches, and an

[1344] "In 1768 it was decided that all sejmiki in the Crown, which could not take decisions unanimously, were to decide by a majority of votes. A similar solution was adopted by the Great Seym [1788-1791], and confirmed by the one at Grodno, ordering the marszałek of the seymik to read the names of the candidates one by one from the list of candidates, if all those present agreed, it was considered that they had been elected, and if at least one of the voters objected in writing to the election of one of the presented candidates for of the seat of the Trybunał, secret elections were to be held, in which the majority of votes were decisive," Waldemar Bednaruk. 2008. *Trybunał Koronny: szlachecki sąd najwyższy w latach 1578-1794*. Towarzystwo Naukowe KUL: Lublin, pg. 211.

[1345] *Ibid*., pgs. 186-198.

[1346] Grześkowiak-Krwawicz, *Queen Liberty*, pg. 22.

[1347] Vladimir Reisky de Dubnic. "Stanisław August Poniatowski, the Polish Constitution of 1791, and the American Connection." In: Michał Rozbicki, ed., *European and American Constitutionalism in the Eighteenth Century*: American Studies Center: Warszawa, pgs. 97-99; Zofia Libiszowska. 1962. *Opinia polska wobec rewolucji amerykańskiej W XVIII Wieku*. Zakład Narodowy im Ossolińskich we Wrocławiu: Łódź, pgs. 16-17.

exploding book market.[1348] The Commonwealth was no different in this regard,[1349] but in some ways took it further, considering that free speech was a right unto itself and that its exercise promoted the public good, regardless of the content of the opinion that was expressed.[1350] While this was sometimes taken advantage of by foreign powers to spread propaganda,[1351] it also allowed for lively democratic discourse and public debate. Rough drafts for legislation that was currently being discussed at the Seymy, *instrukcje* from seymiki, speeches given before the Seym, political pamphlets, as well as open letters to the public or to a specific persons were all aired and could be published at the numerous private, independent publishing houses.[1352] Much of this political literature was specifically critical of the Saxon era.[1353]

When Poland-Lithuania was in deep depression after the disaster of the First Partition, hope could be seen on the horizon: the *szlachta* anxiously looked toward the American Revolution as an example to see whether a nation could truly implement the ideas of the Enlightenment to win its freedom. Questions such as the separation of Church and state, comparisons of feudalism and slavery, the urban vs rural divide, and the implementation of Montesquieu's theory of separation of powers were all topics of incredible interest, not just in the Rzeczpospolita, but throughout Europe.[1354] Franklin and Washington were both highly praised, and regarded as heroes of freedom and reason.[1355] Due to the distance across the sea, the Commonwealth received news about the happenings in America with a two-year delay, but ironically received more word—and faster—about America than their own former fellow citizens in partitioned lands.[1356] As we shall see later, the Poles-Lithuanians' interest in young America was incredibly important for the development of 18th century Polish-Lithuanian

[1348] Dorinda Outram. 2019. *The Enlightenment.* 4th Edition. Cambridge University Press: Cambridge, pgs. 10-25; Peter Degrabriele. 2015. *Sovereign Power and the Enlightenment: Eighteenth-Century Literature and the Problem of the Political*. Bucknell University Press: Lanham, *passim*; James van Horn Melton. 2001. *The Rise of the Public in Enlightenment Europe*. Cambridge University Press: Cambridge, *passim*.

[1349] Anna Grześkowiak-Krwawicz. 2018. *Dyskurs Polityczny Rzeczypospolitej Obojga Narodów: Pojęcia i Idee*. Fundacja Na Rzecz Nauki Polskiej: Toruń, *passim*; Zdisław Libera. 1962. "Europejski character literatury polskiego Oświecenia." *Pamiętnik Literacki: czasopismo kwartalne poświęcone historii krytyce literatury polskiej* 53(3), pgs. 152-153; Irena Homola. 1960. "Walka o wolność druku w publicystyce polskiej drugiej połowy XVIII wieku." *Przegląd Historyczny* 51(1): 74-94.

[1350] Anna Grześkowiak-Krwawicz. 2000. *O formę rządu czy o rząd dusz?: publicystyka polityczna Sejmu Czteroletniego*. Instytut Badań Literackich: Warszawa, pgs. 15-19.

[1351] *Ibid.*, pgs. 20-21.

[1352] *Ibid*, pg. 43; Lukowski, *Disorderly Liberty*, pgs. 99-100.

[1353] Tadeusz Mikulski. 1950. "Stan badan i potrzeby nauki o literaturze wieku Oświecenia [Referat wygłoszony na Zjeździe Polonistów w Warszawie, w Sekcji Historii Literatury, dnia 10 maja 1950 r.]." *Pamiętnik Literacki: czasopismo kwartalne poświęcone historii i krytyce literatury polskiej* 41(3/4), pg. 846.

[1354] Marian M. Drodzowski. 1976. *Rewolucja Amerykańska w Polskiej Myśli Historycznej: w Historiografii i publicystyce 1776-1976.* Wiedza Powszechna: Warszawa, pgs. 12, 16-17, 25, 28; Libiszowska, *Opinia polska*, pg. 46.

[1355] Maria Rólkowska. 2018. "Amerykańska Walka o Niepodległość i Nowo Powstałe Państwo na Łamach Polskiego Piśmiennictwa Okresu Oświecenia." In: Janusz Gołota, ed., *Ostrołęckie Towarzystwo Naukowe im. Adama Chętnika*. Zeszyty Naukowe - Ostrołęckie Towarzystwo Naukowe, pgs.112-113; Drodzowski, *Rewolucja*, pg.9; Libiszowska, *Opinia polska*, pgs. 85-90; Zofia Libiszowska. 1970. "Model Angielski w Publicystyce Polskiego Oświecenia." *Sprawozdania zCzynności Posiedzeń Naukowych* XIII, pg. 3.

[1356] Zofia Libiszowska. 1978. "Echa rewolucji amerykańskiej w Polsce." In: Marian Mark Drozdowski, ed., *Ameryka Północna Studia.* Tom II. Państwowe Wydawnictwo Naukowe: Warszawa, pg. 48.

constitutionalism. Another major source—as already noted—was the *philosophes*, particular Montesquieu and Rousseau, which we shall also address momentarily.

The semi-success of Stanisław August's reforms, the breaking of the Czartoryskis and other powerful *magnaci*, the proliferation of Enlightenment literature, the weakening of the power of the Church with the disbanding of the Jesuits, and the shock of the First Partition consolidated into a powerful consensus for reform. While there would always be those who argued for *liberum veto* and the free election of kings as pillars of *szlachta* golden liberties with their dying breaths, the more radical republicans and the moderate, reformist allies of the king both were converging on a new consensus: that instead of restoring the lost liberties of a golden age or ensuring the proper implementation of law as the executionists had done before them, what was truly needed was a rethinking of the entire constitutional order. The recent success of the 13 American colonies demonstrated that such a major reform was possible—if only the chance occurred. Though it was not clear as to *what* new form of government was to be created precisely, the growing consensus that an entire new way of thinking was required was a fundamental shift unto itself. Both the real-world experience of the First Partition and the American Revolution plus the new theoretical concepts introduced by the Enlightenment would be instrumental. All that was needed was a chance.

Fifteen years after the First Partition, Poland-Lithuania found itself in agreeable circumstances: war broke out between Sweden and Russia as well as Russia and Turkey. Cleverly, Stanisław August asked Catherine the Great for permission to raise an army and to confederate the Seym in order to quell internal opposition and to support the Russian war effort against the Turks.[1357] In 1788 Catherine the Great agreed to some of Poniatowski's plans: she granted permission for him to confederate the Seym but expressly forbade any significant changes before she turned her full efforts towards the war. Prussia had also reached out to Stanisław August, promising to support the Rzeczpospolita against the Russians. The stage was now set for the ambitious Stanisław August to hatch his plan some 15 years in the making: major reforms in defiance of his great patron.[1358]

Butterwick-Pawlikowski explains Stanisław August's goal: to complete the arc of reforms that he had begun so tentatively, and under such dire circumstances, at the beginning of his reign:

> The new monarch, who chose the regnal names of Stanisław August, could hardly contain his enthusiasm for reform. At the *sejm* of 1766 he hailed a 'new, or rather a second creation of the Polish world, (…) when it is necessary to move almost everything at once.' In the essay-periodical *Monitor* and o the stage of the new National Theatre, the follies and vices of traditionalist, provincial nobles were satirized as old-fashioned 'Sarmatism'. Many of them felt deeply offended. For all his impatience, Stanisław August was no aspiring enlightened despot. He admired the limited and parliamentary monarchy he had seen in England the previous decade. It was to an English friend that he expressed his fervent desire to do what the great French philosopher Charles de Montesquieu had written. The context, however, differed greatly. Whereas Montesquieu had feared the absolutist aspirations of the Bourbon monarchy as the chief threat to Frenchmen's liberty and viewed the law courts as their principle shields, Poniatowski saw Poland's path to felicity in a balanced partnership between

[1357] Katarzyna Pudłowska. 2020. *Historia ustroju i prawa polski: w pigułce.* Wydawnictwo C.H. Beck: Warszawa, pg. 91; Davies, *God's Playground*, pg. 399.
[1358] Stone, *The Poland-Lithuanian State*, pgs. 276-277.

> a revitalized legislature and an effective executive. He would doggedly pursue this goal, through many setbacks, until he achieved most of it in the Constitution of 3 May 1791.[1359]

However, before we return full circle to the 3 May, 1791 Constitution and complete our winding journey into the development of Polish-Lithuanian constitutionalism, it is important for us to make two detours into broad clarifications to better understand the conceptual tools and political language used at the time. Only once this framework of ideas is established will it be possible to see the achievements of the 3 May Constitution in greater, more proper clarity. The first of these tours shall be to look at a sample of the political thought at the time to understand the actual debate in the words of many of the key players involved. The second will be to look at the deeper connections and interests shared by the Polish-Lithuanian, British, and American intellectual communities, and how they shared, compared, and contrasted ideas for constitutional and political reform with each other. To these tasks, we now attend.

III. Forging a New Nation

We have already addressed the Enlightenment—and the surprisingly elusive task of defining it concretely—in the introductory chapters to this work as well as the introduction to this particular chapter, so we shall not belabor the point here. Instead, we shall briefly address the major philosophical currents, some comments about which persons were chosen as their respective representatives, to get a lay of the intellectual landscape, so to speak. Broadly speaking, in political science literature one can—from common sense—break any political position or spectrum into three broad moments: the conservatives, who wish for no change; the moderates, who wish for some change depending on the time, place, and moment in history; and the radicals, who always seek to push for the maximum change possible. Translated into the particular experience of the Polish-Lithuanian Commonwealth in the 18th century, we may argue that hardcore defenders of the "golden liberties" and the status quo would be conservatives; the king and those loyal to him would be the moderates; and those who pushed for more changes faster than the king was willing to go were the radicals.

Our whole investigation began with what may be obviously considered as a defense of Polish-Lithuanian constitutionalism and the history of its political institutions, if not in the narrow sense of advocacy form or rationalized justification of their mistakes, but in the sense of calling to examine them more closely, thoroughly, and without ideology. As the task for which we have set ourselves upon is to understand the development (i.e., change) of constitutionalism within the Polish-Lithuanian Commonwealth—persons of a "conservative" persuasion are of no use whatever. Even when we have contrasted two or more thinkers directly, we have never selected a person from a "conservative viewpoint", i.e., someone who is of the opinion that the status quo is *bonum in se*. The absence of any "conservative" viewpoint may trouble those who want a more robust picture of constitutional and political thought in 18th century Poland-Lithuania. Indeed, given that the 3 May Constitution was worked out in secrecy and lasted for less than a year before the Targowica confederation of Polish and Lithuanian *magnaci* joined together in St. Petersburg with the explicit task of

[1359] Richard Butterwick. 2021. *The Constitution of 3 May 1791: Testament of the Polish-Lithuanian Commonwealth*. Polish History Museum: Warszawa, pg. 58.

overthrowing the 3 May Constitution, which they ultimately succeeded in. However, our task is not a complete understanding of political thought during the Polish-Lithuanian Commonwealth, but rather it is to use political thought as an accompaniment to help contextualize its constitutional development, to which a purely conservative point of view contributes nothing. In short, the only persons whose thought we should examine positively contributed to the development of 18th century Polish-Lithuanian Constitutionalism, whether directly or indirectly.

Instead, they represent several broad currents. The first is Montesquieu, who serves as an indirect ancestor of sorts—perhaps something of a grandfather, since Rousseau and the Americans absorbed his ideas, and whose ideas were in turn absorbed by the *szlachta*—given that his thought was so influential for much of 18th century constitutional and political thought in general. Montesquieu will be demonstrated as an influence both in terms of methodology, as well as conceptually. The second major thinker will be Rousseau, who was an invited guest of sorts since hewas asked to help write a new constitution for Poland-Lithuania. Although he was invited to do so by the Confederation of Bar that opposed Poniatowski and which was ultimately defeated, his ideas proved important nonetheless. Both Montesquieu and Rousseau represent the informed observer—though we could perhaps say that Rousseau was more invested in as well as sympathetic to the *szlachta* cause. Montesquieu's *Spirit of Laws* (1748) and Rousseau's *Considerations on the Government of Poland* (1772) are also the first works chronologically.

The next major grouping is the king Stanisław August himself as well as Teodor Ostrowski, an important priest and translator of William Blackstone's *Commentaries on the Laws of England* (1786) as well as author of *Prawo Cywilne Narodu Polskiego* (Civil Law of the Polish Nation (1787). As mentioned earlier, Stanisław August was himself a strong Anglophile and very much interested in their work, though he was himself not a great composer of political tracts. Teodor Ostrowski's work is important for not only introducing the work of William Blackstone—who was the most cited and probably the most important legal theorist in the entire English-speaking world, including the colonies[1360]—but also had attempted to synthesize the work of Blackstone, Beccaria, and others in terms of creating legal reforms for the Commonwealth. His translation of Blackstone's *Commentaries* provides extensive commentary on his own thoughts and opinions that is relatively unknown, largely overshadowed by his *Prawo Cywilne* and his three volume *Dzieje i prawa kościoła polskiego* (History and Laws of the Polish Church) (1793). Poniatowski and Ostrowski represent the faction that was most concerned with the British model as the appropriate model for the Commonwealth to adapt, including the concept of constitutional monarchy.

The last major grouping will be Hugo Kołłątaj and Stanisław Staszic, who represent the more radical and republican faction. They were also careful students of the American

[1360] John P. Figura. 2010. "Against the Creation Myth of Textualism: Theories of Constitutional Interpretation in the Nineteenth Century." *Mississippi Law Journal* 80, pg. 589; Steven G. Calabresi. 2008. "A Critical Introduction to the Originalism Debate." *Harvard Journal of Law and Public Policy* 31(3), pgs.882-883; Saul Cornell. 2007. "The Original Meaning of Original Understanding: A Neo-blackstonian Critique." *Maryland Law Review* 67: 151-155; Meyler, Bernadette. 2006. "Towards a Common Law Originalism." *Stanford Law Review* 59: 551-600.

revolution, preferring it over the British model, especially Staszic,[1361] who was arguably the more extreme of the two.[1362] Both were fascinated with the urban and industrial components of the American way of life, and sought inspiration for how to improve the rights of the urban class within the Commonwealth. The two of them unleashed a flurry of political pamphlets in the 1780s, with Staszic's *Uwagi nad Życiem Jana Zamoyskiego* (Remarks on the Life of Jan Zamoyski) (1785), Kołłątaj's *Anonima Listy* (Aonymous Letters) (1788-1789), Staszic's *Przestrogi dla Polski* (Warnings for Poland) (1790), and Kołłataj's *Uwagi nad Pismem* (Remarks on Writing) (1790). These works were influential not only for building renewed interest in the Enlightenment in the 1780s, but many of the ideas influenced the constitutional reforms directly, given that Kołłątaj and Staszic themselves helped draft it.

Montesquieu (1689-1755): Setting the Stage

While Montesquieu is not a main character in our story, he is a seminal figure, both for our own particular method as well as for constitutional and political thought in the second half of the 18th century, broadly speaking. As such, it is important to briefly recount some of his ideas presented in the *Spirit of Laws*, which effectively set the stage for the ideas of Rousseau, the American colonists, and the Polish-Lithuanian Commonwealth. Born just a year after the Glorious Revolution, in his youth he witnessed the Act of Union between Scotland and England to create Great Britain (1707), the final, glorious years of Louis XIV the Sun King, lived through the twilight years of John Locke, and witnessed the age of Newton. It was a good age for deep thinking about constitutional questions. As we shall see, Montesquieu's particular way of argumentation was also highly effective, namely his approach that grounded "law" as itself capturing relationships within human nature. We shall explore that more specifically in comparison with the works of Kołłątaj and Staszic particularly.

Montesquieu's *Spirit of Laws* appears to have three major themes that shaped discourse in the 18th century, at least as pertains to the constitutional reforms that the American colonies, Britain, France, and the Commonwealth grappled with. As we have discussed at the beginning of our analysis,[1363] Montesquieu discussion of law begins with an ontology. He argues that:

> Man, as a physical being, is, like other bodies, governed by invariable laws. As an intelligent being, he incessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, and subject, like all finite intelligences, to ignorance and error […] Such a being is liable every moment to forget himself; philosophy has provided against this by the laws of morality. Formed to live in society, he might forget his fellow-creatures; legislators have, therefore, by political and civil laws, confined him to his duty.[1364]

[1361] Drodzowski, "Rewolucja Amerykańska," pg. 70.

[1362] Bogusław Leśnodorski. "Wstęp." In: Hugo Kołłątaj. 1954. *Listy Anonima i Praw Polityczne Narodu Polskiego*. Opracował Bogusław Leśnodorski and Helena Wereszycka. Vol. 1. Państwowe Wydawnictwo Naukowe: Warszawa, pg. 19.

[1363] *Supra* n 73.

[1364] Charles Louis de Secondat Baron de Montesquieu. 2004 [1777]. *The Spirit of Laws* in *The Complete Works of M. De Montesquieu*. Translated from the French in Four Volumes. Volumes I and II, *The Spirit of Laws*, Vol I, Book I, Chapter I, pg. 4.

As such, for Montesquieu, understanding of law is an inherent part of human being and the civilization that human beings create. His opponent is Hobbes:

> The law, which, impressing on our minds the idea of a Creator, inclines us toward him, is the first in importance, though not in order, of natural laws. Man, in a state of nature, would have the faculty of knowing before he had acquired any knowledge […]
>
> The natural impulse, or desire, which Hobbes attributes to mankind, of subduing one another, is far from being well founded. The idea of empire and dominion is so complex, and depends on so many other notions, that it could never the first which occurred to the human understanding […]
>
> Besides the sense of instinct which man possesses in common with brutes, he has the advantage of acquired knowledge.[1365]

What Montesquieu is arguing, contra Hobbes, is that man is an inherently lawful being, in that humankind's nature is distinct from that of animals. So that, even in a "state of nature" there is something in the human being that is fundamental super-natural. Thus, every human being has an innate ability to learn and acquire knowledge, even if we have yet to acquire such knowledge, hence the need for philosophy and moral laws to constrain us and to allow us to cooperate in a society. The invention of legislation, of "political and civil law" is thus a mechanism that allows—or potentially allows for human beings to overcome the state of nature. Montesquieu further expands:

> Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which human reason is applied.
>
> They should be adapted in a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another.
>
> They should be relative to the nature and principle of each government; whether they form it, as may be said of political laws; or whether they support it, as in the case of civil institutions.[1366]

The distinction between "political" law as creating a nation and "civil" law as supporting that nation is reminiscent of the difference between "constitutional law as architectonic"—separation of powers, fundamental human rights, the species of government—and what we may think of as civil code, regulation, policy, *inter alia*[1367] that perform the task of maintaining a constitutional order. However, Montesquieu recognizes that the two orders of law are fully co-dependent with each other, though political should be first in the constitutional order.

[1365] Montesquieu, *The Spirit of Laws*, Vol I, Book I, Chapter II, pgs. 4-5.

[1366] Montesquieu, *The Spirit of Laws*, Vol. I, Book I, Chapter III, pg. 8.

[1367] Montesquieu gives a fuller list pertaining to "human law" as well as divine law and natural law:
"Men are governed by several kinds of laws; by the law of nature; by the divine law, which is that of religion; by ecclesiastical, otherwise called canon law, which is that of religious polity; by the law of nations, which may be considered as the civil law of the whole globe, in which sense every nation is a citizen; by the general political law, which relates to that human wisdom from whence all societies derive their origin; by the particular political law, the object of which is each society; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life, against the attacks of any other citizen; in fine, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government," Montesquieu, *The Spirit of Laws*, Vol. II, Book XXVI, Chapter I, pg. 202

> As the civil laws depend on the political institutions, because they are made for the same society; whenever there is a design of adopting the civil law of another nation, it would be proper to examine before-hand whether they have both the same institutions, and the same political law.[1368]

> Political laws demand, that every man be subject to the natural and civil courts of the country where he resides, and to the censure of the sovereign.[1369]

> WHEN that political law which has established in the kingdom a certain order of succession, becomes destructive to the body politic for whose sake it was established, there is not the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first, it would in the main be entirely conformable to it, since both would depend on this principle, that, THE SAFETY OF THE PEOPLE IS THE SUPREME LAW.[1370]

Montesquieu is thus very careful when addressing questions of constitutional change, especially when they seem to be made at the whim of the ruler or by attempting to transplant institutions from another constitutional system, because under both circumstances the process of constitutional change would be "unnatural" and thus violate the harmony of the social order. In this sense, Montesquieu's theory is perfectly consistent: though every person is born with the capacity to learn and grow and thus to escape the state of nature, each political community is built uniquely and with regard to the particular needs of its citizenry. This naturally segues into Montesquieu's "meteorological theory," wherein the climate effects the institutions of the local population, influencing everything from religion to social mores to type of government administration.[1371]

> If it be true, that the temper of the mid and the passions of the heart are extremely different in different climates, the laws ought to be relative both to the variety of those passions, and to the variety of those tempers.[1372]

However, upon closer inspection, to state that this is a purely climatological theory mischaracterizes and oversimplifies Montesquieu's argument, which is a broader contextualism of social institutions, sometime referred to as his "sociology".[1373] As Montesquieu himself explains:

> Mankind are influenced by various causes; by the climate, by the religion, by the laws, by the maxims of government, by precedents, morals, and customs; from whence is formed a general spirit of nations. […]

[1368] Montesquieu, *The Spirit of Laws*, Vol. II, Book XXVI, Chapter XIII, pg. 349.
[1369] *Ibid*., Vol. II, Book XXVI, Chapter XXI, pgs. 229-230.
[1370] *Ibid.*, Vol. II, Book, XXVI, Chapter XXIII, pg. 231.
[1371] Book XIV of *The Spirit of Laws* is titled "Of laws relative to the nature of the climate," and is entirely dedicated to this subject.
[1372] Montesquieu, *The Spirit of Laws*, Vol. I, Book XIV, Chapter I, pg. 292.
[1373] Ran Hirschl. 2009. "Montesquieu and the Renaissance of Comparative Public Law." In Kingston, ed. Montesquieu and His Legacy. SUNY Press: Albany, pg. 201.

> It is the benefits of the legislature to follow the spirit of the nation when it is not contrary to the principles of government; for we do nothing so well as when we act with freedom, and follow the bent of our own natural genius.[1374]

Montesquieu's theory of socio-political contextualism revisits political science's traditional distinction of monarchy, aristocracy, and democracy, by exploring how varying contexts lead to various conceptualizations of "liberty" and the role played by the state.

> There is no word that admits of more various significations, and has made more different impressions on the human mind, that that of *liberty*. Some have taken it for a facility of deposing a person on whom they had conferred a tyrannical authority: others, for the power of choosing a superior whom they are obliged to obey; others, for the right of bearing arms, and of being thereby enabled to use violence: others, in fine, for the privilege of being governed by a native of their own country, or by their own laws […] Some have annexed this name to one form of government exclusive of others: those who had a republican taste applied it to this species of polity: those who liked a monarchical state gave it to monarchy. Thus they have applied the name of *liberty* to the government most suitable to their own customs and inclinations.[1375]

According to Montesquieu, a significant amount of political wisdom is associated with understanding these various possible orders, understanding the order that is in place, and then ensuring that government is conducted rationally.[1376] In fact, in the *Spirit of Laws* Montesquieu's critique of the Commonwealth was that the "inconveniency of the *liberum veto*" had led to an unnatural state wherein the will of individuals superseded the good of the whole:

> Though all governments have the same general end, which is that of preservation, yet each has another particular object […] [I]n general, the pleasures of the prince, that of despotic states; that of monarchies, the prince's and the kingdom's glory: the independence of individuals is the end aimed at the laws of Poland; from thence results the oppression of the whole.[1377]

What Montesquieu was deeply concerned with is when "political liberty" was present in the constitution and not in society, or vice versa where some members of society were free but the overall constitution did not lead to a society that was free. [1378] The former situation is

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[1374] Montesquie, *The Spirit of Laws*, Vol. I, Book XIX, Chapter IV, pgs. 389, 390.

[1375] *Ibid*., Vol. I, Book XI, Chapter II, pgs. 195-196.

[1376] "There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind," Montesquieu, *The Spirit of Laws*, Vol. II, Book XXVI, Chapter I, pgs. 202-203.

[1377] Montesquieu, *The Spirit of Laws*, Vol. I, Book XI, Chapter V, pgs. 197-198.

[1378] "It is not sufficient to have treated of political liberty as relative to the constitution; we must examine it likewise in the relation it bears to the subject.

We have observed, that, in the former case, it arises from a certain distribution of the three powers; but, in the latter, we must consider it in another light. It conflicts in security, or I the opinion people have of their security.

The constitution may happen to be free, and the subject not. The subject may be free, and not the constitution. In those cases the constitution will be free by right, and not in fact; the subject will be free in fact, and not by right.

relatively obvious, in that a society may profess to have a constitution that promotes human equality and freedom and yet the society still possess slavery, as the Ancient Greeks and Romans did and as in America. This would clearly be the failure of implementing the constitution and ultimately bad for society, since it would create disharmony between the ideals of that society and reality. The latter case would be in a period of dictatorship, absolutism, oligarchy, or any other situation in which the ruling elite or extraordinarily powerful citizens do as they please, whatever the text in the constitution. It is worth noting that while Montesquieu was an ardent opponent of slavery, he was not necessarily opposed to monarchy *per se*, should social conditions prevail to support it. The issue would be unrestricted monarchy—tyranny or despotism, in classical terms—which is also unnatural and produces disharmony in the community. As such, while Montesquieu dedicates a significant amount of time to analyzing the English system, which in his mind had produced a high degree of liberty,[1379] it is doubtful whether he considered it be the best objectively and certainly would not have favored it being universally and categorically adopted. As we shall see, this need to understand the deeper constitutional principles of a society in order to build institutions fully compatible with the needs of that society, rather than blindingly adopting or accepting some universal ideas, institutions, or form of governance was also important for Poland-Lithuania, with all five of the persons who shall follow specifically trying to adapt institutions relative to the needs of the Commonwealth at the time.

The final, major and universally recognized contribution of Montesquieu to the constitutional theory of his day was his work on the separation of powers, which proved incredibly influential for both the 1787 American Constitution and the 1791 Polish-Lithuanian Constitution. Montesquieu's theory of using "power to check power" is a natural extension of his theory of society and of human beings' ability to learn and then use that knowledge to constrain themselves and to build the best society that they can, relative to local conditions. Montesquieu's rational balancing of political power feels very Aristotelian in that he was seeking for moderation, but rather than in a passive form, it should be active:

> Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power: but constant experience shews us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say, that virtue itself has need of limits?

It is the disposition only of the laws, and even of the fundamental laws, that constitutes liberty in relation to the constitution. But, as it regards the subject, manners, customs, or received examples, may give rise to it, and particular civil laws may encourage it, as we shall presently observe," Montesquieu, *The Spirit of Laws*, Vol. I, Book XII, Chapter I, pg. 240.

[1379] "In perusing the admirable treatise of Tacitus on the manners of the Germans, we find it is from that nation the English have borrowed the idea of their political government. This beautiful system was invented first in the woods.

"As all human things have an end, the state we are speaking of will lose its liberty, will perish. Have not Rome, Sparta, and Carthage, perished? It will perish when the legislative power shall be more corrupt than the executive.

"It is not my business to examine whether the English actually enjoy this liberty, or not. Sufficient it is for my purpose to observe, that it is established by their laws; and I inquire no further," *Ibid*., Vol. I, Book XI, Chapter VI, pg. 212.

> To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the laws does not oblige him, nor forced to abstain from things which the law permits.[1380]

> In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.
>
> By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other, simply, the executive power of the state.
>
> The political liberty of the subject is a tranquility of mind arising from the opinion of each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.[1381]

Notably, Montesquieu also reconceptualizes "political liberty" in a negative sense, in that it is "tranquility of mind" wherein each person realizes that they exist in a community where they have overcome the natural fear of conflict that so concerned Hobbes. Montesquieu's theory of political power restraining itself is thus consistent with his thesis that the sole and foundational purpose of the state is for the protection of citizens. Notably, Montesquieu does not go into significant detail about "the public good" or a hierarchy of virtues. In fact, on these points Montesquieu is fully consistent with his multivariate contextualism: he prescribes a political order—or, more aptly, he allows for multiple political orders—that would make political law and political institutions consistent with human freedom and security that would be then supported by civil law and civil institutions. Montesquieu was not a purely abstract or system level thinker who only addressed issues in abstract or general terms, but did extensive work analyzing commerce,[1382] the establishment and management of money,[1383] family and marriage law as well as immigration,[1384] the establishment of religion,[1385] Roman Law,[1386] French Law,[1387] and Frankish law,[1388] none of which could be properly considered to be "constitutional" in the sense that we are using in our analysis. However, Montesquieu did give more precise examples of "checks and balance," which were incredibly influential on both sides of the Atlantic.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty: because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty if the judiciary power but not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be

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[1380] Montesquieu, *The Spirit of Laws*, Vol. I, Book XI, Chapter IV, pg. 197.
[1381] *Ibid*., Vol. I, Book XI, Chapter VI, pg. 198.
[1382] *Ibid*., Vol. II, Books XX and XXI.
[1383] *Ibid*., Vol. II, Book XXII.
[1384] Montesquieu, *The Spirit of Laws,* Vol. II, Book XXIII.
[1385] *Ibid*, Vol. II, Books XXIV and XXV.
[1386] *Ibid*, Vol. II, Book XXVII.
[1387] *Ibid*, Vol. II, Book XXVIII.
[1388] *Ibid*, Vol. II, Books XXIX and XXX.

> exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.
>
> Most kingdoms in Europe enjoy a moderate government, because the prince, who is invested with the two first powers, leaves the third to his subjects.[1389]

Where Montesquieu went further was breaking up these first two powers, in that he recognized that the king should not have an explicit role as a legislator, but instead, given that the law itself was to be a reflection of the desire of the community at large, the power to create the law had to be dispersed throughout the population. However, by removing the king as legislator, Montesquieu was very much aware that he was reintroducing the same political problem that had plagued ancient democracies and republics such as Athens and Rome: if every individual had the right to participate as a legislator, then government essentially became unmanageable, what is sometimes referred to as the "small-republic thesis" wherein republican or democratic states could only exist with a small electorate in terms of population, who governed a relatively small geographical area.[1390] Montesquieu's solution was surprisingly modern and forward-looking: the establishment of a representative democracy.

> As, in a country of liberty, every man who is supposed a free agent ought to be his own governor, the legislative power should reside in the whole body of the people. But, since this is impossible in large states, and in small ones is subject to many inconveniences, is it fit the people should transact by their representatives what they cannot transact by themselves.
>
> The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbours than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper, that, in every considerable place, a representative should be elected by the inhabitants.
>
> The great advantage of representatives is, their capacity of discussing public affairs. For this, the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.[1391],

Montesquieu's theory of separation of powers was in many ways an evolution of the traditional three-fold understanding of government archetypes present in classical political thought. Montesquieu argued that the executive should be the king who was not elected, but rather was a hereditary position, one that had very strong constraints against his powers. The legislative body should be held by two bodies, one of whom represents the nobility and the other the people, with parliamentary business beginning in the section that represents the people and then brought to the nobility serving as an upper house,[1392] whereas the judiciary

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[1389] Montesquieu, *The Spirit of Laws,* Vol. I, Book XI, Chapter VI, pg. 198.
[1390] Jacob T. Levy. 2006. "Beyond Publius: Montesquieu, liberal republicanism and the small-republic thesis." *History of Political Thought* 27(1): 50-90.
[1391] Montesquieu, *ibid*., Vol. I, XI, Chapter VI, pg. 202.
[1392] *Ibid.,* Vol I, Book XI, Chapter VI, pgs. 208-209.

power should be selected from among the people.[1393] The bicameral system proposed by Montesquieu was not so different than many proposals throughout Polish-Lithuanian history for a stronger role to be played by the Senat and is closer to the reality that the United States Senate plays today, rather than the British House of Lords or other upper chambers, which are often more symbolic. Secondly, in the American system the point of Congress is to be a representative of the people and thus the most purely democratic component of the system, whereas the President is the monarch and the Supreme Court the aristocracy, respectively.

Another interesting component for Montesquieu's system is that the only member who was truly permanent was the king, who was always present: the legislature was not to be a permanent body, and even though the representatives of one of its houses would always be selected from a relatively fixed body of nobles, the nobles would regularly hold elections among themselves to choose their representatives. Montesquieu argued that—unlike the Seym—the legislature should only arise to deal with certain issues or certain problems, or for otherwise temporary, fixed periods of time. If they continued to be a permanent body then they would take on more and more political power, either taking responsibilities away from the monarch or expanding their power in other ways as a competitor with the king, rather than as a co-worker.[205]

The final element of Montesquieu's system was what has become known as a system of "checks and balances" wherein the three branches of government would have a default, passive state of merely distributed powers—such as existed in the ancient world between the king and the legislature—but that they could snap to active interference of each other's plan should the situation arise. In this, they not only had their own, specific duties that they were to carry out under regular, harmonious circumstances, but also the manner in which they could interact and interfere with each other was also concretely inscribed within the constitutional order. Montesquieu referred to this as the "power of rejecting":

> The executive power, pursuant to what has already been said, ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative. But, should the legislative power usurp a share of the executive, the latter would be equally undone.
>
> If the prince were to have a part in the legislature by the power of resolving, liberty would be lost. But, as it is necessary he should have a share in the legislature for the support of his own prerogatives, this share must consist in the power of rejecting […]
>
> Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

[1393] "The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people, at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.
The legislative power is, therefore, committed to the body of the nobles, and to that which represents the people; each having their assemblies and deliberations apart, each their separate views and interests […]
"The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person," Montesquieu, *The Spirit of Laws*, Vol I, Book XI, Chapter VI, pgs. 200, 204, 205.

> These three powers should naturally form state of repose or inaction: but, as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.[1394]

Though he had achieved considerable fame and respect as an author earlier in his life with his *Persian Letters* (1721) and his *Considerations on the Causes of the Greatness of the Romans and their Decline* (1734), the publication of the *Spirit of Law* (1748) and its 1750 translation into English were just a few years before his death in 1755. He did not live to see the total defeat of France in the Seven Years War, nor the subsequent rise of Great Britain and Russia. The Rzeczpospolita that he knew was the nadir of the country under August III. Montesquieu never had the opportunity to witness just how important his work would be on the constitutional and political thought of Europe. As we shall see, the Americans, Rousseau, Kołłątaj, and Staszic all encountered and reacted to Montesquieu's ideas presented in the *Spirit of Laws* in their own way.

Rousseau (1712-1778): Invited Guest

A brilliant philosopher and musician, Jean-Jacques Rousseau was disowned by his Genevan family at a young age, wandering France and Italy before he eventually moving to Paris where he occasionally mingled with Parisian high society. Throughout his life his political and literary tracts met with great success, though also much controversy, and he was persecuted across Europe for some of his radical ideas, being thrown out of France and his native Switzerland multiple times. He was given an asylum of sorts as a guest of Hume in Britain before the two had an explosive dispute and he returned to the continent. Fredrick the Great and Voltaire both offered to be his patrons, though he declined both. His rivalry with Voltaire over the heart and soul of the French Enlightenment was legendary. The stress of persecution for his radical political and social ideals (that were often anti-clerical) led to a gradual mental breakdown and increased social-isolation toward the end of his life.

Though Rousseau was in almost complete social isolation, in 1770 the official representative of the Bar Confederation to the French court in Paris, Michał Wielhorski reached out to Rousseau, whom he asked about advice on how to systematically rebuild the Rzeczpospolita. Surprisingly, Rousseau agreed and immediately began to work on the project,[1395] though he was largely dependent on the research materials that Wielhorski provided for him. For Rousseau this was not the first time that he had received such a request, as in 1764 he had received a request to write a new constitution for Corsica, though he never completed the project, and the Corsican Republic was soon overthrown. Given the highly partisan nature of his only real contract with Poland-Lithuania, Rousseau romantically believed that Russia would be too weakened in its ongoing war against Turkey to defeat the Bar Confederation, which he wholeheartedly believed would be victorious.[1396]

[1394] Montesquieu, *The Spirit of Laws*, Vol I, Book XI, Chapter VI, pgs. 209-210.

[1395] Richard Butterwick-Pawlikowski. 2021. *The Constitution of 3 May 1791: Testament of the Polish-Lithuanian Commonwealth*. Polish History Museum: Warszawa, pgs. 60-61.

[1396] Jerzy Michałski. 2015. *Rousseau and Polish Republicanism*. Translated by Richard Butterwick-Pawlikowski. Instytut Historii im. Tadeusza Manteuffla: Warszawa, pgs. 25-28, pg. 138.

> "After recalling Rousseau's characteristic qualities and intellectual traits, it is easier to understand the composition of the *Considérations.* They originated in a vision of an idealized Poland, for which Wielhorski provided sufficient material. Among the factors which contributed to the formation of this vision, the first was the idealized image of the confederates of Bar as heroic patriots fighting for liberty against foreign violence and domestic treason suggested by official French propaganda […] The acceptance of this optimistic image of the Confederation of Bar was made easier by the fact that the opposite view was propagated by people, such as Voltaire and Grimm, who took pride of place among the enemies of the author of the *Considérations* – who was already suffering from a mania of being persecuted. Contact with Wielhorski, who managed the difficult feat of gaining Rousseau's trust, undoubtedly helped to strengthen the latter's favourable disposition towards the confederates, and towards the Polish cause which they represented.[1397]

Rousseau finished *Considérations sur le government de Pologne* (Considerations on the Government of Poland) a few months before the disastrous defeat of the Bar Confederation and the First Partition. What is remarkable about the *Considerations* is how Rousseau was able to recreate so much of *szlachta* political culture with the little materials that he had been provided from Wielhorski, much of seeming to be common sense or that Rousseau's assessment of the political situation in Europe and North America anticipated the revolutionary energy that was soon to be unleashed. Part of this could also be explained by how *szlachta* political culture's embrace of individual freedom and a collective sovereignty of the nation closely mirrored his own concept of the "general will" [1398], which he had introduced in his arguably most famous political work, the *Social Contract* in 1762.[1399]

Grześkowiak-Krwawicz notes how the concept that the Seym as the "absolute monarch" of the Commonwealth as the representative of the collective will of the *szlachta* had been a deeper part of *szlachta* political ideology since at least the Rokosz Zebrzydowskiego, even if it was not always clearly enunciated. It was not especially clear whether the representatives themselves were simply representatives of the general will who were capable of making errors in translating that same will, or whether representatives

[1397] Michałski, *Rousseau and Polish Republicanism,* pg. 44.

[1398] Rousseau himself foregrounded a factor which can be described as the particular spiritual and moral energy of the Poles, and their attachment to and heroic defence of liberty […] In the theses which followed he would more than once refer to this spiritual energy of the Poles which distinguished them from other European nations. This was the original thought of the author of the *Considérations* and Wielhorski had not even whispered anything of the sort the Polish nobility, even before it had emancipated other estates and had combined with them in one body, could be a positive phenomenon for Rousseau. This society had the potential, if not to fulfil, then at least to approach his ideal model of the state, in which sovereign power was in the hands of the generality of citizens and whose laws were therefore the expression of the 'general will'. A government was legitimate when it was the 'servant' of the sovereign, and was directed by the 'general will," *ibid.,*, pgs. 50-51.

[1399] "[T]he Rousseauvian 'general will' was at the same time the collective will of the given society and a certain resource of consciousness of its individual members. The 'general will' was one and clear-cut. Rousseau did not allow the possibility of a plural interpretation of the 'general interest' based on different arguments; he was especially opposed to its being treated as a compromise between the diverse interests of particular social groups. For this reason, the 'general will' should be accepted by all citizens as the only right one. So the ideal of legislation was unanimity, which testified to the fact that everyone rightly understood the 'general interest' and acted accordingly, and that society was therefore ruled by virtue," *ibid.,* pg. 113.

themselves *were themselves* that general will.[1400] The former case would represent our modern understanding of parliamentary, representative democracy wherein representatives need to be held to account and where legislation can itself be challenged such as by judicial review. The latter would be akin to parliamentary supremacy wherein the legislature is for all intens and purposes the state with no possibility of external constraints. Rousseau apparently reached this conception on his own, without instigation by Wielhorski.[1401] However, whereas the *szlachta*'s support for the golden liberty was something that had generally become instinctively part of the political culture, Rousseau's treatment of it was more philosophically sophisticated.[1402] In this sense, it could perhaps be said that Rousseau was breathing new life into a deeper Polish-Lithuanian political tradition, which had decayed during the period of Wettin stagnation, wherein the parliamentary and political life of the *szlachta* had become essentially extinct.

To the rest of the world many of these ideas were new and radical, but they were actually the *conservative* position within Polish-Lithuanian intellectual thought, with radical reformers actually pushing for an expanded role played by the state equipped with new tools provided by the Enlightenment. A perfect example of this was the National Education Commission, which sought to actively promote a nation-wide, secular education based on Enlightenment principles. Rousseau did not entirely see eye to eye with the Bar Confederation, however: he accepted the *liberum veto* and serfdom as political and social reality during a time of political turbulence, though he did not personally approve of them. He was also significantly pro-bourgeoisie and pro-urban areas, seeing the life of the city as the future of civilization and commerce.[1403] However, Rousseau did share the Bar Confederates' dislike of the English system, which the king and his moderate reformers had

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[1400]"'The Sejm is thus the absolute monarch in our country'. The nation exercised its sovereign power by electing deputies and issuing them with instructions, in a certain sense it shifted its power onto them, in today's language we would say that power was delegated to them. It is a telling fact that the term Rzeczpospolita, meaning Commonwealth or Republic, was then popularly used in reference to the Sejm as a whole or as the representative body of the knightly estate. However, already in the 17th century there were some who voiced doubt as to whether it might be dangerous to freedom for full power to be entrusted to the Sejm. This was associated with a conviction that not only was power vested in the nation but the nation should unceasingly exercise that power, whereas the deputies were not its representatives but its delegates, the "bits of paper" upon which the instructions of their delegating sejmiki had been inscribed, who were not allowed to make any political decisions on their own. This concept arose as early as during Zebrzydowski's rebellion and underpinned various "confederation" leagues. As long as the structure of governance functioned well, i.e. at least until the mid-17th century, this was not a dominant view and the power of the Sejm was generally not called into question. Later, as well, for many authors of theoretical or not-so-theoretical texts, the sovereign Sejm was the representation of the noble nation and the guarantor of its liberties," Grześkowiak-Krwawicz, *Queen Liberty*, pg. 53.

[1401]Michałski, *Rousseau and Polish Republicanism*, pg. 61.

[1402] "The element of Rousseau's doctrine which was most revolutionary for the inhabitants of other countries – the principle of the inalienable, indivisible sovereignty of the 'people' – did not introduce anything new into the Poles' political thinking, who had long since deprived their monarchs of factual sovereignty. They also seemed to share a conservative attitude, which in the *Considérations* sometimes took on the character of an apologia for Polish constitutional institutions, although the philosophical and historiosophical motivations of Rousseau's conservatism were completely alien to Polish republicans. The conservatism and the republican ideology of liberty professed by the Genevan philosopher sometimes went further, and was more consequential and logical than the primitive traditionalism of the Polish republicans," *ibid*.,, pg. 139.

[1403] Lukowski,.*Disorderly Liberty*, pgs. 125-126.

tried to put into place. Following Montesquieu, Rousseau disliked the permanence of the British parliament, which he saw as a recipe for corruption.[1404] Rousseau begins the *Considerations* with a broadly Montesquiean claim: that only the citizens of a nation were truly capable of understanding it enough to change it in the right direction. The best that a foreign could do was to give general opinions and to provide advice to the reformers.

> Unless one has a thorough knowledge of the Nation for which one is laboring, the work one does for it, however excellent it might be in itself, will always err in application, and even more so when it is a question of a nation already completely instituted, whose tastes, morals, prejudices and vices have taken root too much to be easily stifled by new seeds. A good institution for Poland can only be the work of the Poles or of someone who has studied well the Polish nation and those that border it on the spot. A foreigner can hardly give anything but general views, can enlighten the institutor, not guide him.[1405]

Rousseau then offers substantial praise for the Commonwealth:

> [S]ee all the States of Europe rushing to their ruin. Monarchies, Republics, all these nations so magnificently instituted, all these fine governments so wisely balanced, fallen into decrepitude, menaced by an impending death; and Poland, that region depopulated, devastated, oppressed, open to its aggressors, at the height of its misfortunes and its anarchy, still shows all the fire of youth; and it dares to ask for a government and laws, as if it had just been born. It is in irons, and discusses the means to preserve itself in freedom! It feels in itself that force which that of tyranny cannot subjugate. I believe I am looking at besieged Rome tranquilly ruling the lands on which its enemy has just pitched its camp. Brave Poles, beware; *beware that for wanting to be too well, you might make your situation worse. In considering what you want to acquire, do not forget what you can lose.* Correct, if possible, the abuses of your constitution; but do not despise the one that has made you what you are (emphasis added).[1406]

Rousseau's words seem odd, given that he was writing *before* the American and French Revolutions, before the Great Terror, and the waves of nationalism that Napoleon would unleash. However, he seems to be fully channeling the same social anxieties that had bothered the *szlachta* for a full century, as one republican or moderate monarchy fell after another to growing imperial or absolutist ambitions of Russia or Habsburg Austria. Now with Sweden on the decline, Prussia had instead taken its place on the northern edge of Europe, especially with the diminishing of Saxony and the Wettin dynasty. Curiously, Rousseau seems to think that *all* governments in Europe are due for potential upheaval, though he does not give a concrete prediction as to what he thinks will replace them. Perhaps—through Wielhorski—Rousseau sensed the growing restlessness of the Poles-Lithuanians, perhaps he was blinded by his idealism of proving support for a revolution against a king who he thought was a puppet of Russia, but his warning for the Commonwealth is stark. The "Poles" must beware of losing what they had already achieved and that they risked losing even what little freedom that they had.

[1404] Michałski, *Rousseau and Polish Republicanism*, pg. 47.
[1405] Jean-Jacques Rousseau. 2005. *The Plan for Perpetual Peace, Considerations On the Government of Poland, and Other Writings on History and Politics*. Translated by Christopher Kelly and Judith Bush. The Collected Writings of Rousseau, Vol. II. University Press of New England: Lebanon, NH, pg. 159.
[1406] Rousseau, *Considerations On the Government of Poland*, pg. 170.

Later in the work, Rousseau essentially presents the small-Republic thesis to the Commonwealth, suggesting that the problem may not be that the country was trying to do too little to change itself in its hour of desperate need, but rather that it was doing *too much*. The high level of freedom possessed by the *szlachta* may have been too much, too unpractical, given the imperial ambitions of their neighbors and the inherent instability of Central-Eastern Europe. According to Rousseau, at the heart of the Commonwealth is a fundamental inability to decide whether to be a Republic or to be a large-scall kingdom. Rousseau suggests that care for the people is the true source of political stability and longevity, rather than pursuit of glory or national greatness, leaving anarchy in their wake. Essentially, the only reason why the various "reform" projects to strengthen the monarchy in the Commonwealth failed were due to dumb luck:

> Let us avoid, if possible, throwing ourselves into chimerical projects from the first steps. What undertaking, Sirs, is occupying you at this moment? That of reforming the Government of Poland, that is to say of giving the constitution of a large kingdom the stability and vigor of that of a small republic. Before working for the execution of this project, one must first see whether it is possible to succeed. Greatness of Nations! Extensiveness of States! first and principal source of the misfortunes of the human race, and above all of the numberless calamities that undermine and destroy publicly ordered peoples. Almost all small States, republics and monarchies alike, prosper by the sole fact that they are small, since all the citizens in them know each other and watch each other, since the leaders can see by themselves the evil that is done, the good they have to do; and since their orders are executed under their eyes. All great peoples crushed by their own mass groan, either in anarchy as you do, or under subordinate oppressors which a necessary gradation forces Kings to give them. God alone can govern the world, and more than human faculties would be needed to govern great nations. It is surprising, it is amazing that the vast extent of Poland has not already a hundred times over brought about the conversion of the government into despotism, debased the souls of the Poles, and corrupted the mass of the nation. It is an example unique in history that after centuries such a State is still only in anarchy. The slowness of this progression is due to advantages inseparable from the inconveniences from which you want to free yourselves. *Ah, I cannot say it too many times; think well before touching your laws, and above all the ones that made you what you are. The first reform you need is that of your extent.* Your vast provinces will never allow the severe administration of small Republics. Begin by compressing your boundaries if you want to reform your government. Perhaps your neighbors are considering doing this service for you. Doubtless that would be a great evil for the dismembered parts; but this would be a great good for the body of the Nation (emphasis added).[1407]

It seems odd that Rousseau does not mention the possibility of a representative Republic or some kind of Confederation, as that was what had existed in his native Switzerland at the time, though throughout the 18th century it had become somewhat unstable. Still, that a sophisticated political thinker like Rousseau would make an essentially geographically determinist argument: that geography had to proceed serious political reform. In fact, a little later in the book Rousseau seems to contradict himself slightly, arguing that indeed representative government can be useful in organizing political activity, because people will not accept when others make laws over them, and they at least need the ability to elect their own representatives. Rousseau explicitly rejects the traditional, tripartite model of constitutional estates within the Commonwealth: the king, the Senators, and the *szlachta*.

[1407] Rousseau, *Considerations On the Government of Poland*, pg. 178.

Rather, the only real distinctions are between the king, the bourgeoise, and the peasants, with the king, the Senators, and the *szlachta* being themselves members of what he refers to as the "equestrian Order".

> The Republic of Poland, it has often been said and repeated, is composed of three orders: the equestrian Order, the Senate, and the King. I would prefer to say that the Polish nation is composed of three orders: the nobles, who are everything, the bourgeois, who are nothing, and the peasants, who are less than nothing. If one counts the Senate as an order in the State, why not also count as such the chamber of Deputies, which is no less distinct, and which does not have any less authority. Even more; this division, in the very sense in which it is given, is evidently incomplete; for it was necessary to add the Ministers, who are neither Kings, nor Senators, nor Deputies, and who, in the greatest independence, are nevertheless depositaries of all the executive power. How will they ever make me understand that the part which exists only from the whole, nevertheless forms in relation to the whole an order independent of it? The Peerage in England, considering that it is hereditary, forms, I admit, an order existing by itself. But in Poland, remove the equestrian order, there is no longer a Senate, because no one can be a Senator unless he is a Polish noble first. In the same way there is no longer a King; because it is the equestrian order that names him, and because the king cannot do anything without it: but remove the Senate and the King, the equestrian order and by it the State and the sovereign remain in their entirety and as soon as the next day, if it wishes, it will have a Senate and a King as it did before.[1408]

Here, Rousseau is arguing directly against Montesquieu as well as fundamentally rethinking the Polish-Lithuanian political order. The king, the senators, and the *szlachta* were on the same playing field constitutionally, in that they all had the same rights before the law. It was only when one took into political or economic considerations that they diverged away from this ideal. Since it was not a constitutional distinction that set them apart, the power to create laws did not exist within these particular estates *in se*, but rather had always resided within the collective body of the *szlachta*, and with the *szlachta* alone. As senators were themselves *szlachta*, the Senat should not play any special role. What Rousseau suggests is that so long as individuals feel that only a few "orders" (i.e., estates) have the right to make all the decisions, then the otherwise nobility of a nation is reduced to barbarism and the "sacred law", in harmony with nature, that man has the fundamental desire as well as capacity to govern himself is thereby violated.

> Let it not be said then that the cooperation of the King, of the Senate, and of the equestrian order is necessary to draft a law. This right belongs solely to the equestrian order, of which the Senators are members as are the deputies, but in which the Senate as a body enters for nothing. Such is or ought to be the law of the State in Poland: but the law of nature, that holy, indefeasible law, that speaks to man's heart and to his reason, does not allow the legislative authority to be restricted this way and does not allow the laws to oblige anyone who has not voted for them personally as the deputies do, or at least through his representatives as the body of the nobility does. This sacred law is not violated with impunity, and the state of weakness to which such a great nation finds itself reduced is the work of that feudal barbarity that causes its most numerous, and often healthiest part to be cut off from the body of the State. [1409]

[1408] Rousseau, *Considerations On the Government of Poland*, pg. 184.
[1409] *Ibid.*, pgs. 185-186.

It is here that Rousseau exposes something of a contradiction inherent in Polish-Lithuanian political thinking. In the ancient world, monarchy, aristocracy, and politeia were different forms of government precisely because they had fundamentally different power structures as it relates to political class. The king was a separate personage whose rights passed hereditarily, i.e. whether or not his power was granted by God or political circumstances, there was something inherent in the kings' person. Similarly, the ancient concept of nobility was that they were somehow persons of an inherently superior quality that granted them the right to participate in political life, and while the bloodline of the king and the nobility would intermingle from time to time—if the king or queen did not take a spouse from a foreign royal family—it was always the royal bloodline that predominated. The Rzeczpospolita did not acknowledge inherent bloodline as the basis for political power: the king was elected so there was no special royal bloodline, the king's heir was not treated as a Crown Prince, both *szlachta* and *magnaci* faced equality before the law—at least theoretically—and it was relatively easy for foreigners or commoners to become ennobled. The fact that, for centuries, there had been no official Church in Poland and then the Polish-Lithuanian Commonwealth, and that various kings such as the last two Jagiellonians and now Stanisław August had tried to specifically keep the Church at arms-length also prevented the idea of a divinely empowered, royal bloodline to develop as strongly as in other monarchies throughout Europe.

In other words, though the Rzeczpospolita liked to cloak itself in the terminology and concepts of *republica mixta* from the ancient world, in a very real sense this was a legal fiction as it was not fully reflected in the constitutional system and the resulting political order. Rousseau was actually deeply concerned with the fact that although the *szlachta* were all equal before the law, they could have vast differences in wealth and political power. He compared the situation to the late Roman republic, wherein Roman consuls were often poor, but used their offices to enrich themselves. He argued that some system needed to be put into place where wealth did not so easily translate into power, for that meant that either the wealthy always ruled or those who gained power used it to gain wealth, which then they translated into power, but—as Siemek before him—found no obvious solution to the problem.[1410] However, Rousseau was careful to construct his recommended institutional changes taking potential corruption in mind,[1411] as we shall see.

[1410] "The immense distance between the fortunes that separate the Lords from the petty nobility is a great obstacle to the reforms needed for making the love of the fatherland the dominant passion. While luxury reigns among the Great, cupidity will reign in all hearts. The object of public admiration will always be that of the wishes of private individuals, and if it is necessary to be rich to shine, the dominant passion will always be to be rich. This is a great means of corruption which must be weakened as much as possible. If other attractive objects, if marks of rank distinguished men in office, those who were only rich would be deprived of them, secret wishes would naturally take the route to these honorable distinctions, that is to say those of merit and virtue, if one succeeded only by that route. Often the Consuls of Rome were very poor, but they had lictors, the array of the lictors was coveted by the people, and the plebeians attained the Consulate.

"To remove completely the luxury in which inequality reigns appears to me, I admit it, a very difficult undertaking. But might there not be a way to change the objects of this luxury and to make its example less pernicious?," Rousseau, *Considerations on the Government of Poland*, pg. 183.

[1411] One of his proposed solutions introduced the completely new idea that there should be a progression system within public administration, wherein certain positions were only available to everyone with no experience, and then after three years mid-level adminstrative positions would open up, and after another three years then higher

If we compare the gap between Polish-Lithuanian political concepts and the reality of their political institutions with the ideas of Montesquieu—that the executive should be a hereditary monarch and that there should be a fixed nobility who elected representatives for one of the houses of parliament—and the ideas of Rousseau—that the entire constitutional structure should instead reflect the actual political reality that distinguished the land-owning nobility in the country (the *szlachta*) from the merchant class in the cities (the bourgeoisie) and the peasants—we see that both Montesquieu and Rousseau present constitutional visions that are internally consistent. Rousseau even wanted to go further than contemporary Polish-Lithuanian political reality would allow and to remove serfdom, though he recognized it had to be gradually phased out, rather than removed all at once.[1412] Similarly, as Montesquieu before him, Rousseau was highly critical of the practice of *liberum veto*, though he recognized that it was a political reality that had to be accepted,[1413] apparently unaware that the *liberum veto* had effectively been destroyed by the time of the Bar Confederation.[1414] Following this same spirit of pragmatism, Rousseau was not even sure whether removal of Poniatowski should be the Bar Confederation's ultimate goal, but instead to leave him in place for the sake of stability, weaken his powers, and reform the system around him for the next generation.[1415]

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level administrative positions would open up. This would install some form of meritocracy in that the king, senators, or members of the *szlachta* could not simply appoint friends or close associates to positions purely out of favoritism. However, this would obviously be an imperfet solution, in that such a hierarchy would preference the rich who had the time to dedicate their life to administrative positions in the first place in order to gain experience to climb the hierarchy. For a deeper discussion, see: Michałski, *Rousseau and Polish Republicanism*, pgs. 129-130.

[1412] "God forbid that I believe I needed to prove here what a little good sense and innermost feeling is sufficient to make everyone feel! And from where does Poland claim to draw the power and the strength it is stifling at pleasure in its bosom? Polish Nobles, be more, be men. Then alone will you be happy and free, but never flatter yourself for being so, as long as you hold your brothers in chains.

I feel the difficulty of the project of freeing your people. What I fear is not only poorly understood interest, the amour-propre and the prejudices of the masters. Once this obstacle has been overcome, I would fear the vices and the cowardice of the serfs. Freedom is a hearty nourishment but requires strong digestion; very healthy stomachs are needed to bear it. […]

To enfranchise the peoples of Poland is a great and fine operation, but bold, perilous, and not to be attempted inconsiderately. Among the precautions to take, there is one indispensable one that requires time. It is, before everything else, to make the serfs one wants to enfranchise worthy of freedom and capable of bearing it. Below I will set out one of the means that can be employed for that. It would be reckless of me to guarantee its success, although I do not doubt it. If there is some better means, take it. But whatever it is, consider that your serfs are men like you, that they have in them the stuff to become everything that you are: first work to bring it into play, and do not enfranchise their bodies until after having enfranchised their souls. Without this preliminary, count on your operation succeeding badly," Rousseau, *Considerations On the Government of Poland*, pg. 186.

[1413] "Rousseau also took 'the love of the Poles for the liberum veto' into account, but it was not the only reason why he wished partially to preserve it. He did count the liberum veto among the causes of the reign of anarchy in Poland and considered its maintenance in its full extent as very harmful. He especially condemned the breaking up of diets not only by a single envoy, but by many envoys. At the same time, however, he claimed that 'le liberum veto n'est pas un droit vicieux en lui-meme', and even called it 'ce beau droit'," Michałski, *Rousseau and Polish Republicanism*, pg. 105.

[1414] *Ibid*, pgs. 103-104

[1415] "Poniatowski was doubtless very criminal; perhaps today he is no longer anything but wretched; at least in the present situation, he appears to me to be conducting himself rather as he ought to do by not meddling in anything at all. Naturally at the bottom of his heart he must ardently desire the expulsion of his harsh masters.

Rousseau drew a very real distinction between the political reality that the Commonwealth faced and the proposals that he—and others—had suggested for it. Political reality was an *ad hoc* process, with the state not having evolved with a singular goal or purpose in mind, but rather as a serious of reactions to various events and through the uncoordinated will of various kings and *szlachta* over the centuries. This incoordination was not only highly wasteful, but also allowed or the "multiplying" of abuses. As a new problem was encountered, a new law had to be created, however this law may be incompatible with other laws, and further diluted the law through the increasing creation of more and more law, with more and more inconsistencies. What was unique about the Rzeczpospolita was that its legislature had weakened despite having a relatively weak king. This is what also gave Rousseau hope that repairing and strengthening the legislature would restore the equilibrium that had been lost.

> Poland's legislation was done successively by bits and pieces, like all those of Europe. As abuses were seen, a law was made to remedy it. From that law were born other abuses that had to be corrected again. This manner of operating has no end at all, and leads to the most terrible of all abuses, which is to enervate all the laws by virtue of multiplying them.
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> In Poland the weakening of the legislation was done in a very peculiar, and perhaps unique manner. That is that it lost its force without having been subjugated by the executive power. At this moment the legislative power still preserves all of its authority; it is inactive, but does not see anything above it. The Diet is as sovereign as it was at the time of its establishment. Nevertheless it has no force; nothing dominates it, but nothing obeys it. This state is remarkable and deserves reflection.[1416]

Rousseau argued that another problem was that the executive power had actually been too weak, and he favored strengthening it so that the administration of the state and the justice might be improved. Like Montesquieu, he argued for a permanent executive power, but one whose representative would change, rather than held by a permanent king. In fact, Rousseau fundamentally rejected the theory of the separation of powers, because he believed that it was the tendency of the executive to strengthen over time, and eventually overcome the legislative. The only real solution to this problem was to strengthen the executive, but to strengthen the legislative more and to make the legislature the supreme branch of government, with the power to constrain the executive to its will. A critical weakness of the Seym was that its senators were appointed by the king, and ultimately beholden unto him. Accordingly, Rousseau suggested that the Senat's members should be elected either by the

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Perhaps there would be a patriotic heroism in uniting with the Confederates in order to drive them out; but one knows very well that Poniatowski is not a hero. Moreover, aside from the fact that he would not be allowed to act and he is constantly under surveillance, owing everything to Russia, I declare frankly that if I were in his place, I should not want to be capable of that heroism for anything in the world.

"I know very well that this is not the King you need when your reform is completed; but perhaps it is the one you need in order to make it tranquilly. If he lives for only eight or ten years, since your machine will have begun to go by then, and several Palatinates will already be filled by Guardians of the laws, you will not have to be afraid of giving him a successor who resembles him: but for myself I am afraid that by simply removing him from office you will not know what to do with him and you might expose yourself to new troubles," Rousseau, *Considerations On the Government of Poland*, pg. 239.

[1416] *Ibid*., pg. 186.

Seym or by seymiki, or in some combination where the local seymiki voted on a list of candidates that were then submitted to the general Seym for a final vote.[1417]

This was consistent with Rousseau's overall theory of the general will present in his *Social Contract*, wherein the entirety of the citizenry held the power collectively and wielded such power through the legislature. Rousseau also proposed an overall reform to the Seym / seymik structure in that the *instrukcje* of deputies should play a powerful role. This was to ensure that the Seym would truly be a representation of *the* general will as a kind of aggregate of the "general wills" of each location. *Instrukcje* were to be presented in a clear manner that would react to both the constitutional and daily needs of the Commonwealth and the *szlachta* would have to deal with them before moving on to other parliamentary business.[1418]

Rousseau's support for the broad activity of seymiki and Seymy in the Polish-Lithuanian Commonwealth was a point where he explicitly broke from Montesquieu's ideas. Whereas Montesquieu had worried that a potential flaw with the British parliament was that it meant too often and that instead it should only meet to deal with specific needs of the country, for Rousseau the frequency of both the seymiki and the Seymy was in fact one of the great strengths of Polish-Lithuanian constitutionalism. The constant reelection of new representatives was actually a bulwark against corruption because it did not allow permanent factions to easily entrench themselves, so long as some measures were taken to ensure that there were limits on how many times and how often the same delegates could be elected. In fact, parliamentary supremacy was actually a detriment to British freedom, as it merely allowed for the representatives to gain political powers for themselves. Instead, the natural rotating out of representatives through a regular, constant electoral cycle, the creation of term limits, and making the *instrukcje* from local parliaments binding on the central parliament was a solution that increased political freedom and stability. In Rousseau's estimation, the *szlachta* had in fact underappreciated the true value that the seymik / Seym system had actually produced: though the *konfederacje* had saved the nation, the seymiki were the true lifeblood of the Rzeczpospolita.

[1417] Rousseau, *Considerations On the Government of Poland*, pg. 195.

[1418] "I believe that this is the first and principal cause of the anarchy that reigns in the State. In order to remove that cause, I see only one means. It is not to arm the particular tribunes with the public force against these petty tyrants; for this force, sometimes badly administered and sometimes surmounted by a superior force, could stir up troubles and disorders capable of proceeding gradually to civil wars; but it is to arm with all the executive force a respectable and permanent body such as the Senate, capable by its stability and by its authority of restraining within their duty the Magnates who are tempted to deviate from it. This means appears effective to me, and would certainly be so; but its danger would be terrible and very difficult to avoid. For as one can see in the *Social Contract,* every body that is a depositary of the executive power tends strongly and continuously to subjugate the legislative power and succeeds in doing so sooner or later. […]

"For the administration to be strong, good, and proceed directly toward its goal, all the executive power must be in the same hands: but it is not enough for these hands to change; they must act, if possible, only under the Legislator's eyes and the Legislator must be the one who guides them. That is the true secret for keeping them from usurping its authority.

"The Deputies' instructions must be drawn up with great care, with regard to both the items announced in the agenda and the other needs present in the State or in the Province, and this should be done by a commission presided over, if one wants, by the Marshal of the Dietine, but otherwise made up of members chosen by the plurality of votes; and the nobility ought not to break up until these instructions have been read, discussed and consented to in plenary session," *ibid*. pgs. 187-189.

> I see two ways to forestall this terrible evil of corruption, which makes the organ of freedom into the instrument of servitude.
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> The first is, as I have already said, the frequency of Diets which, by often changing representatives, makes their seduction more costly and more difficult. On this point your constitution is better than that of Great Britain, and once the *liberum veto* has been removed or modified, I do not see any other change to make, other than to add some difficulties to sending the same deputies to two consecutive Diets, and to keep them from being elected a large number of times. I will return to this item below.
>
> The second means is to subject the representatives to following their instructions exactly and to giving a strict account to their constituents of their conduct at the Diet. On this point I can only wonder at the negligence, the carelessness, and I dare to say the stupidity of the English Nation, which, after having armed its deputies with the supreme power, does not add any restraint to them to regulate the use they can make of it for the seven whole years that their commission lasts.
>
> I see that the Poles do not feel the importance of their Dietines enough, neither all that they owe to them, nor all they can obtain from them by extending their authority and giving them a more regular form. As for me, I am convinced that if the Confederations saved the fatherland, it is the Dietines that have preserved it, and it is there that the true Palladium of freedom is.[1419]

Whereas many of his contemporaries saw the *konfederacje* as contributors to the "anarchy" that plagued the Commonwealth at the end of its life, Rousseau saw them as necessary in the struggle to save it. Rousseau hoped that once the dust had settled, the Commonwealth could move on to a fully pluralist voting system and that the *liberum veto* would be completely abolished. There would still be room for the *konfederacje* as a mechanism to rapidly unify the country's political will and institutions in cases of emergency, such as the moment of foreign invasion. Rousseau argued that once pluralism and his other political reforms had been introduced into the system *konfederacje* would not be needed as frequently, and that there should be more specific laws governing when and how they were to be used. Thus they were to be an official institution that had a specific role within the Polish-Lithuanian political order.[1420]

[1419] Rousseau, *Considerations On the Government of Poland*, pgs. 189-190.

[1420] "Dare I speak here about the confederations and not share the opinion of learned people? They see only the harm they do; it would also be necessary to see the harm they hinder. Without contradiction confederation is a violent state in the Republic; but extreme evils make violent remedies necessary, and one must seek to cure them at any price. The Confederation is in Poland what the Dictatorship was among the Romans: both silence the laws in a pressing danger, but with this great difference that the Dictatorship, being directly contrary to the Roman Legislation and the spirit of the government, ended by destroying it, and the Confederation, on the contrary, being only a means of strengthening and reestablishing the constitution when it has been shaken by great efforts, can tighten and reinforce the relaxed spring of the State without ever being able to break it. This federative form, which might have had a fortuitous cause in its origin, appears to me to be a masterpiece of politics. Wherever freedom reigns it is ceaselessly attacked and very often in peril. Every free State where great crises have not been foreseen is in danger of perishing at each storm. Only the Poles have known how to draw a new means for maintaining the Constitution from these very crises. Without the Confederations the Republic of Poland would long ago have ceased to exist, and I am very much afraid that it will not last long after them if it is decided to abolish them. Cast your eyes on what just happened. Without the Confederations the State would have been subjugated; freedom would have been annihilated forever. Do you want to deprive the Republic of the resource that just saved it?

"And let it not be thought that, when the *liberum veto* is abolished and plurality reestablished, the confederations will become useless, as if their whole advantage consisted in that plurality. They are not the

The last factor that should be addressed was Rousseau's treatment of the *liberum veto*, which reveals some deeper thought on the boundaries between constitutional and political law. The *liberum veto*, the misuse of *konfederacje* and the time-honored tradition of *szlachcice* bringing weapons with them into parliament were the three largest contributors to the "disdain for the laws and anarchy" that plagued the Republic, preventing the Seym from reaching its true potential and leading the nation into a peaceful and stable society.[1421] The easiest of the three to resolve was to ban the *szlachta* from brining weapons to their meetings. We have already discussed his treatment of the *konfederacja*. As with the *konfederacja*, Rousseau did not wholly discount the *liberum veto* in principle, just that he was very concerned with its usage in practice. For Rousseau, the fundamental problem turned on the disorganization of the constitution: as there were no clear distinctions between the powers of the king and that of the Seym, it was often the case that a *liberum veto* could shut down the whole of a seymik or Seym's functioning over minute details or administrative issues, or overall dislike with the policies of the king.

Though he was not saying it explicitly, what Rousseau was aiming for was a narrowing and specification of the legislature's powers and removing issues that were not proper to it—such as issues of policy or administration—to the executive wherein they would be beyond the *liberum veto*'s reach.[1422] Rousseau was thus following a path of reform that was quite familiar to the *szlachta*: whereas the executionists and the 16th and 17th century reformers had attempted to specify and limit the powers of the king and simultaneously narrow the interpretation of law this had had the unintended effect of loosening the boundaries of the legislative branch's powers. The remedy was thus to curb the excesses of

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same thing. In extreme need the executive power attached to the confederations will always give them a vigor, an activity, a speed that the Diet—forced to proceed by slower steps, with more formalities—cannot have, and it cannot make a single irregular movement without overturning the constitution.

"No, the Confederations are the shield, the refuge, the sanctuary of this constitution. As long as they continue to exist it appears impossible to me that it will be destroyed. They must be left, but they must be regulated. If all abuses were removed, the confederations would become almost useless. The reform of your Government ought to bring about this effect. It will no longer be anything but violent undertakings that make one need to have recourse to them; but these undertakings are in the order of things that must be foreseen. Thus instead of abolishing the confederations, determine the cases in which they can legitimately take place, and then regulate their form and effect very well in order to give them a legal sanction as much as possible without disturbing their formation or their activity. There are even cases the mere occurrence of which should cause all of Poland to be immediately confederated; as for example at the moment when, under any pretext whatsoever and outside of the case of open war, foreign troops set foot in the State; because, in sum, whatever the subject for that entrance might be and even if the government itself has consented to it, confederation at home is not hostility toward others. When, by any obstacle whatsoever the Diet is prevented from assembling at the time set down by the law, when by the instigation of anyone whatsoever armed men are found at the time and place of its assembly, or its form is altered, or its activity is suspended, or its freedom is hindered in any fashion whatsoever; in all these cases the general Confederation ought to exist by the occurrence alone; assemblies and particular signatures are only the branches, and all the Marshals ought to be subordinated to the one who has been named first," Rousseau, *Considerations on the Government of Poland*, pgs. 205-206.

[1421] "Well proportioned and well balanced this way in all its parts, the Diet will be the source of good legislation and good government. But for that, its orders must be respected and followed. The disdain for the laws and anarchy in which Poland has lived until now have causes that are easy to see. I have already noted the principal one above, and I have indicated the remedy for it. The other contributing causes are, 1st. The liberum veto, 2nd. The confederations, 3rd. And the abuse that private individuals make of the right that they have been left of having armed men at their service," *ibid*., pg. 202.

[1422] Michalski, *Rousseau and Polish Republicanism*, pg. 73.

the legislative branch: to strength its powers, but also to increase their scope. Rousseau favored the creation of several, distinct "orders" of laws, which would be clearly distinguished from each other and would each have their own separate role to play within the constitutional system: political codes, civil codes, and criminal codes.[1423] To effectively restrain the power of the legislative, one had to essentially take certain issues "off the table" of regular parliamentary business by distinguishing "fundamental laws" that formed the basis of the nation from regular laws. The *liberum veto* and the absolute unanimity that it required would only be reserved for discussing these "fundamental laws"—what in our discussion we have referred to as the constitution—so that the political and legal system is preserved. This form of internal check against the legislative power was also a rejection of outright parliamentary supremacy, in that there was even a higher, foundational understanding of laws that the Seym could not wantonly disturb.

> The *liberum veto* would be less unreasonable if it fell uniquely on the fundamental points of the constitution: but for it to take place generally in all the deliberations of the Diets, that is what cannot be allowed in any fashion. It is a vice in the Polish constitution for the legislation and administration not to be well enough distinguished, and for the Diet—exercising the legislative power—-to mix parts of administration into it, to perform indifferently acts of sovereignty and of government, often even mixed acts by which its members are magistrates and legislators both at the same time.
>
> The proposed changes tend to distinguish these two powers better, and by that very fact to mark out better the limits of the liberum veto. For I do not believe that it has ever fallen into anyone's mind to extend it to matters of pure administration, which would be to annihilate civil authority and all government.
>
> By the natural right of societies, unanimity has been required for the formation of the body politic and for the fundamental laws that pertain to its existence, such, for example, as the first corrected, the fifth, the ninth, and the eleventh, enacted in the Pseudo Diet of 1768. Now the unanimity required for the establishment of these laws ought to be the same for their abrogation. Thus there are points on which the *liberum veto* can continue to exist, and since it is not a question of destroying it totally, the Poles who, without much murmuring, have seen this right restricted by the illegal Diet of 1768, ought to see it reduced and limited without difficulty in a freer and more legitimate Diet.
>
> It is necessary to weigh and meditate well upon the capital points that will be established as fundamental laws, and it is only on these points that the force of the *liberum veto* will be brought to bear. This way the constitution will be made as solid and these laws as irrevocable as they can be: for it is against the nature of the body politic to impose on itself laws that it cannot revoke; but it is neither against nature nor against reason for it not to be capable of revoking these laws except with the same solemnity it put into establishing them. This is the only chain it can give itself for the future. That is enough both to strengthen the Constitution and to satisfy the Polish love for the *liberum veto*, without exposing them later on to the abuses that it causes to be born.[1424]

Though the defeat of the Bar Confederation was not a personal loss for Rousseau who remained in Geneva, his *Considerations on the Government of Poland* is perhaps one of the clearest evidences that the ideas of the loser in a conflict may profoundly shape the ideas of the victor. While the more radical portions of Rousseau's work were not adopted—the victors

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[1423] "It is necessary to make three codes. One political, another civil, and another criminal. All three as clear, short, and precise as possible. These codes will be taught, not only in the universities, but in all the schools, and no other body of right will be needed," *Considerations On the Government of Poland*, pg. 207.
[1424] *Ibid.*, pgs. 293-294.

certainly never considering adopting significant portions of the defeated traitors' constitutional renovations—a major impact of the *Considerations* was that it helped clarify the internal discourse within the Rzeczpospolita at the time, that it established concepts and language to describe what the political unconscious was feeling at the time:

> The direct aim of the Considérations – giving counsel to a victorious Confederation of Bar – was made redundant by historical events. The work did however imprint itself on contemporary Polish republican ideology (including Wielhorski himself), providing it with doctrinal motivations, defining its concepts more precisely, and sharpening its postulates.[1425]

> This particular development in the Polish approach to power and freedom was undoubtedly greatly affected by the longstanding crisis of parliament, paralyzed by the liberum veto principle and the shift of a large share of its power to the sejmiki. It seems that the real political situation affected how the traditional conviction of the nation being sovereign in its free state was interpreted, and contributed to the intensification of the just-as-traditional fear of any power external to the nation itself. Although deeply rooted in both the political reality of the Commonwealth and in Polish political philosophy, the notion of a kind of direct democracy as a guarantee of freedom did not take its ultimate shape until the 1770s under the influence of Western concepts, especially Rousseau's *Considerations on the Government of Poland*.[1426]

As we shall see, several of the reforms were taken into account, at least partially, and many more were discussed in the work of Kołłątaj and Staszic, who were certainly aware of the goings-on in the Anglosphere and were seriously comparing the political events on the ground throughout Europe and North America, along with attempting to digest as much of the new, Enlightened ideas as they could. Perhaps, it was ultimately Rousseau's distrust for the English constitution that kept Polish-Lithuanian reformers for incorporating his ideas more seriously,[1427] as many of them—though radical for Europe in an objective sense—were already accepted by moderate and reformist circles in the Commonwealth.

Rousseau ultimately never lived to see his work take root in the 13 Colonies, the Polish-Lithuanian Commonwealth, or the French Revolution, but in many ways, he anticipated and enunciated the delicate balance that many political reformers were struggling with: the Polish-Lithuanian Commonwealth and Anglo-American political systems had both made multiple successes, but they were largely spontaneous experiments or unexpected results of successful revolutions. The Age of Reason suggested that society could be rebuild on a more rational model, building upon the successes of previous generations such as classical liberalism, common law, and classical republican thought. The American and French constitutions were more explicit in trying to build a new constitutional system from

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[1425] Michałski, *Rousseau and Polish Republicanism*, pg. 141.

[1426] Grześkowiak-Krwawicz, *Queen Liberty*, pg. 54.

[1427] "The idea of the sovereignty of the dietines and the binding power of instructions would become prevalent in republican political thought in Poland between the First Partition [1772] and the Four Year Diet [1788–1792], especially in the first years of that diet, when it became one of the fundamental objects of contention being the Patriotic Party and Stanisław August, who supported the English system of representation. Underpinning the popularity of this idea was a specific combination of circumstances: the landowning character of the Polish nobility, the particularist traditions of the dietines, and the interests of the opposition to the king, but the arguments of the author of the *Considérations* helped both to make the idea itself more precise and to explain it attractively," Michałski, *ibid*., pgs. 68-69.

scratch, whereas English political philosophy such as Burke was wary of such extreme experimentation. The Polish-Lithuanian Commonwealth, as we shall see, was caught somewhere in the middle: Stanisław August Poniatowski and his reformist parties favored political pragmatism and natural, incremental improvements to the constitutional system, whereas Kołłataj and Staszic favored more radical change. The 3 May 1791 Constitution would be somewhere in between. The remainder of our philosophical treatment will not treat each philosopher individually, so much as the establishment—and certainly the oversimplification—of two different camps of thinkers, whose general positions will be compared. Within each camp their works shall be presented more or less chronologically to capture the evolution of the internal dialogue and the clarification of concepts as much as possible, beginning with the more moderate voices.

Stanisław August Poniatowski (1732-1798) and Teodor Ostrowski (1750-1802): Moderate Monarchists and Anglophiles

The political preferences of Stanisław August Poniatowski have already been briefly presented above, but it will be necessary to flesh them out a little more. Though the king was deeply learned in the Enlightenment, he himself did not produce a substantive volume of political literature, though he did give several significant speeches before the Seym and did a lot of work behind the scenes, either with the Rada Nieustająca (Permanent Council), the *Monitor*, or the National Education Commission. In his youth he travelled extensively around Europe, wherein he met Montesquieu in France, and in 1754 he travelled to England,[1428] where he fell in love with English literature after seeing a live performance of Shakespeare, and most importantly became fascinated with British politics. He would retain a deep fascination and interest in British culture and politics for the remainder of his life,[1429] and had long wanted a monarchy-parliamentary system for the Commonwealth.[1430] As mentioned earlier, in his youth served as an aide to British ambassador Charles Hanbury Williams in 1755-1756 in St. Petersburg, where he continued his political education.[1431] He also extensively corresponded with several important American political figures. In 1765 and 1769 Stanisław August struck up a personal friendship with Charles Lee, a British officer who served as one of his military aides at court as well as participated in several battles and conflicts. Upon returning to England, Charles Lee found himself sympathetic to the colonists' cause and eventually offered his services to them, joining the American Revolution. Stanisław August and Lee both recognized the unfairness that the American colonists felt in their treatment by the Parliament in Westminster.[1432] Stanisław August wrote to his friend on 20 March, 1768:

> I ask you again to tell me why they do not allow your colonies to have representation in the British Parliament. Representation and taxation would then go together, and the

[1428] Aleksandra Zgorzelska. 2006. *Stanisław August nie tylko mecenas*. Dzieje Narodu Państwa Polskiego: Warszawa, pgs. 1-5; Richard Butterwick-Pawlikowski. 1998. *Poland's Last King and English Culture: Stanisław August Poniatowski, 1732-1798*. Clarendon Press, Oxford University Press: Oxford, pg. 104.
[1429] For an extensive biography of Stanisław August with regard to how his interaction with British thought shaped his intellectual and political life, see: Butterwick-Pawlikowski, *Poland's Last King*, *passim*.
[1430] Izdebski, "Political and Legal Aspects of the Third of May, 1791, Constitution," pg. 106.
[1431] Zgorzelska, *Stanisław August nie tylko mecenas*, pg. 6.
[1432] Butterwick-Pawlikowski, *Poland's Last King*, pg. 130.

> connection between the mother and her daughters would become indissoluble, otherwise I see no alternative but oppression or entire independence.
>
> For the expedient of American Parliaments, or anything else of the kind by whatsoever name it may be called, appears to me likely to produce nothing but an opposition of interests between the colonies and England, as incompatible as it would be injurious to all parties.
>
> The English in America would then have the same relation to those of Europe that exists in the seven United Provinces, which compose a federal republic, and whose government is so defective and slow in its operations on account of the equality of power between the seven little republics respectively. The worst of all would be, that it should become necessary for the acts of the Parliament of England to be approved by an American Parliament before they can be executed in America, which would make the latter paramount to the former. This would be the same abuse that is now seen in Poland, where the Dietine of Prussia arrogates to itself the right of confirming or rejecting what the Diet of the Kingdom of Poland has decreed.[1433]

Stanisław August's analysis was spot on: the central issue was that now that parliament had established itself as the supreme power, the question was how to divide that power. However, the concepts of division of powers or federalism were inconceivable to traditional European political thought.[1434] Instead, if the British did not allow the American colonists to participate in the Westminster parliament, then they would inevitably establish their own parliament anyway, which would—by the very nature of its creation—be "opposed of interest" to English political institutions. Stanisław August also clearly disapproves of federalist principles wherein the individual parts have the power to negate those of the central government, something which did not occur under the supreme parliament of 18th century Britain. Stanisław August's personal publisher, Michał Gröll, also continued to publish Polish-language tracts that discussed the American Revolution,[1435] which kept up the public's interest. The king was personally ambivalent to the American Revolutiona: though he believed in the justice of the American cause he was also worried that an American Revolution would weaken England, which he hoped to call on as an ally in the future to protect the Commonwealth, hoping to take advantage of the increasing rivalry between the British and the Russians.[1436] As other *szlachta*, Stanisław August was largely negative toward the Articles of Confederation, and more receptive of the 1787 Constitution. The king was personally fascinated by the American Constitution as a new model, but also knew that it would be impossible to adopt a radically new model or otherwise effect such a political transformation of the Commonwealth because he knew that military victory was impossible.[1437]

Due to his limited ability to influence public thought in the Rzeczpospolita personally, the king instead created institutions or empowered others to help him carry out

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[1433] Miecislaus Haiman. 1932. *Poland and the American Revolutionary War*. Polish Roman Catholic Union of America: Chicago, pgs. 4-5.

[1434] Butterwick-Pawlikowski, *Poland's Last King*, pg. 165.

[1435] Haiman. *Poland and the American Revolutionary War*, pg. 6.

[1436] Drodzowski "Rewolucja Amerykańska," pg. 71; Butterwick-Pawlikowski posits that he was far more supportive of the French Revolution than the American one, precisely because he was afraid that a Great Britain that was too weak would not be able to help the Commonwealth. See: Butterwick-Pawlikowski, *ibid*., pgs. 271-272.

[1437] Dubnic, "Stanisław August Poniatowski," pg.102.

his vision. One such person was Teodor Ostrowski, a little-known figure in 18th century Polish-Lithuanian history. Ostrowski became a novitiate at the age of 15, studied humanities in Rzeszów for three years (1768-1770) and then came to Warszawa where he had one year of theological studies.[1438] He joined the Piarist order and was involved in their project to publish the first six volumes of *Volumina Legum*. Ostrwoski's main two works are his *Civil Law of the Polish Nation* (*Prawo cywilne Narodu Polskiego*) first published in 1784 and then again in 1787 after heavy criticism, and his work *History and Laws of the Polish Church* (*Dzieje i prawa kościoła polskiego*), published in 1793. His *Civil Law of the Polish Nation* was the only one that was substantially commented upon, and it was generally received negatively for being historically inaccurate as well as insufficient in its understanding of both Roman law (civil law) as well as Polish customary law, though it was one of the first serious attempts to codify Polish civil and criminal law. In this, Ostrowski should be understood as a man thoroughly steeped in the Enlightenment thought of the time: that he wanted to rationally organize all available understanding of law into a civil code.[1439] Ostrowski was also profoundly interested in French legal thought, especially the humanist legal reform proposed by Montesquieu and Beccaria. He was similarly interested in forensics and rules of evidence as a way to ensure that the law was being carried out properly.[1440]

Following in the footsteps of Montesquieu and Rousseau, Ostrowski begins *Prawo cywilne* with a careful description of his vision of legal science, which he refers to as *jurisprudentia.* Herein we see a familiar distinction of laws as *natural laws* given by God, *political law* as to how nations should arrange and govern themselves, and *civil law* or *ius civile*, which treats the relationships *within* a nation.[1441] His work is specifically devoted to the task of defining civil law, which he defines as that which enables the citizenship to be connected to his community *qua* citizen, that is the specific relationships between himself and other citizens and the mutual set of obligations.

> Roman law, otherwise known as universal or civil law, reaching the farthest people of division, first considers each one to be connected with the community. A person under this law will be considered a person in a certain status, e.g. civil or clergy. The condition of persons is the property of them, through which, of whatever law they are partakers. This one will either be natural and empower a man to seek and acquire property to satisfy his inevitable needs, or a civil one, which provides man in the community with the freedom to govern his

[1438] Zbigniew Zdrójkowski. 1956. *Teodor Ostrowski (1750-1802) pisarz dawnego polskiego prawa sądowego (proces, prawa prywatne i karne).* Wydawnictwo Prawnicze: Warszawa, pgs. 5-7.
[1439] *Ibid*, pgs. 16-19, 43, 136-138.
[1440] *Ibid*, pgs. 48-49, 214-219.
[1441] "All laws of science, or *jurisprudentia*, are divided into classes. 1. The law of nature, that is, of the truth which man first ruled towards God, himself and others, by reason of light itself. And this is actually the elementary law, a moral science, *jus primarum*, it is called. Adapted and the right to practice from the people in the assembled community, it will have a name *juris secundarii*. 2. Political law or politics teaches how nations should govern themselves according to the law of nature, how today they govern themselves according to the accepted customs and laws of description. Such a law closes the form of government, states in the nation, prerogatives, descriptions of trade and public deliberations, religion, etc. But when the relationship of only one nation with another, or with all of them, it will be the law of nations, *ius gentium*. 3. *Civil law, ius civile*, deals with the specific relationships of a nation," Teodor Ostrowski. 2022 [1787]. *Prawo cywilne Narodu Polskiego*. Tom I. Opracował Damian Klimaczyk. Iura. Źrodła prawa dawnego: Kraków, pg. 14.

person and property according to the law, and allows him to participate in the rights of fellow countrymen,in any class or citizens.[1442]

The majority of *Prawo cywilne* is uninteresting for our particular task, in that Ostrowski is more or less giving a catalogue of laws and punishments, and then giving some of the reason behind why which law has which punishment. Curiously, he mentioned how England and Holland had repealed anti-Catholic laws and that the Russian monarchy was relatively tolerant,[1443] and though he did not suggest it outright, seemed to imply that he wished that Poland-Lithuania followed suit. The major work of Ostrowski's which concerns us is his translation of Blackstone's *Commentaries on the Laws of England*, which he translated into *Prawo Kryminalne Angielskie* (English Criminal Law) from the French version in 1786. *Prawo Kryminalne Angielskie* is not merely a translation, however, for each section has is prefaced by a discussion—often a few pages long—explaining why the succeeding section is relevant to the Commonwealth and what the Commonwealth could possibly learn from it. At the very beginning of *Prawo Kryminalne Angielskie* he introduces why he is interested in the laws of England in the first place:

> And if, for the scarcity of the Fatherland, we must be governed by foreign Laws, where it is no longer the fortune and Privileges of each, but the honor, fame, safety of the Citizen, and his very life that is at stake; Let us adopt such Laws, that would be closest to humanity and justice: *Let us look for such a Nation, whose customs, way of thinking, arrangement of government, personal prerogatives, come closest to our Constitution*. In particular, we take as our model that Legislation which not the seduction of a Tyrant or a Unitary Ruler's will: not the flattering advice of vile Ministers: not the vengeance and personal interest of the Legislator dictated; But that which a free Nation, with unanimous and unforced voices, guided by the Law of equity, measuring itself by mercy rather than by implacable harshness in spirit, wrote, and nearly for ten centuries improved and perfected.
>
> Such is: The Criminal Law of England! The character of this Nation, the Domestic Policy, the form of Government, the manner of Public Deliberations, and, what is most essential, scarcely dissimilar opinions about National Liberty, and Personal Liberty, more than openly, and visibly exhibit the image of our Republic. Neither would it be difficult for me to support this resemblance more clearly with evidence, if I doubted that the Government, Laws, and Customs of a Nation so famous in Europe today, could be secret to one to whom the light of better taste in science shines (emphasis added).[1444]

> Such a widespread opinion, not only among Letters, but also among entire Nations, about the necessary Reform of the Criminal Laws, makes me flattered, that our Nation, together with others convinced of this domestic need, will eagerly accept the present undertaking of mine. And looking back I am sure that the enactment of the English Criminal Laws will be regarded as more serious and useful to our Country than their most perfect Project. Every citizen knows what benefit the Reform of the Seym sessions, arranged in the image of the English Parliament, has brought us: How could not a part of the Laws of this Nation, win the curiosity and esteem of a Pole? The national taste, curious about the History and Politics of the most ancient Nations, should be praised and encouraged: Searching in the Legislation of the Greeks and Romans: Inquiring into the Laws of Nature, that essential and

[1442] Ostrowski, *Prawo cywilne Narodu Polskiego*, pg. 20.
[1443] *Ibid.*, pgs. 143-144.
[1444] Teodor Ostrowski. 1786. *Prawo Kryminalne Angielskie.* Tom I. J.K. Mci i Rzeczypospolitey u XX. *Scholarum Piarum*: Warszawa, pgs. 4-5.

> indispensable principle of human laws! But this curiosity about the Laws and customs of living Nations, is far more glorious, more useful! [1445]

Ostrowski is fully enraptured in the comparative, rational study of law and politics brought forth by the spirit of the Enlightenment. If Poland-Lithuania has made some improvements from borrowing from the English law already, then certainly it is logical to look deeper for other possible improvements. In this sense, the history of living nations is richer and more open field of research than history of dead ones, as new nations are continually innovating. He acknowledges that the internal situation of the Rzeczpospolita has reached something of an impasse, and requires input from nations abroad in order to move forward: that Poles-Lithuanians should see themselves and their institutions in other nations and then develop deeper connections from there. For example, later in the volume Ostrowski is again impressed with British toleration,[1446] which was important because one of the major arguments against potentially adopting British ideas and institutions was that they were a Protestant country that had passed stringent, anti-Catholic laws in the past. The publication of Ostrowski's translation instead revealed that it was possible to have a Protestant nation that had some tolerance toward Catholics, whereas in the history of the Commonwealth the opposite was usually the case. Thus, the national spirit of Polish-Lithuanian and British institutions in a very real sense mirror each other. In the second volume, Ostrowski looks for ways to improve Polish-Lithuanian legal procedure based on English and French reforms, particularly the work of Beccaria: it is important for the court to convince the public of the guilt of the accused with a prescribed, publicly announced punishment as well as clear presentation of evidence.[1447]

Prawo Kryminalne Angielskie is not a significant work in our own right, at least not in the project with which we are currently engaged, though there certainly needs to be more serious scholarly research into how a project like Ostrowski's sought to balance changes in political law (i.e. constitutionalism) with civil law (i.e. policy and civil codes). Instead, Ostrowski's translation is important for reviving interest in the English system of government in Polish-Lithuanian public discourse in the later 1780s. Though Poniatowski and others like him had been enamored with the British system as a possible source of reforms, in reality there were a lot of misgivings about England. She was seen as a republic in the guise of the monarchy that had long-held, anti-Catholic views. During the Partition Seym (1773-1775), England had been an ally of Prussia, though that relationship quickly soured. Ostrowski and Poniatowski were thus part of a broader attempt to rehabilitate the image of the British constitution in late 18th century Polish-Lithuanian public discourse.[1448] The final two thinkers—Kołłątaj and Staszic matured within the 1770s-1780s political environment but took it one step further: looking to more radical, systematic changes, often inspired by the constitutional and political successes of a young America.

[1445] Ostrowski, *Prawo Kryminalne Angielskie*, Tom I, pgs. 11-12.
[1446] *Ibid*., pgs. 90-93.
[1447] Teodor Ostrowski. 1786. *Prawo Kryminalne Angielskie*. Tom II. J.K. Mci i Rzeczypospolitey u XX. Scholarum Piarum: Warszaw, pgs. 229-233.
[1448] Libiszowska. "Model Angielski w Publicystyce Polskiego Oświecenia", pgs. 2-3.

Kołłataj (1750-1812) and Staszic (1755-1826): Radical Republicans and Americanists

The last two persons on our brief detour into 18th century Polish-Lithuanian political philosophy were the true philosophers of the group, though they were both pragmatic and pushed for changes to political as well as civil law. Though they were contemporaries and active during the same period, we shall examine them one at a time rather than in dialogue with each other, in order so that we may more easily appreciate the nuances of each's views before combining them together. While this is perhaps not the best way to fully grasp the evolution of Kołłątaj and Staszic's thoughts, given that they certainly played off of each other's ideas, this way seems to be the easiest to grasp the ideas and sufficient for the purposes of shedding light on the development of constitutionalism, even if some philosophical nuances may be lost. The first shall be Hugo Kołłątaj, heralded as one of the co-authors of the 3 May Constitution, leader of the so-called Kołłątaj's Forge (Kuźnica Kołłątajowska), an informal gathering of liberal-minded and radical reformers that were the core of the so-called "Patriotic Party". The second will be Stanisław Staszic, another leader of the reformers who in some ways was even more radical than Kołłątaj. Kołłątaj was a member of the petty *szlachta* while Staszic was a burger. Both had excelled at education in their youth and become priests but promoted secular if not sometimes anti-clerical ideas. The two were arguably the most prolific political pamphleteers of their time and supporters of the bourgeoisie and the peasants against the traditional *szlachta* and especially the *magnaci*.[1449] They have been referred to by the author as "radical republicans" and "Americanists" not because they were necessarily great backers of the American cause, but because they attempted to distill elements of the American Revolution and the subsequent decade leading up to the 1787 Constitution in order to find sources of inspiration for reforms, rather than merely trying to adopt parts of the British constitutional monarchy as the king and his supporters preferred.

The works that we shall specifically deal with are Hugo Kołłątaj's *Listy Anonima* (*Anonymous Letters*) (1788-1789), his *Prawo Polityczne Narodu Polskiego* (*Political Law of the Polish Nation)* (1790),[1450] and his *Uwagi and Pismem, które wszyszło pod tytułem: Seweryna Rzewuskiego Hetmana Polnego Koronnego o Sukcessyi Tronu w Polszcze rzecz krótka* (Remarks on the Letter, which was published under the title: Seweryn Rzewuski Crown Hetman on Sucession to the Throne in Poland, Abridged Version) (1790). We shall then proceed to Staszic's *Uwagi nad życiem Jana Zamoyskiego* (Comments on the Life of Jan Zamoyski) (1787)[1451] and his *Przestrogi dla Polski* (Warning for Poland) (1790).[1452] The two authors' works will then be compared with each other in order to grasp a fuller, nuanced understanding of the period.

[1449] Davies, *God's Playground,* pgs. 400-401; Jacek Jędruch. 1998. *Constitutions, Elections and Legislatures of Poland, 1493-1993.* Revised Edition. EJJ Books: New York, pg. 194; Halina Lerski. 1996. *Historical Dictionary of Poland, 966-1945.* Greenport Press: Westport and London, pgs. 259-260, 270-271; Stone, *The Polish-Lithuanian State,* pgs. 317-319; Andrzej Walicki. 1985. "The Idea of Nation in the Main Currents of Political Thought of the Polish Enlightenment." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 165.
[1450] Stanisław Staszic. 1785. *Uwagi nad Życiem Jana Zamoyskiego y Hetmana W.K. Do Dziesieyszego stanu Rzeczypospolitey Polskiey Przystosowane*: Warszawa.
[1451] Stanisław Staszic. 1790. *Przestrogi dla Polski z teraźnieyszch politycznych Europy związkó i z praw natury wypadające.* Michał Gröll: Warszawa.

It is important for us to fully grasp the dire situation which compelled the authors' writing. As we briefly discussed, when wars broke out between Russia and Sweden in the north and Russia and Turkey in the south, Stanisław August finally had the opportunity that he had been waiting for. Under the nominal blessing of the empress, he called what has since become known as the Four Years Seym or Great Seym, a marathon, confederated Seym that run from 1788 until 1792.[1453] Like many political pamphleteers at the time, Kołłątaj and Staszic were directly addressing the debates of their day and trying to persuade public opinion to pressure the delegates' decisions. The entire city of Warszawa became one giant hub of political debate and discussion.[1454] Whereas the tense negotiations behind the American Constitution were held in secrecy, the Seym was completely open to the public, and, incredibly, the galleries were packed by a very vocal and active public.[1455] A major change in the political headwinds blew when the Prussians pledged to help the Rzeczpospolita against Russia.[1456]

We begin with Kołłątaj's *Listy Anonima*, which were sent to the Marszałek of the Seym, Stanisław Małachowski, who provided the quote given at the beginning of the chapter on how *szlachta* had tried to learn from American as well British constitutionalism. A devoted champion of republicanism himself, Małachowski was not a neutral person who Kołłątaj would have had much trouble converting to many of his ideas. Given the prominence of both men in reformer circles, the *Anonymous Letters* were not so anonymous.

As Leśnodorski details in his introduction to the *Listy Anonima*, the Seym immediately revealed its true, revolutionary colors.

> On October 6, 1788, the long-awaited and prepared Seym gathered in Warsaw under the confederation knot. In its founding, the Confederate Seym in 1788 was the work of the king, ambassador Stackelberg and Katarzyna's supporters. Its task was to conclude an alliance with the tsarina and only slightly "raise the domestic forces". In fact, from the very first moment the helm of the debate slipped from the hands of the coterie sponsoring the meeting of the Seym. Perhaps it was most pronounced in the fact that all groups unanimously appointed Marszałek Stanisław Małachowski, who soon turned from a moderate supporter of the Polish-Russian alliance into one of the leaders of the patriotic group. [1457]

As soon as the Confederated Seym began, Kołłątaj, who had thus far been known as a writer for the *Monitor* and a reformer at the National Education Commission, immediately started up his "Forge" to push the Rzeczpospolita toward his more progressive and radical vision.[1458] Though he himself was never elected as a deputy, his thoughts and ideas

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[1453] Butterwick-Pawlikowski, *The Constitution of 3 May 1791*, pg. 81; Davies, *God's Playground*, pg. 402; Stone, *The Polish-Lithuanian State*, pgs. 277-280.
[1454] Richard Butterwick-Pawlikowski. 2012. *The Polish Revolution and the Catholic Church, 1788-179: A Political History*. Oxford University Press: Oxford, pg. 57.
[1455] *Ibid*., pg. 58.
[1456] *Ibid*., pgs. 53-54.
[1457] Bogusław Leśnodorski. "Wstęp." In: Hugo Kołłątaj. 1954. *Listy Anonima i Praw Polityczne Narodu Polskiego*. Opracował Bogusław Leśnodorski and Helena Wereszycka. Vol. 1. Państwowe Wydawnictwo Naukowe: Warszawa, pg. 32.
[1458] *Loc. Cit.*

nevertheless proved incredibly important.[1459] The "Forge" immediately set out to convert the king to their ideas, and ended up writing most of the final text for the 3 May Constitution themselves.[1460]

The *Listy Anonima* began with a decidedly Rousseauian tone: the fundamental problem that the Commonwealth faced was that there was no overall scheme to organize the laws. The new laws created new offices, which did not improve the state of the nation, but instead put in men who had no experience, qualifications, or understanding of their position, which only served to injure the laws and privileges that were already in place. What the state ultimately needed was a clear set of purpose, as well some clear guidelines. He immediately drew upon classical republican theories of moderation, so that, whatever outcome the laws produced, the evils of both luxury and scarcity could be avoided.

> It is not without surprise to think that every novelty in the present day destroys the best of the old laws. We multiplied the offices and magistracies from people who had never attended to them, and we left those to whom the oldest rights were assigned to the ministries of the Republic of Poland.[1461]

> In all the works on which the perfection of political government is founded, proportions should be kept, so that through it luxury and scarcity can be saved as two evil last resort.[1462]

Though he shared Rousseau's concern for corruption and the tendency to create laws for no purpose that diluted and undermined the already existing laws, Kołłątaj also agreed with Rousseau's deeper critique of the Commonwealth as lacking a true identity, and hence a concept of freedom with which to guide its citizens. If the rights of the citizenry were not established on a permanent set of laws, but rather were continuously threatened by the king, or the subject to bartering and negotiations, then the nation was not a true republic, but instead was a feudal government with a moderate aristocracy and a relatively weak king. Instead, a true republic is one where the citizens rule and protect their own rights through a permanent Seym that is the highest political authority in the land, and which ultimately holds both executive as well as legislative power.

> The first disadvantage of our government is that we did not want to have a true image of the Commonwealth so far. We boast in vain with the name of freedom, and in fact our constitutional one only indicates to us a feudal government, a moderate aristocracy. Concerned about the privileges we had taken from the hands of benevolent kings, we were not employed by the Commonwealth with a proper system, several centuries passed in constant disputes with the Majesty. The nation never honestly thought that the republican government did not care to subtract the prerogatives of the king, but to the constant action of people representing the nation and the will of those who carried it out. For what have our Sejmy, which first by chance and then by law convened a few on Sundays, have meant? Nations ruled by the monarchy alike have the same prerogatives, as long as their rulers' violence does not violate them. No monarch, as long as he is just towards his people, may

[1459] Adam Ostrowski. 1945. *Hugo Kołłątaj, Ojciec Demokracji Polskiej*. Spółdzielnia wydawnicza "Czytelnik": Warszawa., pg. 24.
[1460] *Ibid*, pg. 5.
[1461] Hugo Kołłątaj. 1954. *Listy Anonima i Praw Polityczne Narodu Polskiego*. Vol. 1. Państwowe Wydawnictwo Naukowe: Warszawa, pg. 128.
[1462] Kołłątaj, *Listy Anonima i Praw Polityczne Narodu Polskiego*, pgs. 190-191.

> violently change the constitution of a government without universal consent, for it is the first society that rules that the right of special persons only to the ruler is subject to the will of the ruler, as long as he has freely surrendered to him. We can see clear evidence of this truth in the past in the Polish monarchy, and today in the French monarchy. But the republic differs most from monarchy in that not only is it honored by random legislation with power, but at all times it should watch over all its prerogatives and its borders. Being honored with the supreme power in the nation, and having not handed it over to the monarch, it has as many external and internal needs as it has relations with both foreign powers and with the executive power, without which no community can stand. [1463]

However, Kołłątaj was not interested in some theoretical balance of power between a strong Seym and a weak monarchy as well as administrative apparatus. He went further, laying out plans to bring about the balance that he wished for. He specifically outlined the importance of national education as a great equalizer to allow those without wealth to have the opportunities to fully participate in the political life of the nation.[1464] He argued that national tax reform was necessary in order to keep the machine of government going and to continue to enrich the lives of all the citizens of the nation through a stable economy, protected by a permanent army.[1465] Kołłątaj also produced strong Lockean echoes that personal property is the supreme right of the individual and that its guarantee is the basis of the political and social order. This is not merely for the *szlachta*, but for all members of society. Kołłątaj deduces that it is not merely enough to simply bestow the rights of citizenship, but these must be rooted in economic reality. This is especially important for persons who are not born as a member of the *szlachta* or into a burgher family.

> It is not enough to let the farmer know that he is a human being and a citizen, that he is the noblest part of the nation after the landowners, it is also necessary to give feelings to all other people whom Providence did not place in the first two rows [i.e., persons who are not born as *szlachta* or burghers], only by turning to attention most forcefully, lest there be a slacker in any of them. Therefore, without looking at the conditions which differentiate us by convention, let us all at once establish laws for humanity alone: the first, insuring the personal property of a man, the second, insuring his movable property, and the third, insuring his land property.[1466]

In fact, Kołłątaj goes much further than simply securing property rights. The government has the obligation to care for those who are economically disadvantaged, because all men are citizens in Kołłataj's vision and economic inequality in a regime of legal equality before the law breeds resentment. Those who are poor adapt to the conditions of poverty rather than to personal Enlightenment (i.e., morals and reason) and are unable to take part in government. Indeed, Maslow would have agreed with Kołłątaj:[1467]

[1463] Kołłątaj, *Listy Anonima*, pgs. 264-265.

[1464] "If we want to remedy the future, let us not diminish this sacred fund. The zeal and virtue of today save the Republic of Poland for a while, but no one can help in the next few times, only to educate young people handsome and according to the needs of the Republic. Citizens of mediocre wealth should be the strongest defenders of the educational and public education fund, because it is the only means that can catch up with the rich, both in terms of their knowledge of national needs and their skillful and useful satisfaction to their own needs. Let us not touch this most precious treasure, if we do not want to deserve the curses of posterity," *ibid.*, pg. 233.

[1465] *Ibid*., pgs. 273-274.

[1466] Kołłątaj, *Listy Anonima*, pgs. 285-286.

[1467] *Supra,* n 11.

> In every part of the world we find the rich and the poor, but in a free government, in a government in which the will of all, or at least the greater part of the fate of the community, it is necessary to protect disproportion so far that the one who needs mercy and food at the hands of the other, he did not sit on the council, nor offered candidates for it, whatever nature it may be, because the need for an everyday existence, or for a better existence, to adapt to the poverty in which he is staying, is too dangerous a temptation for a poor man, and if this temptation found him free from drunkenness, wonderful and completely worthy of the will of Providence, therefore the very lack of enlightenment, a little knowledge of the interests on which the common whole depends, can make him a slave to a miraculous opinion, and even harmful for the reason that he cannot know what is good, and which may be bad for the Motherland. [1468]

Kołłątaj lays out reforms for organizing the seymiki and establishing clearer voting rules and for reorganizing the województwa so that there is one wojewoda and one castellan in each, thus limiting the number of senators overall. He agrees with Rousseau that the Seym should be permanent.[1469] However, he also shares Montesquieu's concern that a permanent Seym may also be detrimental to the Rzeczpospolita because of the temptation to create too many laws and that doing so would spend so much time legislating that it would not actually govern and attempts to synthesize both Montesquieu and Rousseau's concerns. Kołłątaj divides governance from legislation. The Seym, as the supreme power in the nation, is to be both sovereign as well as legislator, but the Seym must restrain itself after the political law of the nation has been established. Future legislation to change the nature of the country can only be do so with "great caution and permission from all the województwa". Instead, he recommends that there should be a permanent Seym but one that legislates very rarely, with its main task being overseeing the executive branch that is actually administering the nation. In this way, the executive is checked and the Seym is prevented from creating too many laws that would conflict with the political consensus of the citizens.

> Whoever thinks of a future permanent parliamentary system, who wants to have a perfect republic, let him not create a constantly legislative parliament. The need for legislation, once held, should not be repeated any more, or at least it should be repeated with the greatest solemnity, caution and permission from all the województw, which will be explained in more detail in its place. A Permanent Seym is considered to be the right of supreme supervision over the entire government, and this supremacy, even if it does not work with legislation or even wants to work at certain times, will have extensive and important material which belongs to no one but the Republic itself. What kind of monarch would it be, that he would always employ himself by lawmaking alone, so that, having written the law and decided the executive magistrates, he would not supervise it, or entrust it to someone else? Whoever had him would have a thing, and the monarch would only have a vain and inert name. The same could be said of our Republic, which, while attaching much to lawmaking, and even more to executive magistracies, makes little sense of the fact that it is not still representing the supreme supervision of the Council, which dared to entrust itself to the Council, which, being a complex adversary, can never to fall asleep in all the strength and dignity of the power of the Republic. We would like her to be a caretaker, not a master, the Council, wanting to be a master, not a caretaker, has become, in a way, a collection of countless opposites. For whom, even if he is the most faithful servant, can replace you? Let us put it more clearly, he can imagine nothing but a permanent parliament of the Republic of Poland. Everything that we would like to decide in the place of the Seym for the supervision of executive magistracies

[1468] Kołłątaj, *Listy Anonima*, pgs. 295-296.
[1469] *Ibid.*, pgs. 328-331, 359-361.

> will either strive for the former monarchy or, by releasing the spring of the government, must spread anarchy more and more. Let each one reflect on these truths with intense attention. Having added council to the king, which would have the power of the highest supervision, already after the Commonwealth. The council will replace it, or rather the king will have a council separate from the nation, separate from the Commonwealth, with which he can do everything as the sole ruler.[1470]

Kołłątaj, however, was still not satisfied with the self-understanding of what it meant to be either a "republic" *per se*, and especially what it meant to be a Polish-Lithuanian republic. In this he looked first inwards at the Commonwealth's history, and then outwards. As Rousseau before him, Kołłątaj argued that a king was not incompatible with a Polish-Lithuanian republic, due to the special historical understanding that the *szlachta* had of what it meant to be king.[1471] He similarly looked across contemporary Europe to see which "republic" was next of kin. He found few similarities. Venice and Genoa had a powerful senate, whereas the Netherlands had a powerful army. Genoa and Venice were also very small and very wealthy from trade. The Netherlands and Switzerland were internally divided amongst themselves in confederacies.[1472] None of them were particularly applicable. In his mind, the United States actually came somewhat close to the Commonwealth, with Washington and Franklin playing the role of strong, benevolent kings who understood their

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[1470] Kołłątaj, *Listy Anonima i Praw Polityczne Narodu Polskiego*, Vol. II, pg. 14.

[1471] "When the Republic of Poland is under the authority of the highest supervision and rule itself, it will constantly be employed, so it seems that there is no need for a king in a government, so that the cost of maintaining the splendor and dignity of its majesty is vain. The ancient Roman, who destroyed under the emperor's power, might say so, or Batavian or a Swiss might say, one of whom a little mud, the other rocks useless with his own blood for freedom, he wrenched from the tyrant's hands; could yes speak for a Philadelphia citizen whose violence had forced him to break his brotherhood with Great Britain. But a Pole pampered in the bosom of kings, a Pole who owes his freedom to the heirs of the throne, for whom kings are not only practiced in the world as an example of not only usurped power, but sworn prerogatives they liked so many times, a Pole whose vast states grew by hereditary monarchs Jagiełło gave his own principality with freedom, he could never assume such a thought. In the mind of a virtuous Pole, nothing more and more honorable than the name of the king, majesty, on which sat Bolesław the Brave [Bołesław I], Casimir the Just, Casimir the Great, Władysław Jagiełło, Zygmunt I, Zygmunt August, Stefan Batory and so many others, with kindness, justice, bravery and attachment to the nation of famous kings. Could philosophy on any throne count as many friends of humanity and justice as the world has seen on the Polish throne? When in other parts of Europe only such a monarch was called good, who was not appropriated by oppression over the people, in Poland he was the only good king who willingly and of his own free will renounced the usurpation of rights for the sake of the nation, which the unenlightenment of previous ages put into his hand," Kołłątaj, *Listy Anonima* Vol. II, pgs. 42-43.

[1472] "Looking at the multiple forms of the present and old republics, we need to apply one to another and look at their goodness, their resemblance to ours. What's the Netherlands, Venice, Genoa? What are his maxims? What was Rome and what was the Republic of Greece in the old days? The freedom of today's republics, headed by no king, but the perfect predominance of either one of the senates, as it is in Venice and Genoa, or of one of the army, as it is in the Netherlands, is maintained in the interest of foreign countries. Trade and a considerable mass of money, and increasing their turnover in trade, is an important screen of these republics. But what is this likeness to ours? Genoa is not able to compensate for the smallest territory of the thinnest Masovian land. Venice, alone free Venice, self-reigning over the rest of the country, resembles the Roman Republic, and in fact it resembles old Rome as much as a dwarf to a great giant, because they are both human. The Netherlands is divided into provinces, Switzerland is divided into cantons, there is the Netherlands as many jointly confederal republics as it has separate provinces, and Switzerland is divided into provinces and principalities. The form of government of free countries enumerated only from me is not a model of reason and perfection, it is a case of despair, it is the result of a strong resolution of people who were oppressed by the monarch either by a bloody invader or an unjust," Kołłątaj, *Listy Anonima*, Vol. II, pg. 44.

place as servants of the nation.[1473] Kołłątaj agreed with Rousseau that the best way to constrain the legislators from being tyrants was to empower the *instrukcje* as binding,[1474] which was the best way to ensure that the Permanent Seym was the monarch, but restrained from becoming a tyrant.[1475]

Kołłątaj believed that the *liberum veto* had given too much power to individual representatives, and that the English system had done it better, because only the king had the power to veto legislation or dissolve a parliament. It was ultimately not the power to block legislation that was itself bad, but that it could be held by one person. Instead, Kołłątaj believed that plurality of votes (majority rule) was the correct solution to the dilemma, but plurality within two separate parliamentary chambers. This way, there was no one person with the absolute right to veto, though one house could effectively block the legislation of the other if need be.

> Those who introduced liberum veto into the Polish government wanted very well and only lost their way in that, that they gave such an important right into the hands of every *szlachcic*, who at the sejmik and in the Seym had the same seriousness that the English king has, and indeed greater, because the English king Parliament can only dissolve, a nobleman and sejmiki and Sejmy could break. The English king may refuse sanctions by a parliamentary resolution, in Poland, an MP could even forbid the introduction of a project that he did not like, he could break the Seym without any reason, or for such reasons that could be considered a visible laughing stock of audacity and unwise. Did we perceive this wrong, how were we, please, trying to prevent a common nation from unhappiness? Here is an equally dangerous evil Pluralitas unlimited, pluralitas without division, without certain constraints in the governmental constitution is nothing but the violence of a greater number than a lesser, it pleases the mighty or foreign power, oppresses the weaker and is either the work of the rebels or an incentive to do so.[1476]
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> *Pluralitas* is only capable of overcoming the will of the weak, but it cannot resist the strength of the mighty. Whether foreign powers or incompatible nobility will always have *pluralism* behind them. It is not necessary to abandon the liberum veto, but it is in the

[1473] Kołłątaj, *Listy Anonima*, Vol. II, pgs. 47-48.

[1474] "The guardianship power results from the needs of each owner, in particular. This power is either placed in the hands of one person and then the government is truly monarchical, or it is placed in the hands of representatives and then it is commonplace. Our nation wants to be common, and therefore the care of the highest government should be in the hands of representatives from the Provinces sent, whose power is limited by the will of citizens as having the right to send them from themselves, and this will is best seen in the *instrukcye* of each province. On what, then, does this supreme protection depend on and how extensive is it? On the *instrukcye*, I answer which limits they should be. Thus, the collection of deputies gathered in the Seym is not a collection of absolute despots. The will of each województwo, given to a deputy, places the limits of his authority, and whatever he wished to indulge in an *instrukcja* would be always wrong with respect to the województwo, just as a smaller number of compatible *instrukcje* would be an obvious violence against the rest of the country," *ibid*, pg. 51.

[1475] "When talking about executive power, it is easier for everyone to give feelings to its inevitable need, it is easier to make it known; what kind of monarchy and what befits a republic. But by joining the representation of the supreme reign, which is divided into the power of command and supervision, the most difficult and delicate question is being resolved. Without this power, the government would not be able to insist, and without it being properly organized, the people would be in danger of monopoly or anarchy. Having gone so far in terms of improving the Republic of Poland, I will discover my thoughts in this or so difficult matter. Permanent Sejm will be my monarch, it will legislate, it will order all magistrates and citizens, it will supervise its orders," *ibid*., pgs. 88-89.

[1476] *Ibid*., pgs. 208-209.

> constitution of the government, in the division of the legislative power, that it should not be in the hands of one nobleman. If two legislative chambers maintain a balance in the government, if not the *plurality* of votes, one can withhold the enthusiasm of the other, if the royal sanction suspends the bravery of the resolution of two chambers until the time of colder deliberation, if the nation's instructions alone dictate the need for a new law, then I will say that we are a truly free nation that our government's constitution is unshakable and enduring.[1477]

Kołłątaj repeated many of the concepts that had developed throughout Polish-Lithuanian reformist thought over the centuries, going all the way back to the executionists. Law should be stable, cardinal or political laws should be immovable and eternal, excepting unanimity to overturn them, that the king was bound by the law, and if he should overstep his boundaries then he would lose his authority and would effectively lose his position, that no office should be held for life other than that of the king, and that there should be residence requirements to hold office.[1478] Curiously, though he had strong deistic tendencies himself,[1479] Kołłątaj did defend the Roman Catholic Church as the official church of Poland-Lithuania, something that was markedly different than both the American Constitution and the tenets of the French Revolution.

> The Holy Catholic faith, it will reign for centuries in the countries of the Republic of Poland, it will reign eternally and for future times. No one born and residing in the countries of the Republic of Poland or an outpatient clinic who once accepted the faith of St. Catholic, may leave her and go to another religion.[1480]

Kołłątaj's *Uwagi nad Pismem* was written well into the Four Year Seym, and largely concerns itself with whether a king should be elected or hereditary. He does much to deconstruct what he asserts is a myth in Polish-Lithuanian history: that the king has always been elected. Kołłątaj echoes Fredro's *Gestorum* by examining the question of the interregnum, and ultimately concludes that both succession and election follow an interregnum of sources, with the difference being in the former the powers of the nation only brief return to it before immediately transferring over to the new king, whereas in the case of an interregnum followed by an election, the nation holds onto its political power a little bit longer.[1481] In either case, it is not so important whether one argues that Poland had a hereditary monarchy or an elected monarchy, for in either case the Poles have always been a free nation and the ultimate holders of political power.[1482]

[1477] Kołłątaj, *Listy Anonima*, Vol.II, pg. 210.
[1478] *Ibid.*, pgs. 228-230, 241, 251-252, 263, 267.
[1479] For example, Butterwick-Pawlikowski notes that Kołłataj did not invoke the Holy Trinity in one his works, but instead began: "In the name of God the Creator and ruler of the entire world." He also saw the cardinal laws as connected to nature, rather than emanating from God," *The Polish Revolution and the Catholic Church, 1788-179*, pg. 135; See also: Marian Skrzypek. 2006. *Hugo Kołłątaj: Prawa i obowiązki naturalne człowieka oraz O konstytucji w ogólności*. Wydawnictwo IFiS PAN: Warszawa, pg. xliii.
[1480] Kołłątaj, *Listy Anonima*, Vol. II, pg. 228.
[1481] Kołłątaj, *Uwagi nad Pismem*, pgs. 11-14.
[1482] "If the Author who wrote about the Succession of the Polish Throne had wanted to divide the proposal and insisted that we were a free nation first, before we were allowed to choose the King, I would have given his motion fairness to say that such a contribution was based on irrefutable evidence of History. But when he puts the freedom of electing Kings next to the National freedom, and the Election as the essence of freedom, he forgives that I have to differ in this respect: because the History of National History teaches me that much

One final point of interest is that Kołłątaj compares the situation of the Rzeczpospolita's quest for liberty and the American quest for liberty, and argues that it is largely a function of geography in what can perhaps be considered as a modification of Montesquieu's socio-historical contextualist approach. Kołłątaj's assessment largely agrees with Stanisław August's in that it is simply impossible for the Commonwealth to adopt the American system, precisely due to the instability of political geography in Eastern-Central Europe vs the tranquility of Americans living in the new world, without significant military challenge.

> Let us consume from another side, for example America, let us allow our Lawmakers, in imitation of the great souls of Franklin and Wasington, to do with the entire Polish Nation, as did the French Estates, which renounced special privileges and feudal rights; that in Poland, as in France, as in the Netherlands, man will only be the object of the Revolution and Legislation; that the Privileges of the Estates will be destroyed in front of judgments to come; I am asking, therefore, that in such an unexpected event, the Polish Nation stands to follow the example of the American States. The Confederate Republic of America is surrounded by security on all sides; we have the sword of despotism over us on all sides. There the Ocean, or the savage Nations, here the most powerful Empire surround the borders of a weakened Nation; there two and a half million Souls own a land that 30 million people can comfortably feed; this land is not enough of the inhabitant's greed. How does the Author want to organize the Republic of Poland without the King? If, after the example of ancient Rome? let him think that there the Senat and the free people of one City ruled absolutely all conquered Colonies under their power, and in such an undertaking, I do not know if it would agree that Warsaw or some other Polish city would rule only the rest of the Polish land, how happy it would be and the audacious Leader did not make his own. If, after the example of the Greek Republic, let him think, that in the former borders of Poland, having broken it into parts free, he would find nothing between the neighbors, and the Macedonian king and the Persian Power? If, in the end, following the example of the United States of America today, let him be careful if he did not please his greedy neighbors with his ideas, which they did not like in the partition of our country. [1483]

> If we want to imitate the Government of America, we must first consider that if the three and a half million people are divided into the thirteenth Provinces, how many people should not be divided into eight million coming? each Province in America has its own Government, separate Treasury, High, and even Legislation, all of which are united only through a Confederation Union. How extensive would the field be for the rulership incompatible but marked by so many revolutions and foreign influences? [1484]

Ultimately, while Kołłątaj greatly valued "the Franklin system" he believed that its true essence lay in political freedom, regardless of the specific institutions that created it.

> Never can a spirit of imitation be taken as slavish submission to other people's arrangements. Whoever wants to use strangers to use lights should know all the relations that exist between him and the one whom he sets as a role model. The French adopted him differently, the Belgians approach him differently, the Poles should follow him differently. The Franklin System is about human freedom, not about the way in which he will regain his rights everywhere.[1485]

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earlier Poles were a free nation, before the Election of Life Kings became their Government with a Political maxim," Kołłątaj, *Uwagi nad Pismem*, pgs. 18-19.

[1483] *Ibid*., pgs. 71-73.

[1484] *Ibid*., pgs. 74-75.

[1485] *Ibid*., pgs. 75, 77.

Staszic was even more unabashed in his support for the American colonies against English despotism, seeing the great potential in the American urban way of life, and deliberately juxtaposing the American Revolution against the British and French Revolutions.[1486] In his *Uwagi Nad Życiem Zamoyskiego*, Staszic pronounces his full-throated support for the freedom innate to every human being. Agreeing with Montesquieu, Rousseau, and Kołłątaj, Staszic argued that fundamental human freedom was security, security through the creation of law and society.

> A man should not be an autocrat or a slave towards another human being. Every citizen, in whatever human society he has settled, has the right to claim freedom in relation to every other citizen. Because man, by bonding together, gained nothing more than this one freedom; that is, this security: that apart from the law, from the whole society, which is established, no other man will have possession of it.[1487]

While Staszic was a champion of individual freedom, he was keenly aware that the drive for individual freedom could drive people to take unreasonable actions. When making laws, the legislature should follow reason and to make the laws impartial, for when "personal consideration" entered the process of legislation it served to only "multiply" the law, but to create many bad laws as well. Thus, when such individual private interests interfered with the laws of a Republic, it made the outcome worse than despotism. This great love of individual freedom, the great love of individual "personal consideration", is an evil that the Poles-Lithuanians had inherited from their ancestors, and when personal interests led to political disputes within the legislature and public life, it was a signal that the end of the Republic was near at hand. It is this inherently flawed human nature that makes the principle of unanimity—and its necessary corollary, the *liberum veto*—so dangerous: that unanimity is in fact contrary to human nature and contrary as to why the Republic was made in the first place: to protect the freedom of individuals.

> The first and strongest enemy of the Sejmy, or legislation, is personal consideration. Personality always demands consideration. Laws constitute equality. For this reason, the first and strongest condition of a parliamentary bill should be that personal affairs should not be allowed therein by any means.
>
> In this republic, where personal interests easily interfere in scheming, less good happens than in the stupidest despotism. The multiplicity of laws, and every bad law, is always the work of personalities. This little harmful being is the virtue of the old Poles, coming into being several centuries ago. This tool of acrimonious quarrels in later times has become a witness to bad customs and evidences of the imminent misfortunes of the Kingdom. This observation is infallible, that in the public councils difficult unanimity, great distinctions, familial quarrels, are the predecessors of the near collapse of the Republic.
>
> Unanimity, this unreasonable way of examining the universal will, not only causes the greatest delay in ending any council, which the Commonwealth should today be the most wary of, but it is also contrary to the nature of law, and it disturbs the first and fundamental principle of human societies.
>
> If men were perfect, there would be unanimity in their meetings. But among people whose will, from thought, and thought hangs from the position of the body, unanimity is most often impossible.[1488]

[1486] Drodzowski, "Rewolucja Amerykańska, pg. 69.
[1487] Staszic, *Uwagi Nad Życiem Jana Zamoyskiego*, pg. 52.
[1488] *Ibid*., pgs. 61-62.

While all the great thinkers were opposed to the *liberum veto*, Staszic thus recognized it on the most individual level: individuals entered into society in order to find freedom and security, which unanimity threatened. He also recognized the inherent dangers in *konfederacje*, as while unanimity set all against all, the creation of a *konfederacja* threatened to pit the majority against the minority.[1489] Staszic directly quotes from Montesquieu's *Spirit of Laws* that:

> The political liberty of the subject is a tranquility of mind arising from the opinion of each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.[1490]

Staszic's *Uwagi* was not intended as a concrete plan of reform or action, but more of a wake-up call to rouse his fellow citizens, and in this aspect it was a success, being one of the political tracts that truly revived vibrant political discourse in the mid-1780s.[1491] His work *Przestrogi* is more sophisticated, and further demonstrates his understanding of Montesquieu, this time discussing whether Montesquieu's theory of climate had an impact on political culture. While Staszic agreed that it did, climate affected all members of a society equally: thus, while the natural laws of a warm country may differ from the natural laws of another country, within each country all lived under the same natural law:

> The end of human accompaniment is insurance against the laws of nature. Each person in the company swears that he will not use his personal power and reason to defend his law, but will devote all this power and reason to the defense of the company. And company mutually secures each man the defense of his rights and the freedom to use all property according to these laws.
>
> There is one law of companionship for people of any climate, because no country's location changes natural human rights. The climate only reduces or increases human feeling. Such a variation only draws variations in government law, civil laws, awards and penalties.[1492]

Staszic provides his own, nuanced approach to the different categories of law. The first, which he refers to as "Fundamental Laws" are those that influence how a society gathers, how it forms its social contract, and the way in which those laws may be corrected or altered. The second division is civil law, and deals with property. The final division is political law, which deals with the treasury, foreign affairs, the defense of a society, and courts. Staszic argues that the three divisions can only properly work together so long as society is united in its "intention", and that this intention is established by producing unanimity in the creation of the fundamental laws, which is the only arrangement fully compatible with natural law.[1493]

[1489] *Staszic, Uwagi Nad Życiem Jana Zamoyskiego*, pg. 240.

[1490] *Ibid*., pg. 291; *Supra*, n 1384.

[1491] Grześkowiak-Krwawicz, *O formę rządu czy o rząd dusz*, pg.27.

[1492] Staszic, *Przestrogi dla Polski*, pg. 21.

[1493] "The community contract consists of a threefold type of condition. The first ones contain the acts that determine where, when and how the society will gather, who and in what way will be able to correct, change and enlarge the terms of the contract. These are Fundamental Laws.

"The second has a description of personal property, movable property, and land property. They are called Civil Laws.

As with Montesquieu, Rousseau, and Kołłątaj, significant portions of Staszic's *Przestrogi dla Polski* are dedicated to working out what he refers to as "civil" and "political" law, such as the consequences of the First Partition, the importance of tax reform to support a stronger army, the threat of rising despotism across Europe, the importance of national education reform, religion, secularism, and the Enlightenment.[1494] What is most radical about Staszic is that he believed that the "nation" should have a say in everything: the creation of law, appointing of magistrates, officers of the court, and administrates, even the appointment of bishops in their dioceses. He believes in a king, but one where the king has no power to create or administer laws as he sees fit, but only with the will of the nation behind him.[1495] As Kołłątaj, he believed that the Seym should hold all the political power, but he took an even stronger view on the role played by seymiki *instrukcje*: deputies were not allowed to leave or disrupt the Seym in any way, and the seymiki could send new *instrukcje* to their representatives at any time during the course of the Seym. In order to sit at the Seym, a person must be selected at the seymiki and be obligated to fulfill any *instrukcje* that are given to them. He was somewhat less strict on changing political rights, which would only require 2/3 or 3/4 majority to change, whereas some issues such as raising troops or raising taxes would only require a simple majority.[1496] In this he is perfectly consistent with Kołłątaj's ideas that while ideal political changes should only be made with the full will of the people, there are circumstances when the nation needs to more quickly adapt to situations and where only a simple minority will suffice.

Similar to Kołłątaj and Stanisław August, he recognizes that geography places a major role in whether or not a country is able to effectively defend itself from despotism. He specifically praises the accomplishments of England, but recognizes that the sea is unto itself an insufficient barrier to totally ward off the advances of despotism. He praises how the English developed an urban state to increase their power and appointed kings to rule over them, at times giving them extraordinary power in times of crisis to defend the nation.[1497]

"The third includes the treasury of the society, its defense, foreign affairs, internal order, and the way of judging. This is a Political Law. They commonly divide Political Law into the Judicial Power and the Executing Power.

"The first fundamental law: that the entire nation should enter into the contracting process, i.e. laws. Otherwise, the natural law would be violated, and what is most dangerous now, the nation would be internally divided: in such company, the evil citizen will always have a ready supporter, and an external enemy will easily disturb and defeat the people who are separated," Staszic, *Przestrogi dla Polski*, pgs. 200-201.

[1494] *Ibid., passim*.

[1495] *Ibid*, pgs. 198-199.

[1496] *Ibid.,*, pgs. 202, 204.

[1497] "England, which even the sea cannot free from the influence and external ties of despotism, has a free nation within. <Because> it was there that the nobility first learned their political danger and became involved early in the urban and <peasant> state. This is how she saved her and other compatriots freedom. <After all, this free people, in order to repel external violence and to equate the bravery of its government with neighborly despots, had to privilege one of its family in many cases even with despotic power>," *ibid.*, pgs. 58-59.

Coda: a Quick Summary of 18th Century Political Thought in the Polish-Lithuanian Commonwealth

It is worthwhile to take a momentary pause and untangle several of these threads in order to produce a more coherent political context in which the 3 May Constitution arose. Returning to Montesquieu, it is clear that his theory of social, cultural, and climatological contextualism as impacting constitutional development was well-received, as was his distinction of fundamental laws that shaped society vs laws that were more transactional. The other three scholars all followed in his footsteps in that they were not just content to make theoretical abstractions at the constitutional level, but also to produce specific recommendations for how politics, law, administration, or commerce was actually to be conducted. Rousseau generalized this contextualism into his "general will" which served as the true, collective sovereign for society. Whether by coincidence or intuition, this collective conception of sovereignty was very close to the *szlachta* concept of the Rzeczpospolita and the political nation. Rousseau was very focused on the possibility that multiple kinds of political and legal orders could become tangled together, increasing inequality and reducing the common good for all, though he differed from Montesquieu in specifically advocating a model of parliamentary supremacy as the best form of government. Stanisław August and Teodor Ostrowski were not particularly deep political philosophers in their own right, but had an uncanny desire to look outward for inspiration to revive the Commonwealth, seeking inspiration in England and France, and to a lesser degree the American colonies, in the case of Stanisław August.

Kołłątaj and Staszic were both clearly aware of Montesquieu and Rousseau's writings, and cited them directly. They seem to have both agreed on the importance of the legislature as the dominant political branch, the importance of internally restraining that legislature through division into two houses as well as the importance of local seymiki in constraining the Seym, the importance of education in reducing social and economic inequality, the importance of raising a permanent army to defend the nation, and both looked toward the United States as the new frontier in political thought, where the Americans had actually written a "fundamental law" and attempted to put it into practice. Staszic had some significant differences with Kołłątaj, believing in a more limited role for the king, favoring a mass of democracy instead of a meritocracy, and a more ambitious program of social welfare and education. Ultimately, the two shared more in common and were able to provide strong voices for reform through the Forge, the *Monitor*, and swaying the fervent public debates at the time to have a major impact on the writing of the 3 May Constitution, as we shall soon see. Our final task before we encounter the 3 May Constitution itself is to expand our gaze slightly, toward the Transatlantic flow of ideas that allowed Americans, the British, and Polish-Lithuanians to react to as well as learn from each other.

IV. Searching for Freedom: The *Spirit* of American, British, and Polish-Lithuanian Institutions

Throughout this chapter, we have endeavored to demonstrate the close kinship shared between citizens of Poland-Lithuania as well as Great Britain and the 13 American colonies, later the United States. Montesquieu's theories on the comparative adaptation of political

institutions as well as his groundbreaking ideas for new ways to combine and balance political power reverberated on both sides of the Atlantic. The American colonies were a grand experiment. However, as even Montesquieu and then Rousseau, Stanisław August, Ostrowski, Kołłątaj, and Staszic had recognized, Great Britain's experiment with constitutional monarchy was also something to take great interest in. While we risk being overly simplistic in doing so, it seems reasonable to suggest that for the *szlachta*—as others in Europe—the twin experiments in America and Great Britain might have held the future for European constitutionalism, with Great Britain quickly rising as a superpower and the United States a land of unrestricted freedom and opportunity. Of course, the relationship between the Polish-Lithuanian revolution and the revolutionary spirit in France should not be discounted, but is beyond the immediate scope of this study. We take Małachowski, the Marszałek of the Seym that produced the 3 May Constitution at his word: the situation in France was as of yet undecided, and thus the Commonwealth looked to America and Britain for inspiration to reform her institutions. What follows is not a systematic treatment so much as an anthology of texts to "set the mood", so to speak, for the textualist, heavy lifting that is to follow.

As discussed earlier, the *szlachta* were interested in the American Revolution from the very beginning. The Boston Tea Party resonated in the Commonwealth as a story of the elites in the city vs the humble folk in the country, as well as the dangers of mercantilism. The slogan "Wolność i Własność!" became incredibly popular throughout the nation. The *szlachta* did not consider the Americans to be rebels, but rather acting in full accordance with their natural rights to rebel against tyranny.[1498] Dissenters and radicals saw Thomas Paine as their hero.[1499]

For what it was worth, the official English envoy in Warsaw, Wroughton, was in solidarity with Russia and Prussia, especially on the question of religious dissidents in Poland, which certainly did not improve the Poles' opinions of his home country. Soon, both conservative and progressive factions as well as the Jesuit order looked toward England's actions disapprovingly, and though they highly respected its political and constitutional system, they believed it was enacting great injustice towards its colonies.[1500] Under the editorship of Sefan Łuskina, The *Gazeta Warszawska* was strong pro-American, to the point of propaganda. [1501] There were strong sentiments of anti-British feeling, even before the Revolution officially broke out: "So far: many Americans will be hanged in England as rebels; as many (no less, no more) Englishmen will go to the branches in America as tyrants."[1502] Having just suffered the terrible injustice of the First Partition a mere three years

[1498] Libiszowska, *Opinia polska*, pgs. 36-47.
[1499] Zofia Libiszowska 1991. "Polska reforma w opinii angielskiej." In: Jerzy Kawecki, ed. 1991. *Sejm Czteroletni i jego tradycje.* Państwowe Wydawnictwo Naukowe: Warszawa, pg. 70.
[1500] Though the Jesuit order was dissolved in 1773, they were generally supporters of the king and supported the crown in the beginning of his reign, even if Stanisław August had a complicated relationship with the Church more generally. See: Krzysztof Fordoński and Piotr Urbański. 2018. "Jesuit Culture in Poland and Lithuania, 1564-1773." *Journal of Jesuit Studies* 5: 341-351; Richard Butterwick. 2012. *The Polish Revoltution and the Catholic Church, 1788-1792*: *A Political History*. Oxford University Press: Oxford; Libiszowska, *Opinia polska:*, p. 17.
[1501] Sokol, "The American Revolution and Poland", pgs. 7-10; Libiszowska, *Opinia polska*, pgs. 39, 62.
[1502] *Gazeta Warszawska*, 1 July, 1775, nr. 52.

earlier, it was quite clear that the *szlachta* were projecting their hatred of tyranny into support for any movement that they viewed as fighting for freedom, even in distant lands across the sea.

One supporter of the Revolution penned:

> Their cause is a matter for mankind and therefore becomes ours. We take revenge on our own oppressors of our humiliation, pouring out with freedom our anger at least against foreign oppressors. At the sound of the crumbling ties of others, our bonds seem to be better, and we flatteringly think that for some time at least we breathe slower air, learning that the world is beginning to count less tyrants.[1503]

When America won her independence, there was great enthusiasm for the Articles of Confederation, at first, with the *szlachta* recognizing the same spirit of freedom as in the Swiss Cantons and in the Dutch Republic.[1504] However, after the Revolution the American colonies were viewed as being too weak, though Świtowski, the editor of the journal *Pamiętnik historyczno-polityczno* concluded that Poland under the *liberum veto* was far worse.[1505] Many Poles-Lithuanians became anxious: there was great fear over the debts that the young country faced, as well as the large number of loyalists who remained that had to be expelled or who wanted to return to England. Some feared that the discord among the states would prevent a full-fledged nation from ever emerging, while others were afraid that America would collapse into tyranny and invade its neighbors. Kołłątaj feared that the untamed wilderness, Oceans, and wild tribes would be too much for the young nation to overcome. Soon the political commentators in the Commonwealth turned hostile to the Articles of Confederation.[1506]

On the other side of the Atlantic, "Poland" was used as a cautionary tale of what could happen to America if the disastrous state of the Articles of Confederation continued:

> I have heard nothing of your doings in America—Will your convention be able to invigorate your government? Or will my predictions be true—alas! I fear so. All Europe have an opinion you are sinking into anarchy and ruin; but when I reflect on the astonishing exertions during the war, to which you were routed by your extreme danger, I have some hopes—Think on Poland.[1507]

The Federalist 39 declared that Poland was a "mixture of aristocracy and monarchy in their worst forms"[1508] and in an uncharacteristically poor observation by a generally astute

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[1503] T.G. Raynala. 1783. *Historii politycznej rewolucji amerykańskiej*. Michała Grölla: Księgarza Nadwornego J.K. Mci: Warszawa.
[1504] *Gazeta Warszawska*, 8 March 1777, Nr. 20, p.3.
[1505] *Pamietnik historyczno-polityczny*. November, 1789, Pp. 1063-1089.
[1506] Libiszowska, *Opinia polska*, pgs. 106-110, 120, 129-130.
[1507] "Hartford, December 10. Extract of a Letter from a Gentleman in London to His Friend in this City, Dated Sept. 25."*The Connecticut Courant*. 10 December, 1787, pg.3.
[1508] Alexander Hamilton, James Madison, and John Jay. 2008. *The Federalist Papers*. Oxford University Press: Oxford, pg.187.

political observer, John Adams suggested that the conquest of Poland was perhaps a blessing for its inhabitants after so much mismanagement. [1509]

However, optimism on both sides of the Atlantic returned when word of the American Constitutional Convention and the new 1787 Constitution reached the Rzeczpospolita, less than a year before the Four Year Seym would occur, leading to an explosion of American political literature and fervent public discussion:

> The draft of the American Constitution was published in the *Gazeta Warszawska* and reprinted in the *Gazety Wileńskie* in 1787. The final draft was published in Franciszek Siarczyński's *Traktaty między mocarstwami europeyskiemi* (Treaties between European Powers) along with the Articles of Confederation. In the last volume of the collection, 1790, he published the New Constitution of the USA. Philip Mazzei's *Recherches historiques et politiques sur les Etats Unis de l'Amerique Septentrionale* (Paris, 1788) was also well-known to Pôles, with his work well-admired by Stanisław August Poniatowski. Lewis Littlepage, an American who fought in the revolutionary war, was a secretary to August Poniatowski in 1784. Piotr Świtkowski's *Pamiętnik Historyczno-Polityczny* also gained many articles discussing American affairs and American history. From August Poniatowski's correspondence with Mazzeni, it is obvious that he read *The Federalist*.[1510]

During the Four Year Seym itself American documents were extensively read, including the new Constitution of the United States. The most important documents of the American Revolution—the Declaration of Independence, Articles of the Confederation, and the Constitution—were widely published in Poland-Lithuania during the first two years of the Grand Seym.[1511] The elective presidency of the United States was widely debated, with those both in favor[1512] and opposed[1513] to the idea of a permanent monarchy citing it to support their views. However, it was quite clear that the Poles-Lithuanians only selectively drew upon the American model and never had any interest in ever implementing it fully, though what interested them the most was the model of a functioning legislative body."[1514] Much of this was idealized, however, with some of the darker parts of the American experiment such as slavery going without extensive discussion. The *szlachta* were, after all,

[1509] "A republic so lately the protector of its neighbors would not, in an age of general improvement, without the most palpable imperfections in the orders and balances of its government, have declined, and become a prey to any invader—much less would it have forced the world to acknowledge that the translation of nearly five millions of people from a republican government to that of absolute empires and monarchies, whether it were done by right or by wrong, is a blessing to them," John Adams. 1851. *The Work of John Adams, Second President of the United States, with A Life of the Author*. Notes and Illustrations by his Grandson Charles Francis Adams, Volume IV. Charles C. Little and James Brown: Boston., pg. 229.

[1510] Zofia Libiszowska. 1985. "The Impact of the American Constitution on Political Opinion of the Late Eighteenth Century." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 234.

[1511] Libiszowska, *Opinia polska*, pg. 128.

[1512] Tadeusz Morskigo. 1790. *Uwagi nad pismem Seweryna Rzewuskiego*, p. 33.

[1513] Generally speaking, Hugo Kołłątaj was in favor of a more reformed "constitutional" monarchy as in the English system, whereas Ignacy Potocki was originally an opponent of Stanisław August and generally skeptical of monarchy. Over time Potocki compromised and supported Stanisław's reforms.

[1514] Sokol, "The American Revolution and Poland", pg. 12-13.

more interested in looking for ideas to support their goals, more so than make an extensive critique of another constitutional system.[1515]

Ultimately, there was great praise for the new constitution: it was seen as improving upon the English model. It was regarded as the first state that was not borne from a contract between enemies at the end of a conflict, but rather a document created by the people. It was thus the first constitutional state.[1516] There was great respect for Franklin's advice to compromise and accept an imperfect constitution for the good of the nation. At one point in the discussion when heated debate threatened to derail the progress that had been made, Washington's inaugural address was read to calm the fiery tempers.[1517] In a speech given to the Seym after the Constitution was adopted, Stanisław Augustus reportedly said that: "[T]here had been prepared a plan of a Constitution, founded principally on those of England, and the United States of America, but avoiding the faults and errors of both, and adapting it as much as possible to the local and particular circumstances of the country."[1518]

In the English-speaking world there was abundant praise for Stanisław Augustus' part in the 1791 Constitution, which created a nation of citizens, rather than of servants.[1519] By contrast, an English daily observed that: "The new Polish constitution appears to have caught its spirit from the American; joined with a little additional power granted to the executive department: it resembles the English constitution only, as that served for the prototype of the American."[1520]

Burke applauded:

> Here moralists and divines might indeed relax in their temperance to exhilarate their humanity. But mark the character of our faction. All their enthusiasm is kept for the French revolution. They cannot pretend that France had stood so much in need of a change as Poland. They cannot pretend that Poland has not obtained a better system of liberty or of government than it enjoyed before. They cannot assert, that the Polish revolution cost more dearly than that of France to the interests and feelings of multitudes of men. But the cold and subordinate light in which they look upon the one, and the pains they take to preach up the other of these revolutions, leave us no choice in fixing on their motives. Both revolutions profess liberty as their object; but in obtaining this object the one proceeds from anarchy to order: the other from order to anarchy.[1521]

[1515] "As can be seen from the above, the selection of messages and messages published in the press and periodicals served the Polish cause rather than bringing it closer to the American reality. Its darker sides were not discussed, they would spoil the noble vision of democracy presented to the Polish nation as a model and example in the period of the struggle for reform," Libiszowska, *Opinia polska*, pg. 138.

[1516] *Ibid*., pg. 124.

[1517] *Ibid*., pgs. 136-138.

[1518] "Warsaw, Poland May 7." 11 August, 1791. *Independent Chronicle* vol. XXIII, issue 1189, pg.2.

[1519] "The king of Poland may justly stile himself the Father of his People; the title is not sported with by this illustrious monarch to deceive his children—wise by experience, prudent by example, and enlightened by philosophy, he has taken off the chains of the Poles, and hung them up in the temple of liberty." "Cork." 24 January, 1792. *Dunlap's American Daily Advertiser*, issue 4054, pg.2.

[1520] *The Critical Review or Annals of Literature*. 1791. London: W. Simpkin and R. Marshall. Series 2, vol. 3, pg. 443.

[1521] Burke, Edmund. [1992]1790. *Further Reflections on the French Revolution.* Liberty Fund: Indianapolis, pg. 118.

Much of the British popular press followed Burke's sentiments that the Polish Revolution was preferable to that of France.

> "[T]he cause of freedom has gained very considerably by this revolution; and if the *true* whigs wish to celebrate its conquests, the third of May is a better era than the fourteenth of July, inasmuch as a regulated liberty is more desirable than anarchy […] When considered in a general view, this new constitution appears to be an excellent one: when viewed relatively to the former state of the distracted kingdom for which it was adapted, we cannot sufficiently admire the judgement, the ability, the policy, which it displays in every page."[1522]

Others in England praised the new constitution because it was a chance to effect real change, create economic growth, and achieve real freedom for the country.[1523] The 3 May Constitution was highly praised in the United States, and king Stanisław Augustus was looked on exceptionally favorably in American media, with the nobles who opposed him condemned.

> The king of Poland may justly stile himself the Father of his People; the title is not sported with by this illustrious monarch to deceive his children—wise by experience, prudent by example, and enlightened by philosophy, he has taken off the chains of the Poles, and hung them up in the temple of liberty.[1524]

> "In Poland the nobility, by the dereliction of usurping preeminence, have ingratiated themselves with the people; and the new constitution of Poland seems to be erected on the most solid foundation.[1525]

> Thus, Poland, with all the good intentions in the world, may find fresh troubles arise from the senseless opposition of a few and discontented citizens to the wise measures of her diet, and the very liberal designs of her excellent sovereign.[1526]

Even George Washington himself proffered high praise upon Stanisław August:

> "Poland, by the public papers, appears to have made large and unexpected strides towards liberty which, if true, reflect great honour on the present King who seems to have been the principal promoter of that business." – George Washington, July 9, 1791.[1527]

The American public was similarly outraged by the collapse of Poland-Lithuania in 1795, and how no other European power would aid her in her time of need. One paper exclaimed, "What a disgrace to the policy of Europe, that not one State could be found friendly to a cause so honorable to humanity!!!"[1528] while another solemnly declared: "This

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[1522] *The Critical Review or Annals of Literature*. 1791. London: W. Simpkin and R. Marshall. Series 2, vol. 3, pgs, 446-447.
[1523] Libiszowska, *Opinia polska*, pgs. 68-69.
[1524] "Cork.". 24 January, 1792. *Dunlap's American Daily Advertiser*, issue 4054, pg.2.
[1525] Haiman, *The Fall of Poland*, pg. 51; *Dunlap's American Daily Advertiser*, August 15th, 1791; *Gazette of the United States*, August 18th, 1791.
[1526] "London, Jan 24. Political Review of Affairs Abroad." 5 October, 1792. *American Apollo*, pg. 150, issue 1, vol. 1. Full citation: London, Jan 24. Political Review of Affairs Abroad." 5 October, 1792. *American Apollo*, pg. 149-150, issue 1, vol. 1.
[1527] Haiman *Poland and the American Revolutionary War*, pg. 8.
[1528] "Poland." 4 October, 1792. *The Independent Chronicle*, vol. XXIV, issue 1249, pg. 3.

Republic interests every friend to Liberty and National Justice."[1529] Particular vitriol was reserved for England, which in the eyes of the United States, had betrayed the universal cause of human liberty by intervening in France and abandoning Poland-Lithuania to its enemies, while Catherine the Great was also particularly despised.

> The conduct of the English Government justifies the severest reflections. There is no room for, exaggeration, their crimes 'exceed the imagination, and overturn thought' […] The abandonment of Poland, the combination against France, and the injuries of America, plainly out to us a Government whose principle is moral prostitution […] and who disdains even the appearance of justice.[1530]
>
> Alas! unhappy Poland, America proffers thee the tribute of unfeigned commiseration. Lately so happy in a liberal Constitution, a patriot King, and a State of tranquil property—the envy of *Despots*—the PRIDE of FREEMEN—with sorrow she sees thee fallen, fallen, fallen from thy blissful condition and receiving Laws from the imperial and *imperious* CATHERINE![1531]

Whereas the *szlachta* had supported Americans' defeat of England as part of a war against tyranny everywhere, the defeat of the Commonwealth depressed Americans, who saw the light of freedom fading in Poland-Lithuania as well as France. When the troubles began with the Commonwealth's neighbors, the Americans gave great support. In an anecdote that captures the spirit of the times, some in America were afraid that if France and the Rzeczpospolita fell the only place where freedom remained would be America, which the European despots would threaten next.

> Every mind capable of reflection, must perceive, that the present crisis in the politics of nations, is particularly interesting to America. The European confederacy, transcendent in power, and unparalleled in iniquity, menaces the very exillence of freedom. Already its baneful operation may be traced in the tyrannical destruction of the constitution, and the rapacious partition of the territory of Poland: And should the glorious efforts of France be eventually defeated, we have reason to presume, that for the consummation of monarchical ambition, and the security of its establishments, this country, the only remaining depository of Liberty, will not long be permitted to enjoy in peace the honors of an independent, and the happiness of a republican government.[1532]

Ultimately, though, the sympathetic British were too entangled in other affairs to help the distant Rzeczpospolita[1533] and the Americans were too far away and too weak to be of much help at all, and could—like Burke—only condemn its passing.

[1529] "Of Poland." 19 November, 1794. *Columbian Centinel*, vol XXII, issue 21, pg.1.

[1529] "Cork.". 24 January, 1792. *Dunlap's American Daily Advertiser*, issue 4054, pg.2. d." 19 November, 1794. *Columbian Centinel*, vol XXII, issue 21, pg.1.

[1530] "For the Newport Mercury." 21 January, 1794. *Newport Mercury*, issue 1657, pg.1.

[1531] "Boston, Saturday, December 1st, 1792." 1 December, 1792. *Columbian Centinel*, volume XVIII, issue 24, pg.3.

[1532] "Circular Fellow Citizen." *The Gazette of the United States*. 17 July 1793, pg. 472, iss. 118, vol. IV.

[1533] Stanisław August was personally frustrated that he could not secure greater support from England, despite attempting to build closer personal as well as professional ties for essentially his whole life. At one point there was great concern that British trade with Central and Eastern Europe *vis-a-vis* the Commonwealth would be more profitable than dealing with Russia, which England also viewed as a naval rival. Though Prime Minister William Pitt the Younger had sought to build closer ties, the general British public was indifferent to any foreign policy of supporting the country. Britain was deeply engaged in a rivalry with France and Spain, and where Britain met Russia as a rivalry was over the Black Sea, rather than the Baltic. See: Łojek, *Geneza i Obalenia Konstytucji 3 Maya*, pgs. 66-67.

What was it that led to the collapse of the Commonwealth and her final disappearance from the map of Europe? What were the lessons that she had gleaned in her attempt to synthesize the American innovations on British success? What are the lessons that we may learn, not only to complete our long journey and finish the arc of Poland-Lithuania's constitutional development, but then to apply those lessons to enrich comparative constitutional thought more generally? Without further ado, we turn to the 3 May Constitution as a Constitutional System.

V. The 3 May Constitution as an Evolutionary Constitutional System

The 3 May Constitution has traditionally been interpreted as the second major, modern constitution, just a few years after the US Constitution and a few moths before the French one. For example, Lukowski contends:

> In sum, there are far more similarities than differences in the United States, Polish and French Constitutions. It is obvious that all three Constitutions were influenced by ideas of the separation of powers, of checks and balances, of a certain supremacy of the legislative branch (in that political power flows from the people and the people represented primarily through the legislative branch), and of limitations on the power of the executive and the courts. Even with all the differences in tone and content, careful study reveals that the textual similarities of the first Constitutions are by no means incidental ad that a comparable set of factors stimulated the creation of all three constitutional works.[1534]

Butterwick-Pawlikowski largely agrees, even noting how there was a shift in the understanding of the term "konstytucya" to closer to the Anglo and French "constitution".

> The references made to the Constitutional Deputation indicate the traditional meaning of the word *konstytucya* – a law or statute passed by the *sejm*. This usage continued, but it was joined and soon eclipsed by the meaning of 'constitution' that is more familiar today: a solemn, legal framework, usually but not always in the form of a single written document, outlining a country's form of government and the relationship between citizens and government, the whole being derived from the fundamental values shared by the community. Not coincidentally, an almanac published several months later compared 'four constitutions: the English, which served others as a model, the American, which was formed from it, the Polish, which made use of both, and in the end the French, which has had these three models together before it." The *Law on Government* was thus a constitution in both the older and newer senses of the word.[1535]

Was this truly the case? Was the Polish-Lithuanian constitution really a cousin of the British, French, and the American ones? Or is this an overly optimistic appraisal of Anglo-Polish or Anglophile Polonist scholars? What about the centuries of negative publicity that it received under the hands of historical pessimists, including the Kraków School and Marxists? Are all their concerns to be so quickly discounted. What is needed is a more thorough clarification, to not assert that the 3 May Constitution was a constitution in the modern sense without first developing a more precise understanding of "constitutionalism" *per se* and then a specific constitutionalism of the Polish-Lithuanian Commonwealth. The 3

[1534] Rett R. Ludwikowski. 1997. "Main Principles of the First American, Polish, and French Constitutions Compared." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 323.
[1535] Butterwick. *The Constitution of 3 May 1791,* pg. 112.

May Constitution emerged in the space between the boundaries of competing and conflicting theories of "constitutionalism" on the one hand and the weight of its own institutions' historical inertia on the other, and only when these two are compared can such a far-reaching judgement be attempted without threat of generalization or simplification. Unfortunately, the record is not so clear. That the 3 May Constitution played a significant role in reshaping 18th century Polish-Lithuanian constitutionalism cannot be doubted; indeed, it is an article of faith underpinning this very endeavor. But it also emerged chaotically, with multiple documents emerging over the course of the "gentle revolution".

To answer this question more deeply, it is first important to grasp the 3 May Constitution in its full context—including legal and political institutions. In this it was perhaps more so the brightest star in the sky than the only above the Earth. This fact is often overlooked, with historians focusing on political history treating the 3 May Constitution as if it emerged *sui generis*. The second task is to then extract the document from its context and lay the text itself bare in order to understand the changes it had made which distinguished it from that which had preceded it. Only when analysis has made these two movements—comparing external phenomena beyond the text and then comparing internal phenomena in the text itself—may we reach a more definitive answer.

The Ustawy Okołokonstytucyjne (Acts Around the Constitution) Phenomena

As the Four Year Seym went on, it became clear that there was a division of those who wanted more radical reform—the so-called "Patriotic Party" under Kołłątaj and Staszic—the more moderates gathered under the king, and those who wanted to resist all change. Under the energetic enthusiasm of the Marszałek Stanisław Małachowski, the Seym actually made radical changes aimed at strengthening the nation and recovering her sovereignty. Part of the difficulty was that one of the major reformers—Jan Potocki—was immensely distrustful of Stanisław August, and feared that he harbored absolutist ambitions.[1536] Eventually, Kołłątaj and Małachowski were able to convince Potocki and Stanisław August to come together and work in secret to prepare a new constitution that has been referred to as a "coup d'état" on 3 May, where they called a Seym during a holiday period when 2/3 of the chamber was absent. It was a strategic move, with most of those absent being those most hostile to reforms. Polish-Lithuanian Army units surrounded the Royal Palace where the Seym was meeting and thousands of city burghers—tipped off by Kołłątaj's party—lined the streets of Warszawa to shout their approval and intimidate those who opposed it. In a rush that completely ignored parliamentary procedure, the 3 May Constitution was not debated at all: deputies were given a choice to either accept or not. 110 voted in favor, while 72 voted against, out of a Seym that had had 504 representatives when in session when it was full.[1537]

The 3 May Constitution was highly controversial and divisive, with city governments overwhelming accepting it, as did the army, which the new constitution supported. Many of the most powerful *magnaci*—many of them servants of Catherine the Great—hated the new constitution, with the Lithuanians protesting against any reforms that they thought would

[1536] Butterwick-Pawlikowski, *Poland's Last King*, pg. 285.
[1537] Davies, *God's Playground*, pgs. 402-403; Stone, *The Polish-Lithuanian State*, pg. 281.

threaten their country. In May 14th, 1792 many of the *szlachta*, *magnaci*, and some hetmans proclaimed the Targowica Confederation with the full support of the Russian Army. Catherine the Great had promised them they would keep the "golden liberty" as long as they remained under Russia. While the Rzeczpospolita's army saw some early successes, Stanisław August eventually undermined them by insisting on negotiating with the Russians, believing that the war was unwinnable, especially once the Prussians reneged on their promises and entered the war on Russia's side. Stanisław August had joined the Targowica Confederation and Poland-Lithuania was defeated and divided again. Despite the valiant efforts by Tadeusz Kościouszko leading the country into open rebellion, the Rzeczpospolita was again divided and ceased to exist. Stanisław August abdicated and lived the rest of his life at the Russian court, a diminished figure. The 3 May Constitution had been in effect for less than a year.

However, the 3 May Constitution is not unique purely due to its miserable political history, but it significantly and substantially differs from both the French and the United States' Constitution. Unlike the American Constitutional Convention, which produced the American Constitution and the Bill of Rights, the Four Year Seym actually produced several documents that were in effect "constitutional" in that they sought to rewrite the political and legal system of the Rzeczpospolita. The concept of a constellation of supporting constitutional documents rather than a self-contained constitution as in the American understanding was well-recognized at the time, but there was not a single term used to define it clearly. Instead, this approach has been termed "okołokonstytucyjna" (alongside-the-constitution) by contemporary Polish historian of law Wacław Uruszczak.

As Uruszczak explains:

> The term "ustawa okołokonstytucyjna" (an alongside-the-constitutional act) or ustawy okołokonstytucyjna" (acts-alongside-the-constitution) is an example of a neologism that has been accompanying public discussion for a long time. It means a statute issued in connection with the constitution, i.e. with the constitution, in order to clarify or implement it. A considerable number of such bills had already been passed by the Four-Year Seym (October 6, 1788 - May 31, 1792), whose main work was the Government Act of May 3, 1791, known as the May 3 Constitution. At that time, however, no one used this type of name. However, the Constitution of May 3 itself was, in its essence, a framework law, setting out only the general principles of the system and functioning of the state. Its creators themselves assumed that its provisions would be clarified in additional acts, which can be described as "constitutional". There were a total of twenty-four constitutional laws of the Grand Sejm, and they constituted an exceptional piece of legislation in its entirety that deserved an analysis, as well as admiration and respect. They complete the great legislative work done by the failing First Republic of Poland.[1538]

What is ultimately so fascination about the Four Year Seym was its purely *ad hoc* nature. The United States' Constitutional Convention was itself a very long parliamentary session lasting from May to September of 1787, but the Four Year Seym was over four times that length. What makes it further extraordinary is that since the adoption of the Henrician Articles, Polish-Lithuanian parliamentary debate had been constitutionally limited to only six weeks of discussion. So whereas the American session was relatively long with a culture

[1538] Wacław Uruszczak. 2013. "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku." *Krakowskie Studia z Historii Państwa i Prawa* 6(3), pgs. 247-248.

that had no fixed limit on parliamentary duration, the Four Year Seym was an incredible length in a culture that was specifically known for its brevity. As we have discussed throughout, just because an act may be considered to be "a constitution" does not mean that all acts are equally constitutional, nor do they all approach constitutional questions the same way. This is clearly evidenced by the various "ustawa okołokonstytucyjna," outlined in Tables 5.3, 5.4, and 5.5 below.

Table 5.3 Summary of "Ustawy Okołokonstytucyjne" (1September, 1789—May, 1791) Outlined by Uruszczak[1539]

Name of Act	Date of Act	Summary of Act
Ustawy o komisjach porządkowych w Koronie i w Wielkim Księstwie Litewskim (Acts to Establish Order Commissions in the Crown and Duchy of Lithuania)	1789	Establishment of Order Commissions in the Crown and Grand Duchy
Prawa Kardynalne Niewzruszone (Unshakeable Cardinal Rights)	Various Acts Passed 10 September, 1789 to 8 January, 1791	A Rough Draft of a Constitution
Miasta nasze królewskie wolne w państwach Rzeczypospolitej (Our Free Cities within the States of the Rzeczpospolita)	18 April 1791	Extending some of the *szlachta* rights to town people
Prawo o Seymikach (Law on Seymiki / Law Concerning Dieties)	24 March, 1791 (proposed) 28 May, 1791 (formally adopted)	Organization of seymiki: time, place, parliamentary procedure
Deklaracja Stanów Zgromadzonych (Declaration of the Assembled States)	5 May, 1791	It "abolished rules that were inconsistent with the new constitution" and established a "Guard of Rights" to ensure that the new Constitution was enforced. Established the 3rd of May as a national holiday celebrating the new Constitution. Those who opposed or threatened the new Constitution were traitors subject to the Seym court.
Seymy konstytucyjny extraordynaryjny (Extraordinary constitutional Seymy)	28 May, 1791	Regulations organizing of the special „constitutional Seym" to be held every 25 Years

[1539] Uruszczak, "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku," *passim*.

Ustawa z 28 May r.pt. *Seymy* (Seym Act passed on the 28th of May, subsection "Seymy")	28 May, 1791	Organized the rules and procedures of how the Seym functioned.
Ustawa z 28 May r.pt. *Sądy seymowe* (Seym Act passed on the 28th of May, subsection "Sądy Seymowe)	28 May, 1791	Establishing the Seym Courts that Discussed Crimes against the State
Ustawa o prawie Łaski (Act on the Law of Grace)	31 May, 1791	Granted the king the traditional law of grace (*ius aggrandi*) where he could pardon some criminals

Table 5.4 Summary of "Ustawa Okołokonstytucyjna" (6 June, 1791—20 November, 1791) Outlined by Uruszczak[1540]

Name of Act	Date of Act	Summary of Act
Ustawa o Straży Praw[1541] (Act on the Council of Inspection)	6 June, 1791	Gave more details concerning the "Straż" (Council of Inspection): How they Operated and were Organized
Ustawa o Komisji Policji (Act on the Policja Commission)	21 June, 1791	Organization of the Komisja Policja, an internal administrative branch subordinate to the Straż
Urządzenie wewnętrzne miast wolnych Rzeczypospolitej w Koronie i w Wielkim Księstwie Litewskim (The Internal Organization of the Rzeczypospolita's Free Cities within the Crown and the Grand Duchy of Lithuania	21 June, 1791	Organization of city assemblies, including their rules of governance and local elections
Zaręcznie wzajemne Obojga Narodów	20-22 October, 1791	Addressed the relationship between the Crown and the Grand Duchy[1542]

[1540] Uruszczak, "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku," *passim*.

[1541] The concept of "police" was still evolving in 18th century Europe and has very little resemblance to our modern understanding, which emerged in the 18th and 19th century as the power of the modern state increased. Rather, it was more of an administrative function closer to a concept of a "committee of public order" in that it inspected elements considered for the good of the whole community, e.g. building codes, public health, standardization of weights and measurements, etc. In the Polish-Lithuanian Commonwealth, the Straż Praw (the Council of Inspection) were not just interested in constitutional questions or internal securities, but also with the foreign affairs including overseeing the military, and also with what we might consider to be "internal affairs" more broadly, including modern conceptions of the police. Indeed, perhaps the Straż may be closer to the modern concept of the "cabinet" in modern political systems, where a variety of services of both external and internal affairs of the nation are coordinated. The Komisja Policja was the administrative branch of the Straż Praw to ensure that these various departments and branches were coordinated. See: Renata Król-Mazur. 2015. "Z tradycji polskiej policji: Komisja Policji Obojga Narodów w dobie Sejmu Czteroletniego." In: Adrian Tyszkiewicz, ed. *Policja Państwowa w Drugiej Rzeczypospolitej: wybrane aspekty organizacji i funkcjonowania*. Wydawnictwo Uniwersytetu Jagiellońskich: Kraków, pgs. 14-17.

[1542] There is continuing debate as to what exactly the relationship between the Crown and the Grand Duchy was. The traditional view for much of the 19th century was that it established a unitary state with a combined set of institutions for Poland and Lithuania, albeit with both regions maintaining some autonomy for tax administration or local defense. However, this began to be challenged by Władysław Smoleński and other Polish historians after Poland regained her independence after World War I. The modern debate is more nuanced, acknowledging that Kołłątaj—who was been acknowledged as one of the principle architects of the 3 May Constitution just as James Madison has been for the American Constitution—was a strong advocate of a

(Mutual Assurance of the two Nations)		
Ustawa o Komisji Skarbowej Rzeczypospolitej Obojga Narodów (Act on the Treasury Comission of the Rzeczpospolita of Two Nations)	29 October, 1791	Establishment of a Permanent Body to deal with the financial system: minting money, caring for crown jewels, maintaining currency, collecting taxes, customs and duties, construction and maintenance of infrastructure
Rozkład województw, ziem i powiatów, z oznaczeniem miast, a w nich miejsc konstytucyjnych dla sejmików w prowincjach Koronnych i Wielkiego Księstwa Litewskiego (Distribution of Województwa, Lands, and Powiaty with the Designation of Cities and in them Constitutional Seats for Regional Assemblies in the Crown as well as the Grand Duchy of Lithuania)	20 November, 1791	Organization of local administration: marked places of voting and local governance

establishing "Poland" as a unitary state. However, the 3 May Constitution is a manifestation of compromise and much more nuanced than the vision of any one person. The more modern historical position argues that Lithuania preserved a much stronger identity and that the relationship was closer to modern conceptions of federalism. For more on the debate, see: Jerzy Malec. 2012. "Zaręcznie Wzajemne Obojga Narodów – w 220 rocznicę uchwalenia." *Iuridica Toruniensia* 10: 147-166; Juliusz Bardach. 1991. "The Constitution of May Third and the Mutual Assurance of the Two Nations." *The Polish Review* 36(4): 407-420.

Table 5.5 Summary of "Ustawa Okołokonstytucyjna" (10 January—31 May, 1792) Outlined by Uruszczak[1543]

Reform o sądach ziemiańskich	10 January, 1792	Organized local courts of first instance, with judges elected by local assemblies to last for a fixed term; their judgements could be appealed to a higher Trybunał.
Reform of the Crown Trybunał (o Trybunałe koronnym)	21 January, 1792	Organized the Crown Trybunał
Reform of the Lithuanian Trybunał (o Trybunałe litewskim)	21 January, 1792	Organized the Lithuanian Trybunał
Konstytucję o gotowości do obrony pospolitej (Constitution to Prepare for the Common Defense)	17 April, 1792	The King was constitutionally obligated to prepare for the Common Defense of the Nation
Ustawa o Komisji Wojskowej Obojga Narodów (Act on the Military Commission of the Two Nations)	31 May, 1792	Organized civilian control of the military, its training, and financing

[1543] Uruszczak, "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku." Pg. 256.

What should be immediately clear is that there is no over-arching pattern of constitutional design, though there are some broad patterns that we may be able to reason out. The first is whether there is a qualitative difference between legal acts adopted *before* the 3 May Constitution and those adopted *after* the 3 May Constitution. Furthermore, several acts were adopted within a month or so of adopting the 3 May Constitution: is the "flavor" of these acts' constitutionalism similar to the 3 May Constitution, or are they completely distinct? As for the first question, there were several legal acts organizing provincial committees in 1789 and then specific enumeration of "unshakeable cardinal"—i.e., constitutional—rights discussed from 1789 to January of 1791. It is difficult to speculate on the precise nature of why certain legal acts took so long to decide, but it is perhaps worth reflecting that both of these task were relatively easy. The organization of provincial committees—like the vast majority of acts passed over the past 100 years—was praxical in nature, more organizing the system in order to address a problem (potentially) than actually attempting to tackle said problem itself. The second one establishing fundamental rights occurred over a longer period of time, allowing for plenty of time for the *szlachta* to gather their thoughts as to what their truly fundamental, individual rights were.

Given that the *szlachta* shared a common political culture—and had done so for centuries—agreeing to limiting the power of the king, inviolability of personhood and property without sufficient due process, evidentiary requirements for criminal law (i.e. trial before one's peers, rights in court, *inter alia*) would be relatively easy to accomplish. The other acts that were before the 3 May Constitution were the extension of some *szlachta* rights to townspeople, and the organization of the seymiki, though the latter was not fully adopted until after the 3 May Constitution. Whereas the granting of burghers full rights would have been controversial for conservative positions among the *szlachta*, in reality the Commonwealth had extended citizenship rights to various groups throughout the nation's entire history. Given that it was not the creation of any new rights *per se* that threatened or violated the already existing rights of *szlachta*, that the 18th century had witnessed urbanizing trends throughout Europe and North America, that the *szlachta* had been so fascinated by the mercantilist question regarding the American Revolution against Great Britain, and that Kołłątaj, Staszic, and others had been laying the ground for more burgher rights for the last decade, the granting of more burgher rights was more an acceptance of political reality than any revolutionary invention.

The acts that existed within a month or so of the 3 May Constitution are in many ways refinement of questions presented by it, rather than necessarily introducing new ideas on their own. For example, acts organizing the Seym, Seym courts, the *policja*, the financial system, or working out details within the judicial system would be natural continuations of phenomena that had existed in Polish-Lithuanian constitutionalism long before the 3 May Constitution came about and would further clarify provisions within it. The acts furthest after from the 3 May Seym deal with the political situation at the time and the war against Russian and Prussia. As mentioned earlier, Stanisław August had cold feet during this period, so it would seem natural that the Seym would write a document to specifically compel his action. Similarly, organization of the military would be vital for the safeguarding of the nation. However, the author simply does not agree with Uruszczak that these last two provisions could properly be considered as "constitutional" in that they are reactions to the necessity of

the time, and are purely transactional, whereas the other acts that seek to build upon the 3 May Constitution are transactional in one sense, but still of constitutional importance in that they are working out the tensions between underlying constitutional principles.

A third category of legal acts exist: those that are specifically mentioned by the 3 May Constitution itself, regardless of whether they came before it or came after it. They are: the act establishing the Free Cities—mentioned in Article III—the act establishing the extraordinary constitutional Seym every 25 years after the 3 May Constitution—mentioned in Article VI—and the Law on Seymiki—also mentioned in Article VI. It is clear that these acts differ from the other "okołokonstytucyjne" acts in that they are not simply just "around" the Constitution, but are part of "the" Constitution itself. Even Uruszczak seems to accept that they are somehow distinct, in that these three acts were referred to by the 3 May Constitution specifically, whereas the majority of the other acts that he mentions in turn reference the 3 May Constitution.[1544] These shed a unique light on the 3 May Constitution, in that Kołłątaj had always considered the transformation of the Polish-Lithuanian constitutional system to be a process, rather than to create one, large document to reform everything all at once, as the French and American Constitutions did.

Izdebski clarifies:

> The fathers of the Constitution had however an evolutionary vision of the 'pacific revolution.' The Third of May Constitution was for them only the 'political constitution.' In his parliamentary speech of June, 1791, Kollataj launched a program passing three other "national constitutions": the economical (elaborating upon the very general clauses of the Third of May Constitution on peasant question), the moral (i.e., educational), and the legal (codification of the Polish and Lithuanian law). Thanks to it, it was possible to eliminate some defects of the new system, especially in social matters, by the other new "constitutional" acts – without changing the Third of May Constitution.[1545]

The "evolutionary" character of the 3 May Constitution is not particularly unique to it, as the American Constitution also has a clearly, laid-out procedure for evolutionary change. The difference between the two is that the writers of the 3 May Constitution seemed to think that evolution should not just occur naturally and spontaneously, but rather there should be a systematic plan to regularly revisit the constitution with the specific intention of looking for things to change and adjust. Per the 3 May Constitution's text itself:

> Willing to prevent, on one hand, violent and frequent changes in the national constitution, yet, considering on the other, the necessity of perfecting it, after experiencing its effects on public prosperity, we determine the period of every twenty-five years for an *Extraordinary Constitutional Diet*, to be held purposely for the revision and such alterations of the constitution as may be found requisite; which Diet shall be circumscribed by a separate law hereafter.[1546]

It is here suggested that the nature of the "ustawy okołokonstytucyjne", the explicitly evolutionary character of the 3 May Constitution, the long tenure of the Four Year Seym, and

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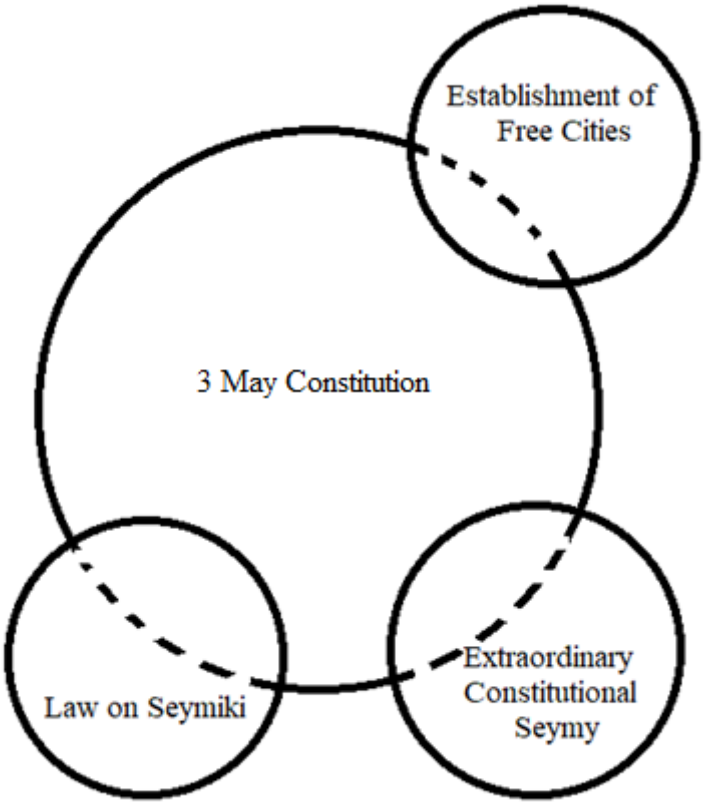
[1544] Uruszczak, "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku," pg. 250.

[1545] Hubert Izdebski. 1990. "Political and Legal Aspects of the Third of May, 1791, Constitution." In: Michał Rozbicki, ed., *European and American Constitutionalism in the Eighteenth Century*: American Studies Center: Warszawa, pg. 107.

[1546] 3 May Constitution, 1791, Article VI.

Poland-Lithuania's ambiguity about "cardinal laws", *konstytucje*, statutes, rights, privileges, the nature of *ius commune*, *inter alia*, challenges how we conceptualize 18th century Polish-Lithuanian constitutionalisms' conception of "a constitution" to begin with: that instead of a stand-alone document, it was always considered to be more in the British sense as a looser system, even though it was written down. However, there was a clearly distinguishable hierarchy of constitutional acts, with the 3 May Constitution being the main goal of the reformers—and accordingly the focus of most of the ire of its detractors. In this sense, there is a clearly distinguishable "core" of the Polish-Lithuanian constitutional system, versus the periphery. This is suggested in Figure 5.1 below.

Figure 5.1 The "Core" of the 3 May Constitutional System



The real test of the 3 May Constitution would be the next election of the sejmiki, in February, 1792. Would they accept the new constitution or would they reject it? The existence of these particular seymiki themselves were something of a watershed moment in Polish-Lithuanian history, a chance to put to task Rousseuian principles of testing the general will through local parliamentary affirmation.[1547] The 3 May Constitution was overwhelmingly

[1547] "Although the legality of the Revolution 'of 3 and 5 May' was maintained by its supporters, an endorsement from the 'nation' was politically imperative. The next sejmiks (to elect deputies to the tribunals) were scheduled for 15 July 1791 in the Crown, but not until 14 February 1792 in Lithuania. Denying opponents the chance of

accepted, but not completely, and the seymiki did add some small changes of their own, but they were mostly procedural improvements.[1548] The Seym was continuing to pass new legislation a full year after the 3 May Constitution was enacted. It was working on the National Education Committee and ironing out more rules pertaining to the województwa, as well as requirements to be appointed to various administrative positions as well as outlining their various tasks until 29 May, 1792, when it had to be suspended due to the war.[1549]

One final question remains: what was the relationship between the 3 May Constitution and potential future changes? Could it be amended? Were new constitutions necessary? It was quite clear that the system was far from finished. A clue to this is given by how the 3 May Constitution reviewed legal acts of the past, i.e., how it posited a theory of constitutional change. There is just one final legal act to consider within the Polish-Lithuanian system: the Declaration of the States Assembled, passed on 5 May, 1791. It begins with:

> All statutes, *old* and new, contrary to the present constitution, or to any part thereof, are hereby abolished; and every paragraph in the foregoing articles, to be a competent part of the constitution is acknowledged. We recommend to the executive power to se the Council of Inspection immediately begin its office under the eye of the Diet, and continue its duties without the least interruption.[1550]

This document is incredibly important because the 3 May Constitution itself has no equivalent of a supremacy clause, which is critically important because, as we have noted, there was a flurry of "constitutional" documents being passed at the same time, so the entire system is incredibly chaotic. The very beginning of our hermeneutic journey was from Article II of the 3 May Constitution, which declares that "laws, statutes, and privileges, granted to the [*szlachta*]" throughout Polish-Lithuanian history by an enumerated list of kings, "are by the present act renewed, confirmed, and declared to be inviolable." However, this presented numerous difficulties: what were the exact privileges that are being referred to? How are they to be balanced? The Declaration of the States assembled resolves this problem: it declares that any act that is deemed to be incompatible with the 3 May Constitution is to be voided, and even stipulates for the creation of an office to specifically deal with inspecting the laws to deal with such discrepancies. However, unfortunately the case is not so easily solved.

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a swift counter-attack, on 26 May 1791 the sejm decided to hold all the forthcoming sejmiks the following February.

"The February 1792 sejmiks were the nearest thing to a referendum in the Commonwealth's history. If this sounds anachronistic, then the idea of 'referring' a question to the 'nation' was rooted in Polish republican culture," Butterwick, Richard. 2012. *The Polish Revolution and the Catholic Church, 1788-179: A Political History*. Oxford University Press: Oxford, pg. 259; For an in-depth analysis on the particular voting of each sejmik, see: Wojciech Szczygielski. 1994. *Referendum trzeciomajowe: sejmiki lutowe 1792 roku*. Wydawnictwo Uniwersytetu Łódzkiego: Łódź.

[1548] Lukowski, *Disorderly Liberty*, pg 238; Kądziela, Łukasz. 1992. "Rok Realizacji Reform Majowych (1791-1792)." In: Teresy Kostkiewiczowej, ed., *„Rok Monarchii Konstytucyjnej": Piśmiennictwo polskie lat 1791-1792 wobec Konstytucji 3 Maja*. Instytut Badań Literackich Pan: Warszawa, pgs. 7- 23.

[1549] Uruszczak, "Ustawy okołokonstytucyjne Seymu Wielkiego z 1791 i 1792 roku." Pg. 257.

[1550] Declaration of the States Assembled, ¶1, 5 May, 1791.

Izdebski contends:

> The Third of May 1791 Constitution did not contain any derogatory clause annulling any previous legislation contradictory with its articles. This is not surprising if the general idea of the 'pacific revolution' is kept in mind. The Constitution was more 'the standard of all laws and statutes for the future Diets' and for the Great Diet's own legislative activities."
>
> However, the Declaration of the States Assembled, 5 May 1791, when the 3 May Constitution was actually legalized: all laws and statutes, old and new, contrary to the present Constitution, or to any part therefore, are hereby abolished.|
>
> It also states: and we declare particular descriptions, necessary to articles and every matter put into the present Constitution, as specifying more precisely the obligations and the form of government, to be a competent part of this Constitution.
>
> "The provision includes serious interpretative difficulties. The literal interpretation – that every law enacted by the Diet in constitutional matters should be a part of the Constitution possible to change only every 25 years – seems to be too absurd. The Four Years Diet itself gave however an authentic interpretation. The law concerning the Diets of 16 May 1791 define itself as the "the constitutional law" and the same constitutional force was attributed to the law of 27 May 1791 on the Extraordinary Constitutional Diet. The law concerning the Diets changed in a way some provisions of the Constitution because it restored practically the Diet's supremacy, typical of the Polish 'republicanism' and contradictory to the constitutional principle of the separation of powers.[1551]

Andrzej Stroynowski opines that perhaps this ambiguity was part of the ideology of the pragmatic reformsers, who were trying to convince as many of the *szlachta* to accept the constitution as possible.[1552]

While it is difficult to say precisely what the architects of the new constitutional system would have done moving forward, it is worthwhile to make some brief remarks to pause upon what they did do, and perhaps to organize their accomplishments, that is to put some order to the "ustawy okołokonstytucyjne". As we observed earlier, the parliamentary order followed by the Four Year Seym generally followed the pattern of sticking with procedural questions and points of broad consensus, before then moving on to more and more systematic changes. However, after the 3 May Constitution was established, the 5 May act

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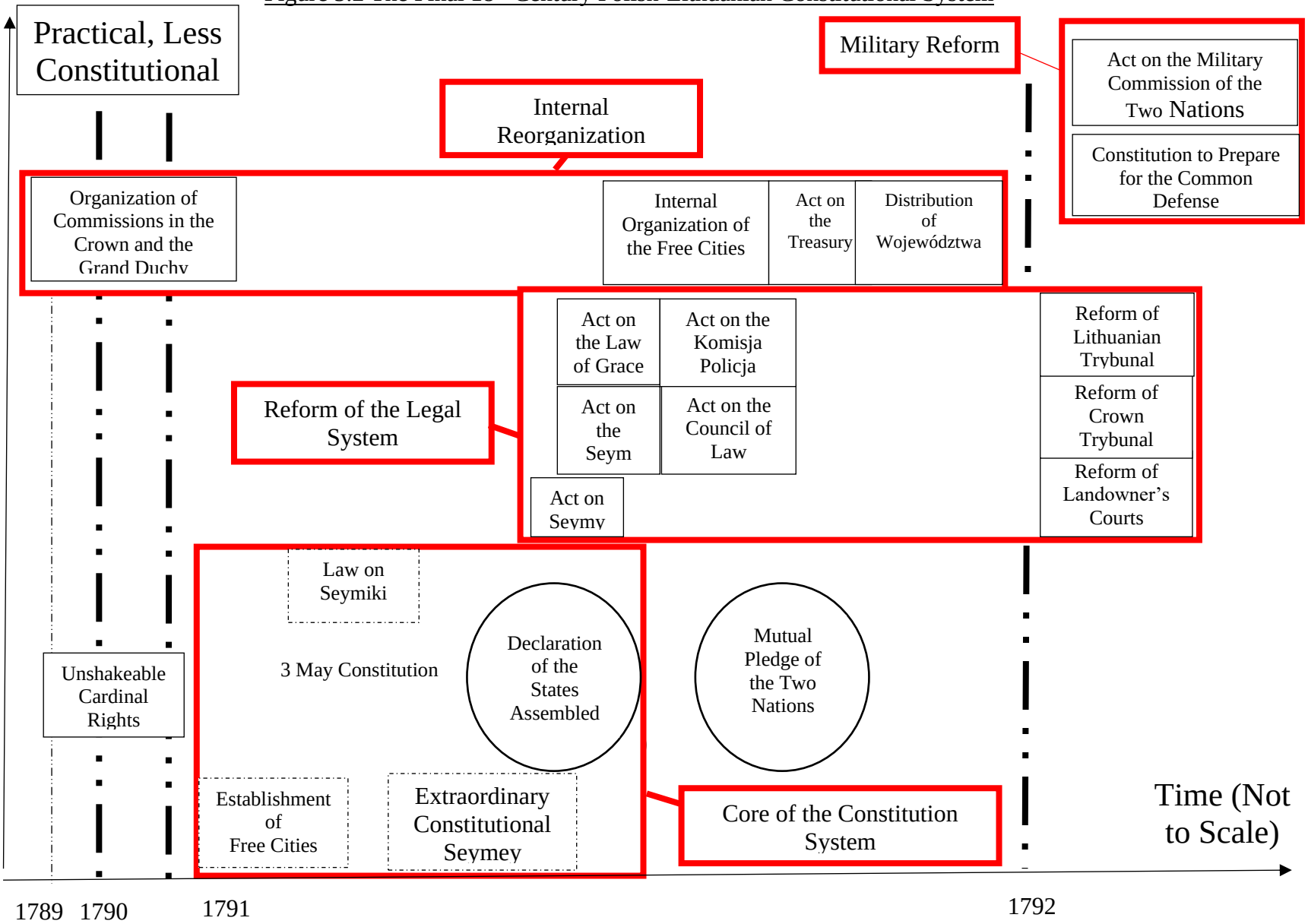
[1551] Izdebski, "Political Aspects," pg. 109.

[1552] "It should always be remembered in discussions and evaluations of the terms of the Constitution that many provisions were deliberately left imprecise and open to interpretation so as to moderate the vehemence of the anticipated opposition. This was also due to the fact that the Constitution was being drawn up in the course of a heated debate, amid the clash of opposing interests and in a dynamically changing political situation. […]Equally ambiguous was the outline of the principles of the estate system, which seemed not to have been influenced by the French 'Declaration of the Rights of Man and of the Citizen' of August 26th, 1789. This happened because the traditional division of the Republic into four estates—nobility, clergy, burghers, and peasantry—was to remain in force as a result of the need to comply with the expectations of the provincial nobility on whom the final recognition of the Constitution depended. At the same time, however, there appeared a modern definition of the term "nation", going beyond the division into estates, mostly clearly expressed in the wording of the last article of the Constitution: "all inhabitants are natural defenders of their country and its liberties[…] This deliberate avoidance of precision in the formulation of the provisions of the Constitution can also be seen in the definition of the name of the State, because alongside the words *Polska* (Poland) or *polski* (Polish), the term *Rzeczpospolita* (Republic) appeared, and even became predominant in the 'Inviolable Cardinal Laws'," Stroynowski, Andrzej. 2021. *Konstytucja 3 Maja 1791 Roku / The Constitution of May 3rd, 1791*. Wydawnictwo Sejmowe: Warszawa, pgs. 107-109.

immediately clarifies its relationship with the rest of the system. We then see various legal acts that are passed that essentially flesh out the rest of the system or reorganize parts of it, adding a little detail here, a little color there, as it were. The final version of the constitutional system is explained in Figure 5.2 below.

Figure 5.2 The Final 18th Century Polish-Lithuanian Constitutional System



The author proposes to outline the Polish-Lithuanian constitutional system as follows: that there was a core of documents established in relation to the 3 May Constitution, specifically: the act establishing the free cities, the act establishing seymik law, the act of extraordinary constitutional Seymy, and the Declaration of the States Assembled. Each of these parts serve a different moment in constitutional space: the establishment of the free cities proceeds the 3 May Constitution, the law on seymiki is a procedural clarification of the legislative process outlined in the 3 May Constitution, whereas the Declaration of the States assembled orient the constitutional system into the future by outlining legitimate constitutional change. These serve as the "core" and are "the most constitutional" in the architectonic sense. Following that, there are a series of less architectonic, praxical and poietic reforms that fall into two broad groups: internal organization of the country, e.g., województwa, cities, tax policy, *inter alia*., and criminal justice reform, e.g., the reform of Trybunałs, management of internal and external affairs via the Straż and the Komisja Policja, *inter alia*. Finally, the last cluster is military reform, which was purely for the sake of saving the country. As addressed throughout, simply because a text may be considered "constitutional" does not mean that it is constitutional "in the same sense" as another part of "the constitution." This logic applies both within a text—e.g. the ages of officeholders under the United States' Constitution being "constitutional" in a literal sense, but not an architectonic one—as well as within a collection of texts. Here, military reform is of a purely practical value, that is necessity for the survival of the state, but reflect no deeper architectonic principles for the structuring of said state. Thus, tax reform or military reform would be of the least constitutional significance.

Four major stages of constitutional development occur in the "ustawy okołokonstytucyjne": before the constitution there was a mix of both practical and deeper constitutional reforms, whereas during the creation of the constitution itself there was no parallel practical legislation; thirdly, in the period after the 3 May Constitution, there was a shift in emphasis toward practical concerns. In the final period in 1792, we see a complete shift toward practical matters and the least constitutional of the acts, which were attempts to reform the military in order for the nation to survive.

The 3 May Constitution as a system is incredibly complex, and totally distinct from its French, British, or American cousins. In some sense it is close to the British system in that it is a series of legal acts that are more importantly held together by a republican ideology and ethos, one quite similar to that of Britain's own.[1553] Secondly, it could be perceived as quite close to its American cousin, and in fact, historically has generally been considered to be quite similar to it.[1554] However, as noted earlier, the way in which the Constitution was

[1553] Butterwick-Pawlikowski remarks on the similarities between who he refers to as "Commonwealthmen" and the *szlachta*: They were a small group of "Englishmen who wanted a "constitution based on the sovereignty of the people
and an original contract, which would enshrine the right of resistance, further restrict the royal prerogative, and perhaps even make the throne elective. The ideology of these radical Country Whigs or "Commonwealthmen," in the early eighteenth century was certainly comparable to Polish noble republicanism," Butterwick Pawlikowski, *Poland's Last King*, pg. 17.

[1554] First, and perhaps foremost, is not what is in it but that it exists at all. The term *constitution* in the European past had been commonly used for an abstract understanding of how a society was constituted: its body of law,

written makes its relationship with the rest of the constitutional system ambiguous. If a constitution does not have a supremacy clause but then relies on an external document to provide it a supremacy clause, can we honestly say that a constitution is truly supreme? Is there something between a written constitution and an unwritten one, a constellation of documents with a relatively clear hierarchy? How clear does this hierarchy have to be? Can the hierarchy be changed, or is it established once the constitution itself has become ratified? These are puzzles for a future time. Our last step in the hermeneutic cycle is to briefly return to the 3 May Constitution itself to see what we missed or perhaps simply misunderstood with our first gaze. It is time to return to the text itself.

A Final Textual Analysis

Our analysis of the text shall be relatively straightforward. We shall move article by article, highlighting what is significant or interesting about them. The entirety of the articles shall not read, but the author shall highlight what he believes are the relevant parts, followed by a brief discussion. The Articles follow in this order: Article I: The Dominant National Religion; Article II: Nobility, or the Equestrian Order; Article III: Towns and Citizens; Article IV; Article V, Form of Government, or the Definition of Public Powers; Article VI: The Diet or Legislative Power; Article VII: The King, or Executive Power; Article VIII: Judicial Power; Article IX: Regency; Article X: Education of Kings Children; Article XI: National Force, or the Army. Articles IX and X specifically dealt with the affairs of the king and were not constitutional in the sense that they did not fundamentally alter the relationship between the king, the state, or any major political or legal institutions. Similarly, Article XI is not constitutional by this same metric. Thus, we shall be concerned with only the first eight articles.

Article I: The Dominant National Religion

> "The Holy Roman-Catholic Faith, with all its privileges and immunities, shall be the dominant national religion. The changing of it for any other persuasion is forbidden under the penalties of apostacy: but as the same holy religion commands us to love our neighbours, we therefore owe to all people of whatever persuasion, peace in matters of faith, and the protection of government; consequently we assure, to all persuasions, in religions, freedom and liberty, according to the laws of the country, and in all dominions of the Republic."[1555]

As we have observed, there was a strong tendency in the Polish-Lithuanian Commonwealth to gradually restrict the freedom of non-Catholics since the 17th century.

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practice, tradition, and commonsense understandings of correct practice. As thus understood, a constitution was not a single document enacted at a commemoration-worthy date. Constitutional reformers commonly were people who were trying to find the old constitution that was being effaced by more recent and improper practice. Legal scholars would often conduct research into precedent, hunting for the constitution. The new, eighteenth-century propensity to think of a constitution in a different way, as a document needing to be thought through by the present generation and written down in order to shape the future, was fundamental for modern democracy. It enshrines an act in which human beings deliberately decide how they choose to be governed. Poland's is the first of the many European constitutions of the revolutionary age to take up the American model," Piotr Konieczny and John Markoff. 2015. "Poland's Contentious Elites Enter the Age of Revolution: Extending Social Movement Concepts." *Sociological Forum* 30(2), pg.290.

[1555] 3 May Constitution, 1791, Article I.

Many of the Jagiellonians and the Waza kings had shown personal favoritism in their appointments throughout the life of the Commonwealth, but had done a relatively good job of staying neutral in regard to the religious wars throughout Europe at the time. Furthermore, though the king was always Catholic the relationship between the Church and the king often frayed. It was not until Jan II Kazimierz and then the Wettins after him that the decline in religious toleration and severe curbing of religious participation of Protestants in the political life of the Commonwealth began. It was not until 1790 that the Catholic Church had been declared *de jure* the dominant religion. There was something of a contradiction in that the laws nominally promised equality of religion before the law, with it being illegal to punish or persecute based on faith. However, persons were not allowed to convert to faiths other than Catholicism, and the ability of the non-Catholic sects to reign in their own apostates was severely curtailed.[1556] This was despite the fact that by 1791 still only about half of the Rzeczpospolita's inhabitants were Roman Catholics.[1557] Lukowski suggests that the "ambivalence" of Article I was actually by design, because of the difficulty of building consensus at the time.[1558] Regardless of the precise reason, Article I was nonetheless the continuation of a trend that had long been weakening the nation. While the Commonwealth was known for being tolerant during its lifetime—and while this was still relatively tolerant compared to pogroms and outright persecution—the 3 May Constitution was nonetheless a crystallization of a significant loss of liberty for the *szlachta*.

Article II: Nobility, or the Equestrian Order (Selections)

> Revering the memory of our ancestors with gratitude, as the first founders of our liberties, it is but just to acknowledge, in a most solemn manner, that all the preeminence and prerogatives of liberty, both in public and in private life, should be insured to this order; especially laws, statues, and privileges, granted to this order by Casimir the Great, Lewis of Hungary, Ladislaus Jagellon, and his brother Witoldus, Grand Duke of Lithuanaia; also by Ladislaus and Casimirus, both Jagellons; by John Albertus, Alexander, Sigismundus the First [Zygmunt I], and Sigismundus August[Zygmunt Augustus] (the last of the Jagellonic race)

[1556] "The projected first Cardinal Law was read out on 2 September 1790. It stated that the Roman Catholic faith, with all its privileges, would forever be the dominant faith, and that it was to be referred to as such in all public acts. Although this was the first time in the Commonwealth's history that the Catholic faith had been described in law as 'dominant' (panująca), the wording should not have been controversial. Catholicism's dominant status had been axiomatic for over a century" […]
"The next Cardinal Law promised all inhabitants of the Commonwealth 'peace in confession and rites, guaranteeing that no clerical or lay authority shall be able to persecute anybody for reasons of confession or rites'. This provision implicitly constricted the ability of Orthodox, Protestant, and Jewish clerics to discipline their own faithful, as well as protecting non-Catholics from Catholics Butterwick, Richard. 2012. *The Polish Revolution and the Catholic Church, 1788-179: A Political History*. Oxford University Press: Oxford, pgs. 212, 213.

[1557] Davies, Norman. 1997. "The Third of May 1791." In: Samuel Fiszman, ed., *Constitution and Reform in Eighteenth-Century Poland: The Constitution of 3 May 1791*. Indiana University Press: Bloomington, pg. 5.

[1558] "The preamble to the new constitution acknowledged the 'long-established failings of our government' – something which could never have been publicly proclaimed a generation earlier. It was up to Poles themselves, during this 'fleeting moment', to escape their humiliating subjection to foreign powers. Article I, 'The dominant religion' was characteristically ambivalent. Catholicism was Poland's ruling faith – yet 'we owe all men of whatever belief the peaceful practice of their faith and the protection of government'. Such toleration was qualified: the laws committing to exile apostates from Catholicism remained in force. Enlightened toleration was embraced; religious hardliners were at least meant to be appeased. It set the tone for the rest of the document," Lukowski, *Disorderly Liberty*, pgs. 226-227.

> are by the present act renewed, confirmed, and declared to be inviolable [original Polish spellings added].
>
> We acknowledge the rank of the noble Equestrian order in Poland to be equal to all degrees of *szlachta*—all persons of that order to be equal among themselves, not only in the eligibility to all posts of honor, trust, or emolument, but in the enjoyment of all privileges and prerogatives appertaining to the said order: and in particular, we preserve and guarantee to every individual thereof personal liberty and security of territorial and moveable property […] nor shall we even suffer the least encroachment on either by the supreme national power (on which the present form of government is established), under any pretext whatsoever, contrary to private rights, either in part, or in the whole; consequently we regard the preservation of personal security and property, as by law ascertained, to be a tie of society, and the very essence of civil liberty.

This article had three major functions. First of all, it established a constitutional continuity of rights that proved the backbone of *szlachta* identity, as well as formed the architecture of the legal system overall. Secondly, it guaranteed the nominal equal of all *szlachta* before the law. Thirdly, it made the inviolability of person and property the basis of the constitutional order. Whereas Poland-Lithuanian had always respected personal property and personal inviolability since the adoption of *neminem captivabimus*, there was a decidedly Enlightenment turn in asserting that it was "the very essence of civil liberty", rather than one amongst many such "essences". This was fully aligned with Enlightenment teachings all the way from Hobbes' insistence that human society evolved from a chaotic state of nature by facilitating the protection of person and property to Locke's Proviso that all men had the right to private property, "at least where there is enough, and as good, left in common for others"[1559] to Montesquieu, Rousseau, and Kołłątaj, and Staszic.

Article III: Towns and Citizens

> The law made by the present Diet [Seym], entitled, *Our royal free towns with the dominions of the Republic*, we mean to consider as part of the present constitution, and promise to maintain it as a new, additional, true, and effectual support of our common liberties, and our mutual defence.

This is the direct confirmation of the legal act of 18, April, 1791.

Article IV: Peasants and Villagers (Selections)

> This agricultural class of people, the most numerous in the nation, consequently forming the most considerable part of its force, from whose hands flows the source of our riches, we receive under the protection of national law and government, from the motives of justice, humanity, Christianity, and our own interest well understood: enacting, that whatever liberties, grants, and conventions, between the proprietors and villagers, either individually or collectively may be allowed in future, and entered authentically into; such agreements, according to their true meaning, shall import mutual and reciprocal obligations, binding not only the present contracting parties but even their successors by inheritance or acquisition—so far that it shall not be in the power of either party to alter at pleasure such contracts, importing grants on one side, and voluntary promise of duties, labour, or payments on the other […]

[1559] John Locke, *Second Treatise of Government*, Chapter V, §27.

> Thus having insured to the proprietors every advantage they have a right to from their villagers, and willing to encourage most effectually the population of our country, *we publish and proclaim a perfect and entire liberty to all people*, either who may be newly coming to settle, or to those who, having emigrated, would return to their native country; and we declare most solemnly, that any person coming into Poland, from whatever part of the world, or returning from abroad, as soon as he sets his foot on the territory of the Republic, becomes free and at liberty to exercise his industry, wherever and in whatever manner he pleases, to settle either in towns or villages, to farm and rent lands and houses, on tenures and contracts, for as long a term may be agreed on.

Article IV firmly established the feudal character of the Commonwealth. In some sense, it was therefore more honest than the American Constitution, which spoke of freedom but permitted slavery. When contrasted with Article II there is this curious trend where even though the system was clearly pro-*szlachta* against the rights of the peasants, it also attempted to remove or reset the distinctions between the ranks of the *szlachta* and in this sense was arguably pro-feudal but anti-aristocratic to some degree.[1560]

It also firmly established the Commonwealth as a Christian nation. Nominally, it promised freedom to those who came into the country, as well as free movement of immigrants within its borders, and that they could enter into whatever "tenure" or "contract" that could be established, including serfdom, naturally. Thus, while it could be said that the act abolished *de jure* slavery and that it assumed a patrimonial relationship wherein the king and the national government were to protect the peasantry—even against the *szlachta* if need be—the reality was far from what Rousseau, Kołłątaj, or Staszic would have wanted. The language that all the people should receive the same liberty was in line with the ideals preached by Rousseau, Kołłątaj, or Staszic, though it seems clear that the rights of immigrants and the *szlachta* and the rights of the *szlachta* to keep their serfs—and their serfs' descendants—in serfdom in perpetuity was a contradiction, just as the American Constitution's tacit endorsement of slavery was.

Article V : Form of Government, or the Definition of Public Powers

> All power in civil society should be derived from the will of the people, its end and object being the preservation and integrity of the State, the civil liberty, and the good order of society, on an equal scale, and on a lasting foundation. Three distinct powers shall compose the government of the Polish nation, according to the present constitution; viz.
>
> 1st. *Legislative* power in the States assembled.
> 2nd *Executive* power in the King and the Council of Inspection
> 3rd *Judicial* power in Jurisdictions existing, or to be established.

Here it is quite clear that the framers of the 3 May Constitution fully understood Montesquieu's theory of the tripartite division of political power rather than Rousseau's embrace of the general will and the parliamentary supremacy that it would have implied, a reform that would have been more palatable to Stanisław August's desire for a constitutional monarchy with a strong parliament and a hereditary monarchy. In this, the 3 May Constitution is indeed closer to the American one than to the English model.

[1560] Ludwikowski, "Main Principles," pg. 316.

Article VI. The Diet, or the Legislative Power (Selections)

The Diet, or the Assembly of States, shall be divided into two Houses; viz, *the House of Nuncios* [Izba Poselska], or Deputies, and *the House of Senate*, where the King is to preside. The *former* being the representative and central point of supreme national authority, shall posses the pre-eminence in the Legislature; therefore, all bills are to be decided first in this House.

1st. *All General Laws*, viz. constitutional civil, criminal, and perpetual taxes; concerning which matters, the King is to issue his propositions by the circular letters sent before the Dietines [seymiki] to every palatinate and to every district for deliberation.

2d. Particular Laws, viz. temporal taxes, regulations of the mint; contracting public debts, creating nobles, and other casual recompences; reparation of public expences, both ordinary and extraordinary; concerning war; peace; ratification of treaties, both political and commercial; all diplomatic acts and conventions relative to the laws of nations; examining and acquitting different executive departments, and similar subjects arising from the accidental exigences and circumstances of the State.

In regard to the House of the *Senate*, it is to consist of Bishops, Palatines, Castellans, and Ministers, under the presidency of the King, who shall have but one vote, and the casting voice in case of parity.

Those Senators and Ministers who, from their share in executive power, are accountable to the Republic, cannot have an active voice in the Diet, but may be present in order to give necessary explanations to the States.

The ordinary legislative Diets shall have their uninterrupted existence, and be always *ready* to meet; renewable every two years. The length of sessions shall be shall determined by the law concerning Diets.

No law or statute enacted by such ordinary Diet can be annulled by the same.

The law concerning the Dietines, or primary elections, as established by the present Diet, shall be regarded as a most essential foundation of civil liberty.

The majority of votes shall decide every thing, and every where; therefore we abolish, and utterly annihilate, *liberum veto*, all sorts of confederacies and confederate Diets, as contrary to the spirit and of the present constitution, as undermining the government, and as being ruinous to society.

Willing to prevent, on one hand, violent and frequent changes in the national constitution, yet, considering o the other, the necessity of perfecting it, after experiencing its effects on public prosperity, we determine the period of every twenty-five years for an *Extraordinary Constitutional Diet*, to be held purposely for the revision and such alterations of the constitution as may be found requisite; which Diet shall be circumscribed by a separate law hereafter.

The influence of Montesquieu and Rousseau remain strong in establishing the power of the legislature, which, like that of the United States' Constitution, has its role specifically first, followed by the executive, and the judicial last. The Seym kept the tradition of the division into two houses with the Izba Poselska's members elected by the seymiki and the Senat's members appointed by the king. Curiously, it is merely stated that the Izba Poselska

was to be a "representative" body but it gives no mechanism for what it was supposed to be representing or how its members were to be chosen. Much of this was actually supplied by the Laws Concerning Deities, which was being discussed simultaneously with the 3 May Constitution and was passed later in May, 1791. Given the continuity of the seymiki, it is clear that the system of seymiki electing its members would continue, which was perhaps obvious to the drafters who saw no need to specify it. In a slight deviation from the "king-in-parliament" model, the king was present in the Seym as the president of the Senat, wherein he cast the final vote as a tiebreaker. However, he did not conduct parliamentary business at all.

Following Rousseau and British constitutionalism, the Izba Poselska is declared to be the supreme "national authority" and the more powerful of the two houses. Senators were further restricted in that they could not be actively holding administrative positions as well as vote within the Senat, which suggests a rotating body of senators. The Seym had to meet a minimum of once every two years, but how long it could last or specific parliamentary procedure governing its meeting would be decided by a future law. In here we can see that the drafters of the 3 May Constitution had clearly learned the lessons of their history, and did not necessarily want a fixed period of the Seym set in stone, but rather to leave it up to further negotiation and specification in the near future. The law to govern the seymiki was being developed parallel to the 3 May Constitution, and its authors explicit elevate it as vital to the functioning of the constitutional system. The *liberum veto* was completely abolished, replaced with majority voting in everything, even in the Senat, which was only an advisory body and had no effective power to completely block legislation. However, the drafters did align with Montesquieu contra Rousseau by declaring that the Seym would not be a permanent institution, and that all *liberum veto* and *konfederacje* were to be removed. While it states that they were "contrary to the spirit of the present constitution," it was also true that they were essentially redundant now that majoritarianism had been fully embraced everywhere.

The Polish Constitution thus significantly differs from the American one in that there was actually a system to call upon new *constitutional conventions* every twenty-five years to thoroughly reexamine the laws. One possible explanation of this is that the Poles-Lithuanians, due to many experiences of interregna and dynastic shifts, as well as the weakness brought about by infrequent parliaments, recognized the value of semi-organized constitutional renewal. There is, of course, something of a contradiction in that the *pacta conventa* and the privileges of the nobles were supposed to be held in perpetuity. While the king was still technically elective in that there was an explicit recognition that the basis of the royal family was dependent upon conforming to the *pacta conventa*, the line of succession was now hereditary, rather than each new monarch having to effectively campaign for their election. As such, with so much of the Constitution held to be eternal or unchangeable, it is difficult to say what exactly subsequent constitutional conventions would actually do.

Finally, there was a distinction between "General" and "particular laws" that strongly correlates with what Montesquieu (and Kołłątaj after him) referred to as the distinction between "political law" and "civil law," wherein political law shaped the entirety of society and should be slow to change, e.g. constitutional law, whereas civil law were more practical

in nature. However, the terminology is somewhat confusing, with “particular” laws treating both “civil” as well as “political issues”, which perhaps reflects Staszic’s terminology where the deeper law was referred to as “fundamental law” and “political law” was more transactional. The general laws were an adaptation of the *instrukcje*: the king could send general laws to the seymiki who would then discuss them during the Seym. It is clear that there was not a complete separation of powers in that the king still held some legislative prerogative in drafting general laws and also in appointing the senators.

There was essentially a dual-track system for the approval of “general laws” versus “particular laws”, captured in Figure 5.3 and Figure 5.4.

General laws began as propositions from the king, which were then sent to the seymiki for discussion, which would then appoint representatives to the Izba Poselska to discuss the law and give them *instrukcje*. If the Izba Poselska accepted the law by a majority vote, then it would be sent to the Senat for approval. If the Senat then approves it becomes a new law immediately. However, if the Senat chose not to vote on it or disagreed with the bill, it becomes suspended, wherein it lies in wait until the next Seym is called, wherein it returns again to the Izba Poselska. If a majority of the Izba Poselska voted for the bill, it became law immediately.

The parliamentary process of the particular bills started the exact same way as the general laws with a proposal from the king. However, a law could also originate in the Izba Poselska. The only distinction was that King’s propositions would have priority before “private bills.” However, a majority of votes from the Izba Poselska is not required before it is sent to the Senat. Then, the combined majority of both houses vote in favor of it, it is then accepted.

Figure 5.3 Passage of a General Law after the 3 May Constitution

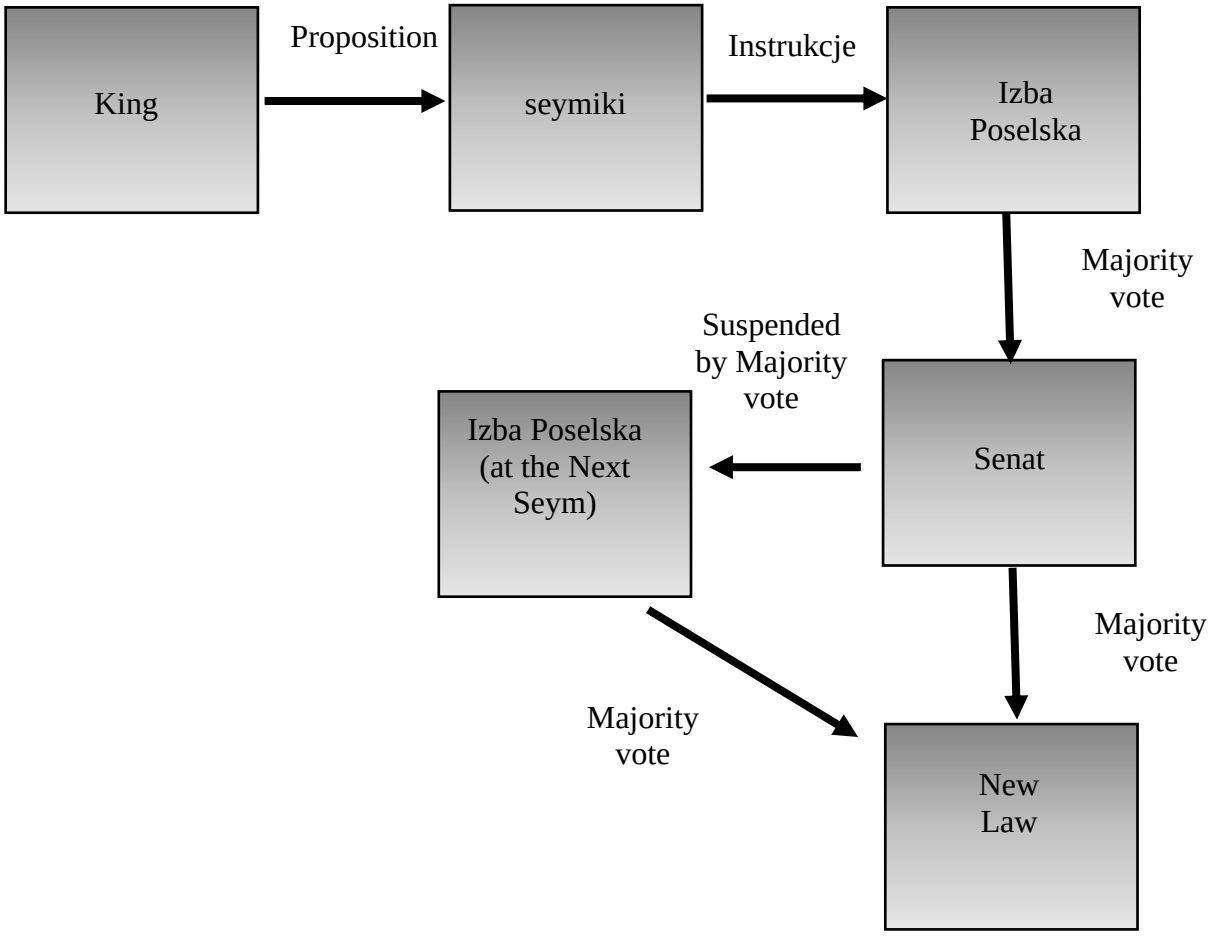
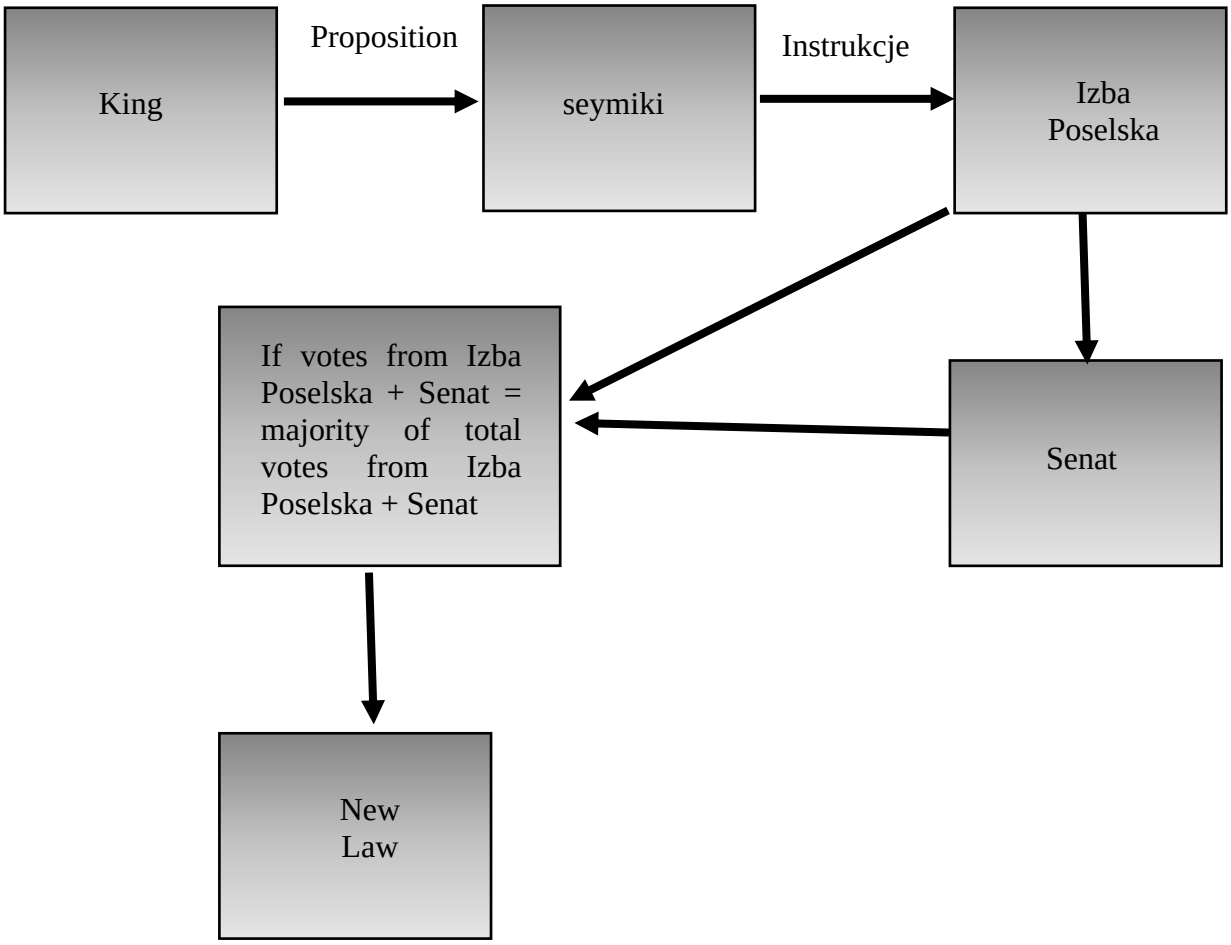


Figure 5.4 Passage of a Particular Law after the 3 May Constitution



Here it is important to remember that the number of representatives at the Izba Poselska vastly outnumbered the members of the Senat. Thus, if a particular law was incredibly unpopular with the *szlachta* it would be incredibly unlikely to pass. Thus, depending on the law, a particular law could be relatively easy or relatively difficult to pass and the Senat an the king had little power to stand against them. However, if the Senat voted to suspend a general law this meant that it had to wait until the next legislative term, which could be years in the future. It also, in modern parlance, essentially called for new elections before the Seym could take it up again, giving chance for more extensive debate amongst the *szlachta* and at the seymiki. This lower threshold for "less serious" and "less constitutional" provisions than for constitutional provisions is perfectly consistent with constitutional theory, given that the United States also recognized the difference between majoritarian and supermajoritarian thresholds for passing statutory vs constitutional law.

Article VII The King, or Executive Power (Selections)

The most perfect government cannot exist or last without an effectual executive power. The happiness of the nation depends on just laws, but the good effects of laws flow only from their execution.

[T]he supreme inspection over the executive power, and the choice of their magistrates, *we entrust to the King, and his Council, the highest power of executing the laws*.

This Council shall be called *Straz*, or the Council of Inspection.

The duty of such *executive power* shall be to watch over the laws, and to see them strictly executed according to their import.

All departments and magistracies are bound to obey it's [the Council of Inspections] directions.

This executive power cannot assume the right of making laws, or of their interpretation. It is expressly forbidden to contract public debts; to alter the repartition of the national income, as fixed by the Diet; to declare war; to conclude definitively any treaty, or any diplomatic act; it is only allowed to carry on negociations with foreign courts, and facilitate temporary occurrences, always with reference to the Diet.

The Crown of Poland we declare to be *elective* in regard to families, and it is settled so for ever.

Having experienced the fatal effects of interregna, periodically subverting government, and being desirous of preventing for ever all foreign influence, as well as of insuring to every citizen a perfect tranquility, we have, from prudent motives, *resolved* to adopt *hereditary succession* to our Throne.

We reserve to the nation, however, the right of electing to the Throne any other house or family, after the extinction of the first.

Every King, on his accession to the Throne, shall take a solemn oath to God and the Nation, to support the present constitution, to fulfil *the pacta conventa*.

The King's person is sacred and inviolable; as no act can proceed immediately from him, he cannot be in any manner responsible to the nation; he is not an absolute monarch, but the father and the head of the people […] All public acts, the acts of magistracies, and the coin of the kingdom, shall bear his name.

The King, who ought to possess every power of doing good, shall have the right of pardoning those that are condemned to death, except the crimes be against the state.

The King's opinion, after that of every Member in the Council [of Inspection] has been heard, shall decisively prevail. Every resolution of this Council shall be issued under the King's signature, countersigned by one of the Ministers sitting therein; and thus signed, shall be obeyed by all executive departments, except in cases expressly exempted by the present constitution.

If it should happen that two-thirds of secret votes in both Houses demand the changing of any person, either in the Council, or any executive department, the King is bound to nominate another […] when these Ministers are denounced and accused before the Diet (By the special Committee appointed for examining their proceedings) of any transgression

> of positive law, they are answerable with their persons and fortunes. Such impeachments being determined by a simple majority of votes, collected jointly by Houses.

Here again, we see the drafters of the constitution mixing various political influences with Poland-Lithuania's own history and experiences. It is also quite clear that the king is expected to narrowly interpret the laws and not to have any power to legislate at all. This was not only a nod to the theories of clear separation of powers and parliamentary supremacy but was also a callback to the Henrician Articles and the executionists who had inspired it.

As we discussed earlier, one of the struggles of the period of constitutional construction—particularly the efforts of the executionists—was not to limit the power of the king in an objective sense, but rather instead to give the king essentially unlimited power but within a very narrow and well-defined sphere, which was to be somewhat counterbalanced by a permanent council of senators to advise the king. This line of reasoning saw its entelechy in the 3 May Constitution with the establishment of the Straż. The king was given all power and could overrule the Council of Inspection and make whatever decision he wanted to, so long as he heard all of their opinions and advice first. Once that position was made, all members of the executive branch in any department in any part of the country had to obey the king's command. This is quite close to the American "unitary executive theory" wherein the power of the executed is solely "vested" in the President of the United States, that in essence the legitimacy to act within the executive branch must flow from the President downward. In this sense, the President is essentially absolute within the executive branch, though he is strictly bound by the separation of powers and the threat of impeachment of himself or of any of his advisors for breaking the law.[1561] The king did face some restrictions of this power, however: he could not pardon for crimes against the state, nor could the king block it if one of his ministers was impeached by the Seym.

The position of the king was much closer towards Montesquieu and the Americans' vision of a strong executive—albeit one for life—than Rousseau, Kołłątaj, and Staszic's model of a weak king that was subservient to a powerful Seym. In fact if one compares the roles that Montesquieu establishes for a king—appointing ambassadors, overseeing the police, punishes criminals, conducts war, *inter alia*—it is quite similar to that adopted by both the United States 1787 and the Polish-Lithuanian 1791 Constitutions. The major change that the Poles-Lithuanians enacted with the 3 May Constitution was essentially declaring that the monarch was hereditary rather than elected, but the king had to sign the *pacta conventa* and swear to uphold the laws, just as if they had been elected. In this, the author is convinced that Staszic was correct: that it did not make much substantive difference whether the king was elected or hereditary, because the *szlachta* had such a long and fierce tradition of acting as the collective political sovereign and the kings had been too weak, traditionally, to seriously challenge that consensus. It is particularly noteworthy that implementing a hereditary monarchy was a specific solution to the political problems that the Commonwealth had faced nearly continuously since Jagiełło II Władysław first convinced the *szlachta* to elect his children as the kings of Poland nearly 400 years earlier. There is again an echo of

[1561] Ryan J. Barilleaux and Christopher S. Kelley, eds. 2010. *The Unitary Executive Theory and the Modern Presidency*, Texas A & M University Press: College Station; Steven G. Calebresi and Christopher Yoo. 2008. *The Unitary Executive' Presidential Power from Washington to Bush*, Yale University Press: New Haven.

Montesquieu's belief in the importance of tranquility in the minds of the citizenry, with the 3 May Constitution stating that: "as well as of insuring to every citizen a perfect tranquility, we have, from prudent motives, *resolved* to adopt *hereditary succession* to our Throne."

One final point that is curious to note is that Article VII gives a list of ministers who composed the Council of Inspection. The Marszałek of the Seym had a right to sit on the Straż but was not a voting member. Instead, the Marszałek had the right to convoke the Seym in cases of emergency, even against the wishes of the king to do so, and was obligated to inform both the representatives and the Senators. It is interesting to note that the Marszałek of the Seym is mentioned here instead of Article VI, because the Marszałek was a legislative position, but the office of the Marszałek—or how he is to be elected—is not even mentioned in the entirety of Article VI. Instead, the election of the Marszałek is discussed in the *Laws Concerning Dietines*, section XII.

Article VIII Judicial Power

> As judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected. It ought to have local existence, that every citizen should know where to seek justice, and every transgressor can discern the hand of national government. We establish therefore:
>
> 1st. Primary Courts of Justice for each palatine and district, composed of Judges chosen at the Dietine […] From these Courts appeals are allowed to the high tribunals, erected one for each of three provinces, in which the kingdom is divided[.] Those Courts, both primary and final, shall be for the class of nobles, or equestrian order, and all the proprietors of landed property.
>
> 2ndly. We determine separate Courts and Jurisdictions for the free royal towns, according to the law fixed by the present Diet.
>
> 3rdly. Each province shall have a Court of Referendaries for the trial of causes relating to the peasantry, who are all hereby declared, *free*, and in the same manner of those who were so before.
>
> 4thly. Courts, curial and assessorial, tribunals for Courland, and relations, are hereby confirmed.
>
> 5thly. Executive commissions shall have judicial power in the matters relative to their administration.
>
> 6thly. Besides all these civil and criminal Courts, there shall be one supreme general tribunal for all the classes, called a Comitial Tribunal or Court, composed of persons chosen at the opening of every Diet. This tribunal is to try all the persons accused of crimes against the State.
>
> Lastly, we shall appoint a Committee for the for the forming a civil and criminal code of laws [sic], by persons whom the Diet shall elect for that purpose.

Article VIII follows the same broad trend of the United States Constitution in that the section detailing the judicial power is the most vague and underdeveloped. However, both the 1787 Constitution and the 1791 Constitution also share the historical reality that they were followed by legal acts that immediately filled out much of the details organizing the

judicial system that waws either not imagined at the time of writing each respective constitution, or otherwise could not have been implemented. As noted earlier, there were multiple judicial reforms adopted in the ustawy okołokonstytucyjne through the period of May, 1792, when the 3 May Constitution was essentially destroyed by the victory of the Russian-backed Targowica Confederation and the conclusion of the Polish-Russian War of 1792. Thus, within less than a year since the adoption of the 3 May Constitution, there were already multiple acts passed to flesh out the gaps in its understanding of judicial power. This was actually not much different than the evolution of the United States Constitution: if one recalls, the United States Constitution was created in September, 1787 but was not fully ratified until June of 1788 and went into full effect in March, 1789. The first American Congress passed the Judiciary Act on September 24th, 1789 a day before the Bill of Rights was created on September 25th, 1791 and was only ratified in December of 1791. Thus, though constitutional historians normally think of the Bill of Rights as being adopted as part of the overall compromise to get the Constitution approved by the states, in reality the Bill of Rights was not even the first significant piece of legislation passed by Congress and that George Washington spent the first two and a half years of his presidency before the Bill of Rights coming into force. In this sense, it is perhaps worthwhile to reflect upon—and indeed, dig a little deeper into—whether the judiciary power generally tends to be the least developed in a constitution and that it is generally addressed by a serious of legal documents and civil codes adopted soon after a constitution is ratified. From the point of view of constitutional theory, to a certain degree this seems reasonable: if a constitution is an architectonic document, then ontological and teleological questions are addressed first, whereas praxical and poietic questions (voting procedures, development of ministries, conducting of elections, *inter alia*) are the task that the young constitutional system turns to once it has been established. In fact, if we recall, the United States Constitution gives no organization to the Court system whatever, leaving it up to the Congress to decide.

Whereas the United States' judicial system was relatively underdeveloped, it did have the advantage of being a full, tripartite division of power with the establishment of a permanent Supreme Court, an institution that had existed in Poland-Lithuania but was not something that Montesquieu or Rousseau had advocated for. In this case it seems most curious that the United States—which came from a legal tradition without a strongly centralized hierarchy—would interpret Montesquieu to mean the need to build a Supreme Court on an equal playing field as the Presidency and Congress, whereas Poland-Lithuania, which actually had the tradition of a strongly centralized, permanent Crown Trybunał, would choose to forego it for a largely decentralized legal system where the members of the Comitial Tribunal [or Seym Court] were selected at the beginning of every Seymy. Furthermore, whilst the United States Supreme Court came to be recognized as the superior interpreter of the law and of all the courts in the nation, accompanied with granting itself the power of judicial review, Article VIII instead creates a series of courts—one for the *szlachta*, one for the peasants, one for each town, one for Courland—and even allows for executive committees to more or less govern themselves. The process of appealing and the criteria for selecting candidates to the Trybunał or to the Seym Court are not specified by the 3 May Constitution itself, but are found within the ustawy okołokonstytucyjne. This further demonstrates the decentralized, fragmentary nature of the 3 May Constitutional system.

The scope of analyzing all of the ustawy okołokonstytucyjne is far beyond the scope of our analysis—and given that the 3 May Constitution must be where our journey begins and ends—and ultimately not helpful for answering the narrow question that we have attempted to restrain ourselves to. However, a deeper examination and elucidation of the 3 May Constitution as a "system" rather than as a single document, to look for general patterns and posit general hypothesis with which to examine the emergence of other constitutions around the world appears to be a fascinating and worthwhile scholarly endeavor. Unfortunately, as our analysis draws to a close we can only venture forth to make one final summary of the 3 May Constitution's constitutional archetypes and then to briefly discuss them before turning back to our final question: how our investigation of the 3 May Constitution reflects onto our understanding of constitutionalism *per se*.

Coda: The Puzzle of Constitutional Change in the 3 May Constitution

While the 3 May Constitutional system could evolve organically, spontaneously, and gradually, Kołłątaj and the other founding fathers saw the need for a mechanism of intentional, systematic change. For this reason they created a constitutional provision for an extraordinary Seym that would meet every twenty-five years in order to reevaluate the constitution. On the other hand, it did not have a clear mechanism for constitutional amendments as the American Constitution does. Whether or not this would have led to a (potentially) new Constitution every twenty-five years or something of an amendment process is up for speculation, given that the United States Bill of Rights was not fully ratified until December 15, 1791 and there was not any time for the Poles-Lithuanians to debate the merits of their constitutional change vs the American way.

It seems that, in absence of the concepts of judicial view or executive veto power, there was no effectively way to change an act of parliament aside from an extraordinary Seym. Grounding this seemingly perplexing and inconsistent outcome, one is immediately recalled to Fredro's concept of interregna as the only point when the fundamental law of a nation can be changed, because it is at this moment when sovereignty completely returns to the citizens. The concept of the people as the ultimate reservoir of political authority—and thus the only persons capable of effecting such deep, systematic changes—was shared by Rousseau, Kołłątaj, and Staszic, particularly the latter who suggested that kings had always been essentially representatives of the people. If fundamental changes could only occur when there was a dissolution of the government and the reconvening of the seymiki and Seymy to effectively restart the nation, then an extraordinary constitutional Seym served as an artificial interregnum of sorts. Thus, it was not necessary that the 3 May Constitution be a "finished", unchanging document intended to last for centuries, but was planned as an evolutionary process.

> The Constitution of May 3 did not end the work of repairing the Republic of Poland, but it opened a broad perspective for the future. The basic law was followed by detailed laws on the functioning of the Seym, ministries and courts, and the entire "political constitution" was to be revised after 25 years.[1562]

[1562] Emanuel Rostworowski. 1985. *May 1791-1792 Rok Monarchii Konstytucyjnej*. Zamek Królewski: Warszawa, pgs.11-12.

It is worth briefly summarizing the 3 May Constitution and comparing it with a more mature gaze than when first attempted at the beginning of this analysis. To go through the text point by point would be redundant, so we shall briefly summarize the differences in concepts, principles, and ideas that we have uncovered through a gradual, careful grounding of the Constitution. The first theme to address is that a deeper, historical understanding does not always provide more objective understanding of *what* a particular text says, but can help clarify *why* it was written in a particular way.

To put it another way, there is a more holistic appreciation of the *meaning* inscribed into a text, how a particular idea or arrangement of institutions is now recognized as a solution to a very real historical problem. At other times, this deeper appreciation can help elucidate what appear to be gaps in the text or to reveal that what appears to be contradictions may not be so contradictory at all. The greater we understand the arc of a text's development, the more clearly revealed to us are the ironies, the internal dramas, the tragedies and farces. To illustrate the point, during our first encounter with the text it was remarked that "The system is also hierarchical, with the Church and the *szlachta* given firm rights. There is a clear contradiction between principles of religious toleration and freedom for non-Catholics while Catholics who change their religion are severely punished, which would not be acceptable in modern democracy."[1563] While the objective evaluation does not change upon examining the text a second time—it is still an odd contradiction that seems unsure of whether to promote intolerance or tolerance—once it is examine through the lenses of the Konfederacja Warszawska, the scapegoating of the anti-Trinitarians in the mid-17th century by a selfish king to pay for the selfish, ambitious designs of his dynasty and their eventual expulsion for it, a greater tragedy is revealed. One remembers better times when the lines between Catholic and Protestant and Eastern Orthodox blurred during the Reformation, when a coalition of *szlachta* of varying faiths banned together to take back their rights, check their king's excesses, and usher in a period of peace and reform. One recalls how a zealous Polish Catholic *magnat* and his Lithuanian Protestant *magnat* ally charged and defeated Catholic king who dreamed of absolutism and empire, not on the battlefield, but in the hearts of two nations, ushering in a golden age of liberty, prosperity, and peace.

From a purely objective point of view, the transition of the Polish-Lithuanian monarchy into a constitutional monarchy at the close of the 18th century does not feel particularly new or novel: after all, England had already begun the transition and within the century most remaining European monarchies—those that survived the nationalist floods unleashed by Napoleon, that is—would also embrace constitutional monarchy. However, this objective truth does not appreciate the full difficulty that the Commonwealth faced, the delicate balance of trying to restrain a king to be a good citizen and leader and to bring about an era of prosperity and peace, as the last two Jagiellonians, Bathory, Władysław IV, and Jan Sobieski tried to do. What is also significantly not told by a first, cursory reading of the text is a full appreciation of what is missing from it, what was omitted because it was so obvious to its writers, for example the nature of the seymik / Seym interdependence. Or how significant it was that the Seym shifted toward majoritarian voting in all aspects of life, when

[1563] *Supra*, pgs. 103.

such a decisions appears natural and obvious to our modern-day minds.

It has been our task to elucidate and explore Polish-Lithuanian constitutionalism, to reveal its warts and wrinkles as well as jewels and pearls. Nestled in the heart of Eastern-Central Europe it emerged from local warriors governing themselves in tribes to form uneasy alliances with powerful families and then kings over centuries of bargaining, fighting both on the floor of the Seym as well as the battlefield, and numerous disasters, invasions, and close calls. The period of constitutional construction was long and difficult. Privileges were granted *ad hoc* and kings often reneged on them at the first possible opportunity. Only centuries of banding together across religious and cultural divides produced a movement to force the king to listen to the demands of the *szlachta*. The executionists not only paved the way for the fist true Polish-Lithuanian constitution, but also helped popularize republican ideas, narrow interpretation of a text, the rule of law, and religious toleration. After a difficult interregnum, an all-too brief reign of the beloved Batory, and the rebellion against Zygmunt III August, the major players had all been established and *szlachta* and the Seym both reached the peak of their political power and wealth.

The period of decay and decline was long, with gradual worsening of religious toleration, as well as the relationship between the *szlachta* and *magnaci* with the people lying on the outskirts of the Commonwealth. Inside of being trading partners and being allowed to fully embrace the *szlachta* ideas of freedom and equality, the Cossacks became enemies and the system collapsed, piece by piece. In period of deep crisis and plagued by political paralysis, the *liberum veto* was born as a mechanism more efficient than any other before it at preventing the king or powerful *magnaci* for getting their way in the Seym. Indeed, as the external circumstances deteriorated, the Poles and Lithuanians made great strides in political, administrative, and parliamentary organization, without which truly nothing would have happened to say the life of the Commonwealth. Government turned increasingly procedural and toward the local parliaments, who managed quite well without successful kings or Seymy. Eventually, even the internal features reached local seymiki for a complete and total paralysis.

After several generations of paralysis and two kings under whom the Rzeczpospolita deteriorated into a Russian client state, the *szlachta* had enough. Their Confederacy of Bar was soundly defeated and crushed, but it would only be a catalyst for volatile attempts at reform in volatile age. An ambitious king who travelled the world in his youth desperately tried to synthesize disparate and warring factions within the government in order to make real reform and reinvigorate some of that lost golden era. Considering its time and circumstance, the 3 May Constitution is a remarkable achievement, and it is a fitting close to a long and storied history of *szlachta* and kings fighting together. It synthesized all the great thinkers of its age and combined them with what had become traditional *szlachta* values: the importance of the individual, respect for law, distrust of concentrated political power, inviolability of persons and personal property, the importance of due process and a fair criminal justice system. Polish-Lithuanian constitutionalism was not anarchic, it was not disorganized, it was in a sense too complex, too nuanced, too multifaceted in an era of steel-gloved fists. Balancing power and organizing institutions, and promoting individual freedom and the rule of law are not easy tasks in any age, let alone a nation that was struggling after

so many years of chaos, decline, and being used as a pawn in a larger game between rising absolute powers. Rather than being critical of Polish-Lithuanian constitutionalism, we should recognize that there is so much more to give. In many ways, the people who lived in the Rzeczpospolita were more safe, more secure, and had more rights than in many nations that are still-developing today. It is truly a remarkable story.

V. The Final Turn of the Hermeneutic Spiral: What can Constitutionalism Learn from the 18th Century Polish-Lithuanian Experience?

The time has come to ask ourselves the question: what are the achievements of this long period of constitutional construction? What can we learn from Polish-Lithuanian Constitutionalism, i.e., how does its institutional, practical, and ideational production—as evidenced and elucidated through texts—reflect upon our understanding of constitutionalism *per se*? It is here our exegetical approach truly demonstrates its merit as an iterative process: as an adaptive, learning fusion of theory and methodology. Whereas the previous two iterations provided for both clarification, expansion, and even the addition of new constitutionalist archetypes with which to engage our field of inquiry, this final turn of the hermeneutic spiral offers an occasion to reflect on the entire process itself. The particular nuances of the 3 May, 1791 Constitution itself as well as the constitutional system that was centered around it both presented fundamental challenges to the model itself. These challenges reiterate and clarify not how the categories of the analysis were themselves lacking and in need of refinement, but rather demonstrates the inherent limitations of the categories that were selected at the beginning of our inquiry, namely the tension between "modernity" and "constitutionalism".

The argument, to put it in broad terms, is that Polish-Lithuanian constitutionalism has been vastly underrepresented in scientific literature due to deep historiosophical flaws in past approaches to evaluate it, and that it still has merit with which to contribute to modern comparative constitutional theory. Whereas extensive work was done in order to properly define "constitutionalism", the category of "modernness" was left woefully under-defined, and was more or less assumed as emerging sometime in the 18th century, i.e., that if the 18th century was the beginning of modernity, the constitutions that it produced are *modern* constitutions. The difficulty with such a brief definition is that it broadly placed the American, French, and Polish-Lithuanian constitutions together in the same conceptual category—modern constitutionalism—simply because they occupy relatively similar historical spaces, filled in with shared philosophical foundations as well as the deep cultural and intellectual exchanges that occurred within all three. Yet, it begs the question whether putting them together in the same category to begin with was overly simplistic.

There are two critical details that distinguish the Polish-Lithuanian constitution from both the American and the French constitution. The first is that it was not created by a process of social revolution, and hence did not explicitly remove itself from the previous political system, namely constitutional monarchy for the American colonies and absolute monarchy in the case of the French Revolution. What all monarchies share in common is the personage of the king as inseparably connected with the concept of the state, whether or not in a symbolic, constitutional fiction in the case of modern constitutional monarchy, or in a more

literal sense in the case of Louis XIV's cry "l'etat c'est moi!" That Poland-Lithuania did not abandon its monarchy, whereas the Americans and French did, as well as many others following after them in the Age of Enlightenment and then the wave of revolutionary nationalism unleashed by Napoleon makes the Polish-Lithuanian constitutionalism fundamentally distinct from "modern constitutionalism." It was much more moderate and evolutionary, rather than revolutionary in nature. Throughout this work, there has been some difficulty capturing this division of the state from the person of the king, signified in various things such as: limitations on the usage of the king's lands and the inspection of that usage by the Seym or its representatives, limitations on the usage of the royal seal, the growing autonomy of members of the *Senatorowie Rezydenci* or the Senat to disagree with the king or block the king's plans, control of the treasury, *inter alia*. These have not fit into the constitutional archetypes produced from the very beginning, not due to any inherent flaws in the archetypes themselves, but rather because the archetypes were specifically established with a "modern" constitution in mind. Thus, categorizing "pre-modern" institutions or institutions that we could perhaps say are in some transitional period between pre-modern and "modern" institutions naturally cannot be captured by the archetypes used throughout this analysis, except perhaps in the negative freedoms of the *szlachta* against the power of the king.

The second critical detail is that both the American and the French constitution were specifically secular, if not anti-clerical in the case of the latter. The first Amendment to the Bill of Rights specifically opposes any official establishment of religion, whereas the French constitution puts it into its very preamble. By contrast, the *very first* article of the 3 May Constitution is the establishment of the Roman Catholic Church as the official religion. The close relationship between religion and the state is a hallmark of our modern understanding of monarchism, and along these lines the 3 May Constitution clearly fails the test of "modern" constitutionalism.

Putting the two of these threads together, it seems doubtful whether to consider the 3 May Constitution as the "first modern European constitution" at all. In the sense that a constitution is an architectonic document that founds the legal and political system, the 3 May Constitution is indeed a modern "constitution". However, if one equates "modernity" to the combination of secularism and the separation of the personage of the ruler from the existence of the state, then the 3 May Constitution is not "modern", just as a constitutional monarchy is not modern. Instead, the 3 May Constitutions appears to be on the edge of modernity, lying somewhere between pre-modern British constitutionalism that developed in the 17th century and 18th century modern constitutionalism

Given that the ancient world was replete with monarchies and non-secular governments, the categories of modern constitutionalism are not particularly helpful for understanding broader swaths of human history. Though the 3 May Constitution mentioned some privileges granted by the Piast period, that period was clearly pre-modern. How would a hermeneutics approach operate when going between such broad categories as "modern" and "pre-modern"? We shall return to this question of modernity, and its entanglement with writtenness, the separation of church and state, and the independence of the estate from the personage of the king in the concluding chapter.

Table 5.6 Typology of Constitutionalisms

1789 American Constitution 1791 French Constitution 19th Century Constitutions	Shariah Law Israeli Basic Law	Modern
3 May Constitution, 1791		
Constitutional Monarchy	British Constitution	Unmodern
Written	Unwritten	

Such an investigation would require a deeper spectrum, with broader categories, including pre-modern and non-secular constitutionalisms. Is a theocracy like Iran modern, if it has a written constitution? Is a state like Israel more "modern" than Iran, even though it has an unwritten constitution because it is able to better balance Jewish law with secular law? Such questions would evade the kind of approach that we have presented in this work.

VII. Conclusion: The Gentle Revolution as the Right Thing at the Wrong Time and Place

Was Kołłątaj right? – Kołłątaj's great fears for America was that it was a nation that was too young in a land too distant and too wild, which proved to only provide fuel for the young nation's growth. On the other hand, Poland-Lithuania was a nation that was in many ways too old with many creaking institutions and ideas in a land that was too close to everyone and without anywhere to escape to. Comparing the two, Kołłątaj remarked that the system of "Franklin" could never be adopted in Europe: what was needed was a strong, centralized state and a king to hold a nation desperately together, a captain trying to rally his crew on a ship moments away from capsizing amid thunderous waves and stinging rain.

Was Rousseau right? – Rousseau claimed that one of the best things that could have happened to the Commonwealth was that it be divided to make it more manageable. To Rousseau, the sprawling Rzeczpospolita was too chaotic to govern, the general will too lost in the noise. After the failure of the Confederation of Bar and the First Partition it appeared that the nation had indeed calmed for a time, but it appears that it was calm before the storm. There was no solid republican consensus among the *szlachta*: the drafters of the 3 May Constitution had to meet in secret and wait until their enemies were on holiday to pass the constitution without any opposition, and it still was barely ratified. In less than a year the most ambitious reform project in the history of the Republic had been destroyed at the hands of traitors who received the backing of Catherine and Frederick, naively believing their lies that they just wanted Stanisław August removed and the world returned to normal. Instead

many of them died in exile in disgrace, abandoned by their patrons, their nation and its history stamped out. Even now *Targowiczanin* means to Poles what Iscariot means to Christianity.

To a certain degree, both of these approaches were right. We began this inquiry by asking whether Poland-Lithuania was murdered or committed suicide. We may perhaps be able to give an answer to such a hypothesis. A pessimist would say that she committed suicide, a realistic might say that the Commonwealth was pushed down a flight of stairs while inebriated. A romantic would say that she was cruelly betrayed and murdered, an innocent maiden plucked in her prime. We choose a different answer. The reforms that the Rzeczpospolita attempted sought to increase the freedom of her people, to correct the mistakes of the past. The 3 May Constitution was not perfect. No constitution ever is. Freedom of trade, freedom of conscience, freedom of religion, rule of law, executives who do not abuse their power, and basic respect for human dignity have proven time and time again throughout human history to be keys to peace and prosperity in the long run. Cicero would say that the question for human freedom is natural, that all tyranny fades next to the human spirit.[1564] America, England, and Switzerland adopted many of these principles and thrived, shielded by seas or mountains. Others attempted them and perished.

It was not geography—or the absence of it—that killed the Commonwealth. Rather than meekly accept diminishment and disgrace, she bravely struggled and lost. It was the fight that killed her. It is a story worth remembering. It is story that needs retelling.

[1564] Indeed, Cicero's whole point is that concentrations of political power "contrary to nature" is the driving force of political cycles. See: Marcus Tullius Cicero. 2004. *On the Commonwealth*. George Holland Sabine, trans and Introduction. Kessinger Publishing: Whitefish, Book II, Sections XXIII-XXXIIII.

Conclusion

The *Spirit of Polish-Lithuanian Constitutionalism*: Persisting Relevancies for Today

I. Introduction

Our intellectual journey began with a problematization of the historiosophy of the Polish-Lithuanian Commonwealth, which has waffled between Poles of romantic-messianic fetishism to pessimism. An antidote and a potential grounding to escape this trap was offered: a more robust conceptualization of Polish-Lithuanian constitutional development, a rediscovery of Polish-Lithuanian constitutional language. Through problematizing the concepts of "constitution" and "modernity" the 1791 Constitution could be revived as a reflection and parallel for our own age, that after first understanding its nature—its triumphs and failures, its struggles and nuances, we could then make the 1791 Constitution as a transcendent phenomenon with lessons to learn for any time and in any place. Whether or not that task has been achieved or not, it has already been achieved by now. The 3 May Constitution has now already come alive for us, and it is time to close that chapter and to reflect on constitutionalism *per se*, as well as on future horizons into the dangerous and unknown.

If the reader will indulge us, it is time to take a shift in tone, a shift in approach. The first few sections were introductory and made in a comparative spirit to properly ground us for a deeper exploration of the evolution of the 3 May Constitution on its own terms, our story within a story. The chapters exploring its long and painful period of construction, its frustrating period of decay and maintenance, and the highs and then tragic low of its attempt at renaissance avoided comparisons and asides as distractions whenever possible. Texts were presented and then scrutinized over and over to wring as much context and meaning from them as possible. We now have a different task: to unleash that burning desire to compare and theorize, to indulge in wild thoughts and intuitions that scratched in the back of our minds as we investigated slowly and carefully. It is now time to look toward the future ahead.

This final, brief chapter will proceed as follows. We shall give a final summary of Polish-Lithuanian Constitutionalism to grasp its meaning in the broadest way that we can, but simultaneously apply some of the concepts and tensions that we have discovered back onto constitutionalism *per se*. Finally, we shall look to the future, where the author will highlight what he believes to be some potential research for would-be-fellow-adventurers. Of course, as stated throughout this work, these categories are not absolute: reflecting upon various constitutionalist themes from Polish-Lithuanian history requires some comparison, even if comparison may not be the explicit or primary goal of that section *per se*. As a final general comment, this final indulgence has little in terms of sophisticated structure, but is to some degree a "thinking out loud" of observations present throughout our journey, often presenting ideas or intuitions presented by Polish-Lithuanian thinkers themselves as potential hypotheses to test. This section will also be light on literature, which distracts away from

pure discussion of ideas, but the author believes such an approach will be forgiven, considering how exhaustive the literature has been in previous sections.

II. What Does Polish-Lithuanian Constitutionalism *Mean?*

A. Fredro was Right: The Cyclical Nature of the Polish-Lithuanian Constitutionalism

One of the most intriguing theorists of Polish-Lithuanian thought was Andrzej Maksymilian Fredro. His work has been covered extensively already, so we shall not belabor ourselves with excessive literature here. Fredro was a remarkably well-read person, combining deep insights from his own practical experience, but also from classical sources, particularly history, which he used as a lens with which to interpret his own times. An attribute of Fredro's analysis that stands out is its cyclical nature, with societies only having a set number of stable possibilities to gradually pass through in various phases. While he did not believe in determinism or a set teleology, Fredro did appear to have a sense of pessimism at times, as if his beloved Republic could not endure forever.

However, Fredro also presented an incredibly fascinating thesis for us about the cyclical nature of the Rzeczpospolita. Not in the traditional sense that it was gradually decaying from one form to another, but rather that there was some kind of stability to it. The process of interregnum was not an inherently chaotic process, but one in which there was an opportunity for deeper reflection upon constitutional institutions, with a very real possibility of enacting change and reform. In many ways, Fredro anticipated the later ideas of Staszic, in that interregna were a time when the sovereignty returned to the people and it was only when political legitimacy returned to its source that true change could begin, just like animals returning home to spawn. The 3 May Constitution hypothesized that it was possible in some way to recreate this process artificially by establishing a constitutional convention every 25 years with the express purpose of attempting significant change. One drawback was that the 3 May Constitution also did its best to *prevent* systematic changes outside of these extraordinary events. Here it is not the implementation that is interesting: whether an interval of 5 years or 25 years is better for such a purposeful reinvention of the constitution is a question that is ultimately unanswerable.

Indeed, in the modern world with its pace of seemingly constant acceleration, the interval between such widespread, systematic changes appears to be shortening and shortening all the time. No, what we are truly interested in is the principle *behind* such change. Here we must ask, are there other constitutional theories who have attempted to codify the rejuvenating power of what is ordinarily destructive and chaotic? Are there other constitutions over the course of human history that have written similar mechanisms into their constitutions? One of the difficult tasks of modern constitutionalism is the rapidity at which new laws are established or interpreted: the United States produces hundreds of thousands—if not millions—times more pages in regulation than the length of the Constitution every year. Would a cyclical theory of regularly imposed constitutional change even be noticed in the modern world? Would it be more meaningful than modern institutions and bureaucracies endlessly seeming to produce law simply for the sake of producing law? Here undoubtedly the two experts are Bruce Ackerman, who invented this concept of

constitutional moment where society regularly gathers to reconstitute itself—sometimes even if unaware of it— and Marek Tracz-Tryniecki,[1565] an expert on Fredro who has tried to synthesize his theories with modern approaches to constitutional thought.

There is another aspect of the Polish-Lithuanian Commonwealth that appeared cyclical: the long process wherein the *szlachta* would gradually gain their rights from the king. Inevitably the pattern would fall: the king would abuse the state's resources for his own gain, such as financing a war that was unpopular or trying to head off domestic rivals, *inter alia*. The *szlachta* would raise their concerns to the king, would be ignored until they completely withdrew their consent, i.e. their taxes and their military support, and perhaps even threatened to rebel. The king would inevitably make promises, try to partially fulfil them or renege on them, followed by escalations by the *szlachta*. Eventually a crisis would occur—often precipitated by a crisis such as the sudden death of the king, a disastrous military campaign, an unexpected invasion, etc.—and the king would then be forced to relent. After the crisis was resolved, the king would try to take some power back or would be weak throughout the remainder of his reign. This process repeated numerous times, with the *szlachta* threatening to revolt quite regularly, but over time privileges such as *Neminem Captivabimus* and *Nihil Novi* were won. An interesting line of research would be to compare all of these disparate political contexts and synthesize them into a "political cycle crisis theory" of the Commonwealth, either an internal history or comparing to how other contemporaries of the *szlachta* may have won their rights, for example the Hungarians, the originators of the *rokosz* to begin with.

B. The May 3 Constitution as a Hybrid between British and American Constitutional Styles

We have already discussed how any kind of constitutional comparative analysis requires a firm conceptualization of what a "constitution" truly is. Furthermore, when evaluating the historical claim that the 3 May Constitution was the second "modern" constitution, it is necessary for a deeper investigation into what modernity means. The 3 May Constitution drew on elements from both the American and the British constitutional systems particularly, and its advocates saw the Commonwealth as building upon both of them. However, in the establishment of both a hereditary monarchy as well as recognizing the Roman Catholic Church as the official church, it is doubtful that the 3 May Constitution is truly "modern" in the sense that that the American and the French constitution were, which were both designed to be radically secular as well as to explicitly remove a monarch. It seems that the 3 May Constitution was somehow in the middle of these two—Britain on one hand, America and France on the other—constitutional traditions, in that while the Rzeczpospolita never had an active policy of religious intolerance and persecution, in many ways the deck was stacked against Protestant groups throughout its long history. The First Article of the 3 May Constitution is ambiguous and seems to reflect some kind of political compromise, rather a coherent political position.

[1565] *Supra*, n1225.

This theme of somehow lying in between the two largest 18th century camps of constitutional thought is also reflected in the Rzeczpospolita's concept of monarchy. A powerful king in the sense of Louis XIV's famous "L'etat c'est moi!" never existed in the Commonwealth. At the same time, Poland-Lithuania did not adopt the concept of constitutional monarchy that evolved in Britain post the Glorious Revolution, which set the tone for how most European monarchies would develop until today: the monarch is a figurehead whose control over the state is ceremonial, rather than wielding real power. Under the 3 May Constitution, the king had serious powers and some role in setting the parliamentary agenda, even if most legislation was developed by the Izba Poselska and could be rejected by it. Whereas Rousseau, Kołłątaj, and Staszic preferred a king who was more of a figurehead and may have toyed with the idea of not having a king at all in the writings, they were pragmatic enough to realize the political reality of needing a king to anchor the country through a troubling time. Hence the role of king in the 3 May Constitution is similar to that of the American presidency, although it would be a president elected for life.

Returning to the legislative branch, the Senat was actually closer to the British House of Lords than the American Senate, in that it was a largely ceremonial institution that could slow down or provide a soft check against legislation proposed by the Izba Poselska but could ultimately not overrule it. Both the Senat and the House of Lords also had many of their permanent members being representatives of the Church, though from time-to-time politicians in the House of Commons or other government officials may have been granted life peerage to serve in the House of Lords whereas many Senat members were always ministers or other members of the monarch's government. The lines between the executive and the legislative were thus blurred in Poland-Lithuania, whereas they are distinctly fused in the British system, but ultimately in both of them the role of the upper house is significantly weaker than the American Senate.

It is also important to more deeply flesh out this connection between "modern" constitutions and "writtenness". The "first modern constitutions" of 1789 and 1791 are often categorized by broad strokes such as written vs unwritten, common law vs civil law, common law vs continental law, civil law vs cannon law, etc. When problematizing this first broad category writtenness is a poor constitutionalist category, in that there are no clear criteria to internally differentiate among written constitutions, i.e., there is no objective way to determine *how* written they are. For example, the United States' Constitution has only around 4,500 words—so less than 10 pages if it were published in a standard academic journal in regular—rather than stylized—font. On the other extreme, the Constitution of India is over 145,000 words long, which is longer than many popular novels. The United States Constitution and "older" constitutions also use a mix of natural law and some positive delimitation of rights as a framework to shape other laws, whereas gargantuan modern constitutions blur the line between a constitutionalist document and a civil code. Thus, in many ways the broader, architectonic, and natural law themes presented in the United States Constitution remain arguably closer to the "unwritten" constitution of Britain and other common law countries than to other "written" constitutions; for example one could take all day to read the Constitution of India whereas one could read the United States' Constitution, the *Magna Carta*, the 1707 Act of Union, the 1688 Bill of Rights, and other significant Acts of Parliament written before 1900 in under an hour, *combined*.

Thus, the ontological category of writtenness is too simple and artificial. In its place was suggested "quasi-writtenness" as kind of an intermediate category between written and unwritten as ideal types within constitutional theory, an example being a central constitutional text that nonetheless is highly dependent on a constellation of minor, ancillary texts to support its interpretation. The question for constitutionalist scholars is thus on the stand-aloneness of the primary text—*the Constitution*—from texts that have *constitutional* import. Ultimately, this presumes that some kind of inherent hierarchy of textual sources is required within any "written" constitutionalism. Instead, a more accurate and nuanced understanding is whether or not constitutional systems are arranged hierarchically with one text being supreme or more horizontally with a wide variety of texts more or less on the same playing field, constitutionally speaking. Thus, *writtenness* and the *stand-aloneness* of constitutional texts are themselves variables to be taken into account, rather than simply assumed *a priori*, which establishes a spectrum of varying constitutional constellations. A "quasi-written" constitution would occupy an intermediate position wherein there is a central text that is relatively "weak"—that is bereft of constitutional details and positive provisions, uses vague language, specifically enumerates and identifies sources of law or pre-existing legal texts that it relies upon, etc.—and thus does not stand alone, but rather is at the core of a tight constitutional constellation. We posit here that the 3 May Constitution is an example of quasi-written constitutionalism *par excellence*, though there is much room for debate as to how the *ustawy okołokonstytucyjne* should be most properly interpreted and arranged, and as to whether such an order is necessarily fixed or not.

If a "constitution" is designed in a loose manner and is intended to evolve—either *ad hoc* as in the American case, or according to a regular, prescribed order—than the hierarchy of constitutional texts has to be continuously evaluated at various points over its lifespan. Thus, rather than to assume a constitution neatly fits into one category or not and then to make broad comparisons between the categories or within such categories, the various connections that each constitution has within its own unique constitutional environment—so to speak—cannot merely be assumed, but itself is something of constant scholarly investigation. For example, it has been suggested that broad insights from American constitutional theories that attempt to wed textualism, contextualism, and a theory of sociohistorical constitutional evolution, e.g., original-law originalism. What is difficult about such a task is that the American constitution has a very clear supremacy clause and does not explicitly address any other, legal acts. American legal scholars' thus find themselves within an ever-present tension: either have a narrower interpretation of that text and treat it as self-contained source as much as possible, or otherwise have a broader but also more speculative history of trying to identify where which source of which particular idea comes from. The 3 May Constitution presents something of a unique opportunity in that the aforementioned tension is lessened, because it *firstly* has an explicitly evolutionary approach to constitutional development, rather than one that is implied; *secondly*, it provides a concrete list of sources that it draws upon, as we have attempted to work out very briefly in our analysis throughout; *finally*, by listing the supremacy clause of the 3 May Constitution in a text lying outside the original constitution itself, it is automatically some kind of hybridized constitutional system, by its own internal understanding. In many ways, the 3 May Constitution is thus more fertile

ground for the contextualist theories developed by American constitutional lawyers than the American constitution itself is.

A final comment would be that perhaps the concept of polycentricity should be used to describe Polish-Lithuanian constitutionalism as a common theme leading up to its fuller, more systematic presentation in the 3 May Constitution. Ordinarily, polycentricity is used to indicate multiple, independent centers of political power or governance, such as in federal system. Certain understandings of constitutionalism and subsequent constitutional texts would reflect such polycentric understandings, i.e., the 1787 Constitution has an implicit theory of polycentric government within it because that was already effectively the political reality of the American states at the time it was drafted. As such, there may be multiple centers of governance on particular levels, but the overall hierarchy of levels is itself something that is generally fixed and well-understood. Of course, this is something of an oversimplification, as some federalist interpretations of the United States Constitution would understand the 9th and 10th amendments as putting limitations on the federal government. The extremes of these few, such as antifederalist, constitutional theorists of the Confederacy and contemporary states' rights activists would argue that the federal government is in fact supposed to be quite weak. Another problematic modern example would be the European Union, which has the two contravening constitutional principles of unified, rule of law but also requires constitutional changes to be unanimous, which greatly empowers individual states, even against the consensus of the bloc. To summarize, a system might be polycentric but there is generally always some kind of hierarchy or centralized document that reflects and outlines such polycentric nuances.

Taken to its extreme, this would be a confederation, rather than a federation. The case of 16th century Poland-Lithuania perhaps sheds some light into this understanding of polycentricity, in that there was actually the establishment of a *dual system* where institutions directly paralleled each other, rather than simply allowing each constituent unit to govern themselves. As such, there was some consensus in the sense of how a constitutional system should be structured, but at the same time other considerations such as geography or political-cultural identity created parallel structures that could not be subsumed within a clear hierarchy. Indeed, much of the difficulties and nuances within the Polish-Lithuanian Commonwealth was the fact that it was a dual union, not in the sense of the 1707 Act of Union between England and Scotland wherein they may have been nominally equal but in reality, England was in all senses the superior in the relation, but in the sense that the Kingdom of Poland and the Grand Duchy were genuine partners since the 14th century. Thus, Poland-Lithuania has much to contribute to historical understanding of unions: how they come about, how they adapt, how they thrive, and how they decline.[1566]

C. Jurisprudentially Conservative Nature of Polish-Lithuanian Constitutionalism: the Importance of Praxis and Poiesis

[1566] That Poland-Lithuania has much left to contribute to scholarship on the idea, institutions, and practice of "unions" is a key idea of Frost, who specifically wrote the first volume of *The Oxford History of Poland-Lithuania* with this in mind. For his summarize of the concept of union as well as his own interpretation of union in specific reference to Poland-Lithuania, see: Frost, *Oxford History of Poland-Lithuania*, pgs. 36-46.

One observation that could be made about the 3 May Constitution was that it was actually not so radical of a document after all, but rather it was a clear outgrowth of multiple themes and practices throughout the history of the *szlachta* and their quest for the golden liberties. For example, as mentioned earlier, in many points the Roman Catholic Church was always the *de facto* Church of the nation: every coronation of the king and every session of the Seym would be accompanied by an official mass, the clergy appointed to the king's council would always be from the Catholic hierarchy, the Akademia Krakowska and other royally supported centers of learning were always associated with and staffed by the clergy, that every Polish and then Polish-Lithuanian king was a member of the Catholic church or had to convert in order to receive the crown, *inter alia*. The 3 May Constitution arguably just transformed the *de facto* reality in *de jure* reality.

Another theme that was consistent was that there was always a tension between the *magnaci*, the *szlachta*, and the king, which not helped create some kind of bicameral parliament after *nihil novi* in 1505, but that this quite easily and naturally fit with tripartite division of governments according to classical political theory. The tension between the Senat and the Izba Poselska as well as aristocratic, monarchic, and democratic elements quite naturally and easily led to *monarchia mixta* becoming the dominant political theory, with even strong "monarchists" being unwilling to adopt a Filmerian theory of the king, and with even very strong "republicans" arguing that the king should always remain, even as a figurehead with which to unite the nation together. The theory of *monarchia mixta* and the political necessity of maintaining some figure—even if symbolic—to unite the disparate lands of Lithuania, Ruthenia, and the Polish Crown quite naturally secured the presence of a "citizen monarch" as a guarantor and protector of liberty, as a "first-among-equals" who would rule more as a manager than as an absolute source of political power.

Throughout the history of the Commonwealth there was always a very strong, pragmatic tendency that looked to address the pressing needs of the nation first, rather than to make conscious, systematic changes or reforms. Whether or not this is specifically unique to Polish-Lithuanian constitutionalism or is a general rule of thumb universally is a question beyond the scope of this study, as it would be attempting to look at the intersection between various constitutional cultures and political realities throughout history in order to look for such broader patterns. For example, is it consistent across history that whenever there is a time of intense *external* pressure, e.g., invasion, natural disaster, plague, *inter alia*, that there is a shift away from foundational questions to practical ones? Or are some cultures more or less jurisprudentially conservative, i.e., willing to preserve their institutions first and foremost? Another question would be to ask if foundational questions always necessarily develop before practical ones? Or is the distinction between foundational and practical, and then developing foundation aspects before the practical aspects simply a result of 18th century, early modern constitutionalism, which evolved from classical republicanism and natural law into classical liberalism? As we have already observed, Montesqueieu, Rousseau, Ostrowski, Kołłątaj, and Staszic devoted considerable effort to both foundational as well as practical concerns. Can it be generalized that if a group has enough political consensus to draft whatever constitution they wanted rather than having to draft whatever constitution the political context allowed— in practical terms, being forced to make compromises—that both foundational and practical questions would be worked out from the beginning? The 1787

Constitution and the 3 May Constitution were notably the results of compromise, hence perhaps it was only possible to build foundational contours first, and then to build in more specifics later. Contrastingly, the creation of a new constitution by a dictatorship or with an overwhelming political consensus, i.e., a constitution adopted by a victorious party at the end of a civil war or revolution, would have very different characteristics.

To use some concrete examples from the Polish-Lithuanian constitutional history, the executionist movement began with simply asserting the need to respect the old laws, even though the external political situation was relatively stable, and the Poland-Lithuanian union was relatively powerful, militarily. Still, the *szlachta* erred on the side of caution and gradual reform, with Modrzewski pushing for broader reforms to the Church and serfdom than were eventually adopted. The executionists did not employ radical language either, but always were focused on the importance of justifying their actions as correct interpretation and implementation of the law, though this did have some effects such as reshaping how the law was interpreted according to the will of the *szlachta* rather than the king. So thus, by small, more incremental and practical measures, constitutional changes were gradually accomplished. Similarly, a century later Siemek, Opaliński, and Fredro were concerned with parliamentary procedures and institutions, generally arguing that the present flaws of the state should be mended in order to repair political consensus and build *szlachta* unity before making any large changes. Fredro was especially concerned with preserving the law and making sure that previous laws were generally interpreted very narrowly, whereas Opaliński was concerned with egzorbitancje and the balance of power between the senators and the *szlachta*. Przypkowski was concerned with the importance of toleration on foundational as well as practical levels, but his most pressing concern was trying to not get expelled from the country. Regardless of their specific concerns voiced in their writings, Fredro, Opaliński, and Przypkowski were also engaged in the political process, and were thus not disconnected theorists.

As a final note worth considering on this point, it was quite clear that throughout the history of the Commonwealth, there was a distinction between what more modern constitutional theory would refer to as "constitutional" vs "political" questions,[1567] though the terminology that was used was inconsistent, e.g., fundamental law, cardinal law, political law, the golden liberties, the jewel of freedom, konstytucje vs privileges, *inter alia*. This lends further credence to the idea that even though a clear distinction between constitutional and political questions was revived by modern constitutionalism, this does not mean that such a distinction is necessarily inherent to modern constitutionalism *per se*.

[1567] The distinction of "political questions" as issues that the Supreme Court should not engage in, e.g., internal management of the executive branch or the implementation of policy, was one of the achievements of *Marbury v.* Madison. For a brief overview of the vast literature, see: Tara Leigh Grove. 2015. "The Lost History of the Political Question Doctrine." *New York University Law Review* 90:1908-1974: Louis Michael Seidman. 2004. "The Secret Life of the Political Question Doctrine." *John Marshall Law Review* 37: 441-480; Rachel E. Barkow. 2002. "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy." *Columbia Law Review* 102(2): 237-336; Robert F. Nagel. 1989. "Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine." *The University of Chicago Law Review* 56(2): 643-669; J. Peter Mulhern. 1988. "In Defense of the Political Question Doctrine." *University of Pennsylvania Law Review* 137(1): 97-176; Louis Henkin. 1976. "Is there a 'Political Question' Doctrine?" *The Yale Law Review* 85(5): 597-625.

D. A Nation as a Ship of Theseus: Inherent Paradoxes of Constitutional Power

The processes of interregnum and election throughout the history of Commonwealth also demonstrate the central importance of the question of the continuity of the institutions of power, authority, and legitimacy, as well as the concept of the political nation more generally. Władysław II Jagiełło achieving the throne and then his sons further inheriting it was a series of what Staszic would refer to a minor, natural interregna. However, the election of Henryk Walezy demonstrates how this was essentially a legal fiction, with the *szlachta* as a collective always being the true source of the nation.

The only solution to this inherent paradox is to recognize that the there had to be some other site of political will or authority that existed above and beyond the king. This is certainly consistent with Fredro and Staszic contending that power ultimately resides in the political nation itself, to which it returns, though Staszic seems to take the argument to its logical conclusion: that it has always been so that, in the end, whether a king is elected or hereditary or not is not important. However, even assuming that the "people" or the "nation" are somehow the ultimate wellspring of legitimacy, then where does a constitution come from? The modern understanding of a constitution is that it must be the supreme law of the land, i.e., there can be nothing higher than the constitution itself. However, when a collective group gathers together to draft a constitution, where do they get the authority, legitimacy, and power with which to draft the constitution in the first place? Surely, it is absurd to say that there was some kind of natural constitution, which only they truly understood and implemented, which then retroactively justifies its own existence? But is this not retroactive assumption of legitimacy by a constitution when it has been signed the exact same species as when a king retroactively grants himself authority by signing the act by which he is then crowned?

This seeming paradox of constitutionalism and ultimate authority in society is not limited to the Rzeczpospolita. When the barons forced John II to sign the *Magna Carta*, what authority did they have to rebel and then create the new constitution, and was the *Magna Carta* a constitution granting said authority in of itself, or merely an expression of the rebelling barons' interests? The traditional Whig response was that there was an Ancient Constitution in England which was merely codified by the *Magna Carta*, whereas Bentham was more cynical, critiquing the political motivations of the barons.[1568] In 1688 a similar

[1568] Sir Edward Coke (1552-1634) and Sir William Blackstone (1723-1780) were two of the most prominent advocates of the *Magna Carta* as manifestation of the natural constitution thesis. While this hypothesis does remain prominent in the literature, modern legal historians have generally followed the trend of historians elsewhere to be more cynical, such as positing that the *Magna Carta* was a limited document between the nobles taking opportunities of a weakened king to protect their wealth and secure more privileges from themselves. According to this view, the idea of the *Magna Carta* as some universal document of rights is therefore a myth. As with all intellectual history, it is to be said that both sides of the argument have weight to them, as well as many possible alternative interpretations or those that may fall between them. The author prefers something of a reconciliatory approach in that the myth of the *Magna Carta* may somehow have taken on a life of its own and thus become more important than the original document itself, and that this is what has transhistorical value. For a fuller perspective on the debate, see: Edward Coke. 2010. "Selected Writings of Edward Coke." *Online*

argument could be made that noble rebellion against the king was a question of them transferring sovereignty (back) to themselves.[1569] For the example of the United States Constitution, in some sense the 1789 Constitution was illegal because there was an already existing constitution at the time—the Articles of Confederation—which even spelled out a mechanism for constitutional change to amend or change the existing constitution.[1570] Thus when the 1789 Constitution declares itself the supreme law of the land there is a direct problem of who is the true sovereign, and by what right does a (new) constitution legitimize

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Library of Liberty, pgs. 838-839; William Blackstone. George Sharswood, ed.1898. *Commentaries on the Laws of England in Four Books*. J.B. Lipincott: Philadelphia; William Sharp. McKechnie. 1914. *Magna Carta: A Commentary on the Great Charter of King John*. J. Maclehose and Sons: Glasgow; Robert C. Palmer. 1985. "The Origins of Property in England." *Law and History Review* 3(1), pg. 1-50; Morton J. Horowitz. 1997. "Why is Anglo-American Jurisprudence Unhistorical?" *Oxford Journal of Legal Studies*, pg. 555; Ralph V. Turner. 2003. *Magna Carta: Through the Ages*. Harlow: Longman; Theodore F. Plucknett. 2010. *A Concise History of the Common Law*. Liberty Fund: Indiannapolis; Robert Blackburn. 2016. "Foreword: Magna Carta: Our Common Heritage of Freedom." In Zbigniew Rau, Przemysław Żurawski vel Grajewski, and Marek Tracz-Tryniecki, eds. *Magna Carta: A Central European Perspective of Our Common Heritage of Freedom*. Routledge: London and New York, pgs. xii-xvii.

[1569] The Glorious Revolution of 1688 is most directly responsible for the maturation of parliamentary supremacy in England, which remains dominant in today's United Kingdom, though some argue that it was also an opportunity to restore the Ancient Constitution that had existed in various forms and to varying degrees since the *Magna Carta*. The reapportioning of sovereignty that was the consequence of the Glorious Revolution was a major point of contention in the late 17th and 18th century Anglo constitutional sphere, in that advocates of parliamentary supremacy argued that the diminished powers of the king automatically transferred to parliament, whereas others argued that they returned to the people (i.e. the nobility). This latter view was the minority view in the United Kingdom but the dominant view in the American colonies, who argued that sovereignty shifted to their local governments, rather than to Westminster. For a fuller debate, see: Robert M. Pallito. 2015. *In the Shadow of the Great Charter: Common Law Constitutionalism and the Magna Carta*. University Press of Kansas: Lawrence; Eric Nelson. 2014. *The Royalist Revolution: Monarchy and the American Founding* Belknap Press: Cambridge, Massachusetts; Gary W. Cox. 2012. "Was the Glorious Revolution a Constitutional Watershed?" *The Journal of Economic History* 72(3): 567-200; Jack P. Greene. 2011. *The Constitutional Origins of the American Revolution*. Cambridge University Press: Cambridge; Alexander Hamilton. 2008. "Federalist 26." In: Alexander Hamilton, Hames Madison, and John Jay. *The Federalist Papers*. Oxford University Press: Oxford; John P. Reid. 1995. *Constitutional History of the American Revolution*. University of Wisconsin Press: Madison; Ian R. Christie. 1977. "British Politics and the American Revolution." *Albion: A Quarterly Journal Concerned with British Studies* 9(3): 205-226; *S*.F.. Milson. 1969. *Historical Foundation of the Common Law*. Butterworths: London.

[1570] Article XIII of the Articles of Confederation states:

"Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." The 1789 Constitution was largely written in secret by persons who were not formerly elected representatives to the Colonial Congress since they knew that the threshold of consensus for constitutional change demanded by the Articles made amendment to them nearly impossible. Given the chaotic situation of the 13 colonies in the 1780s it became clear that drastic measures would be needed, something of a reset of the system, rather than simply trying to make incremental changes from within. While it may be argued—in historical hindsight—that the Constitutional Conventions were necessary for the survival of the nation and that the 1789 Constitution is the most enduring constitutional document in the history of the world, its creation was technically illegal in that its creation was not authorized, though it was also ratified by the state legislatures. It was the constancy of these state legislatures both under the Articles of Confederation as well as the Constitution that provided continuity and legitimacy. For a full text of the Articles of Confederation and some light commentary, see: "Articles of Confederation." September 27, 2019. History.com. https://www.history.com/topics/early-us/articles-of-confederation. Accessed 10-17-2021.

itself while legitimizing political and legal power? Finally, the National Assembly that elected its own members to write the 1791 French Constitution was itself a body that had questionably seized power during an unstable social change.

Further research into the paradoxes of constitutionalism and legitimacy within the history of the Commonwealth is not likely to be earth-shattering for either constitutional or political thought. However, there is so much about the Polish-Lithuanian within the world's history that is unique: that it was a dynastic and personal union that essentially became permanent through the mutual will of both constituent parts, rather by military force, as had occurred with the 1707 Act of Union as a result of wars between England and Scotland. Furthermore, the entire process of electing a king in relatively peaceful transfers of power—from 1434 to 1697 there had never been a serious, prolonged civil war or rokosz over the question of an election although there were some armed moderate clashes or some regions refusing the new king, as with Bathory's election being rejected by the north of Poland around Gdańsk that was quickly settled with military force—is quite unique and in many ways parallels the peaceful transfer of power commonplace in developed democracies today. Hence, there may yet be more contributions to political science and constitutional theory that could be made by further study.

III. Work to Do in Exploring Polish-Lithuanian Constitutionalism: Horizons for Future Research

A. Prosopography of Seymiki and Seymy diaries

A crucial element of Polish-Lithuanian political life was specifically omitted from this study due to limiting the field of inquiry to constitutionalism and texts: the vibrant political and cultural life that occurred at seymiki and Seymy. There are multiple collections and editions of various seymik and Seymy diaries, both those that were official productions at the time as well as the personal diaries of persons who attended them.[1571] The purpose of our inquiry must be as narrow and as limited as possible, which is useful as a prolegomena

[1571] For a brief view of the immense literature, see: Paweł Wiązek. 2021. "Posłowie wobec problem reformy prawa sądowego w pierwszym roku obrad Sejmu Wielkiego w świetle diariuszy sejmowych Jana Pawła Łuszczewskiego i Antoniego Siarczyńskiego." *Prawo* 332: 55-67; Małgorzata Dawidziak-Kładoczna. 2018. "Przejawy świadomości językowej w zakresie stosowania perswazyjnych aktów mowy w średniopolskich diariuszach sejmowych." *Acta Universitatis Wratislavienisis* 28: 87-99; Iren Kaniewska. 2016. *Diariusze sejmu koronacyjnego Zygmunta III Wazy 1587/1588 roku*. Towarzystwo Wydawnicze „Historia Jagellonica": Kraków;Andrzej Stroynowski. 2016. "Zalety i wady tronu elekcyjnego w świetle wystąpień sejmowych czasów stanisławowskich." In: Mariusz Markiewicz, ed., *Wokół wolnych elekcji w państwie polsko-litewskim XVI-XVIII wieku. Oznaczeniu idei wyboru—między prawami a obowiązkami.* Wydawnictwo Uniwersytetu Śląskiego: Katowice, pgs. 57-73; Małgorzata Dawidziak-Kładoczna. 2015."Językowe syngały recepcji mów w staropolskich diariuszach sejmowych i sprawozdaniach stenograficznych z obrad sejmu." *Prace Naukowe Akademii im. Jana Długosza w Częstochowie. Językoznawstwa* XI: 19-32; Kamil Marek Leszczyński. 2014. "Stanisław Sędziwój Czarnkowski – marszałek sejmu lubelskiego 1569 roku w świetle publikowanych diariuszy sejmowych." *Białostockie Teki Historyczne* 12: 61-80; Andrzej Stroynowski. 1981. "Metody walki parlamentarnej w toku dyskusji nad reformą królewszczyzn na Sejmie Czteroletnim." *Acta Universitatis Łódzki Folia Historica* 10L: 35-48; Władysław Czapliński. 1970. "Z Problematyki Sejmu Polskiego w Pierwszej Połowie XVII Wieku." *Kwartalnik Historyczny* 77(1): 31-45.

to any future work on constitutional study. The difficulty with such diaries is that it is nearly impossible to discover the intention of collective texts with multiple authors or generations of authors, and the legacy of past Supreme Court Justice Scalia was in advocating for a purer constitutional text that treats the text *as-if* it were an objective social fact. This is not done for ideological reasons, but for methodological ones, and sidesteps the impossible process of discerning intentions of multiple authors and multiple sources across multiple generations.[1572] It is not therefore clear that incorporating diaries of legislators and of examining legislatures' notes and minutes would do much to solve questions of constitutional meaning at all, and instead might introduce an interminable series of problems.

However, it one were interested in understanding the interaction between how a constitutional text emerges from a specific political culture, then such diaries would be particularly interesting. The first such method with which to attempt to synthesize such broad information would be collective biography of the *szlachta* who attended the seymiki and the Seymy in the first place, e.g., what historians refer to as a prosopography.[1573] The second would be attempt some kind of deeper textual analytics to map out debates that occurred during constitutional conventions and how texts actually emerged from such discourses, such as is current being attempted at the Quill Project based at Pembroke College, Oxford.[1574] This would not only bridge Polish-Lithuanian parliamentarism with contemporary studies of comparative parliamentarianism, but would be a more scientific, evidence-based approach to try to close the gap between legislators' individual intentions and constitutional texts.

B. A Constitutional Political Economy of Religious Toleration– Przypkowski's Stress Test

The second major avenue of potential research would look at Samuel Przypkowski's thesis that nations that create religious toleration are more prosperous, freer, safer, and have citizens more willing to engage in public life and the defense of the nation when necessary. What is significant about Przypkowski's approach is that he gives multiple dimensions on

[1572] Kiran Iyer. 2014. "Justice Scalia, Justice Thomas, and Fidelity to Original Meaning." *Dartmouth Law Journal* 12, pgs. 68-70; Randy E. Barnett 2013. "The Gravitational Force of Originalism." *Fordham Law Review* 82: 412-415; John O. McGinnis and Michael B. Rappaport. 2009. "Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction." Northwestern University Law Review 103(2): 758-760; Lawrence B. Solum 2008. "Semantic Originalism." *Illinois Public Law and Legal Theory Research Papers Series No. 07-24*, pgs. 14-15.

[1573] Stuart B. Schwartz. 2021. "New Approaches to Latin American History." In: Richard Graham and Peter H. Smith, eds., *New Approaches to Latin American History*. University of Texas Pres: Austin; Jacky Akoka and Cédric du Mouza. 2020. "Contributions of Conceptual Modeling to Enhancing Historians' Intuition – Application to Prosopography." In: Gillian Dobbie, Ulrich Frank, Gerti Kappel, Stephen W. Liddle, and Heinrich C. Mayr, eds., *Conceptual Modeling*, Springer, Cham, pgs. 164-173; Jacob Aagaard Lunding, Christoph Houman Ellersgaard, and Anton Grau Larsen. 2020. "The *Craft* of Elite Prosopography." In: François Denord, Mikael Palme, and Bertrand Réau, eds., *Research Elites and Power: Theory, Methods, Analyses*. Springer: Open Access, pgs. 57-70; Andrej Svorenčík. 2018. "The Missing Link: Prosopography in the History of Economics." *History of Political Economy* 50(3): 605-613; Koenraad Verboven, Myriam Carlier Myriam, and Jan Dumolyn . 2007. "A short manual to the art of prosopography." In K.S.B. Keats-Rohan, ed., *Prosopography Approaches and Applications. A Handbook*. Unit for Prosopographical Research (Linacre College): Oxford, pgs. 35-69; John Bradley and Harold Short. 2005. "Texts into Databases: The Evolving Field of New-style Prosopography." *Literary and Linguistic Computing* 20 (Issue Suppl): 3-24; Lawrence Stone. 1971. "Prosopography." *Historical Studies Today* 100(1): 46-79.

[1574] https://quillproject.net/quill (Accessed 31 October, 2022)

which the creation of religious toleration should be understood and promoted, e.g., that the religious toleration guaranteed by the Konfederacja Warszawska: 1. prevents "slavery of consciousness", which is an ontological argument about human nature and psychology, 2. that religious freedom is the foundation of all other freedoms, which is a constitutional argument, 3. that every republic can only exist on principles of consent, which is a constitutional argument, 4. that religious toleration always for a union of nations, hence the current Commonwealth, which is a political argument, 5. that the Konfederacja Warszawska is the foundation of the current Rzeczpospolita and what establishes and ensures equality among all citizens before the law, which is a practical argument.[1575]

One social theory that attempts such a sophisticated, multilevel analysis is the constitutional political economy developed by Buchanan and Tullock, which stated that:

> Many ill-informed scholars and students, especially those who work on the fringes of the discipline, conceive the study of economics to be aimed primarily at establishing norms for the earning of higher incomes by individuals and higher profits by business firms. The normative statements of economics are conceived to take the form of demonstrating to the individual what he *should* do (how he should behave) in order to further his own position in the economy vis-à-vis that of his fellows. Properly understood, this is not at all the subject matter of political economy: the latter is concerned with the norms for individual behavior only insofar as these norms determine individual action which, in turn, becomes data to the analysis of social organization.[1576]

Buchanan went on to further specify constitutional economics as the science wherein the constraints of a society, e.g., its institutions, are the level of analysis and that are subject to experimentation, comparison, and analysis, whereas traditional economics is dependent on optimization of behavior given within those constraints.[1577] To put it in another way, constitutional political economy is a science dedicated to theorizing about and then testing different social and political orders, to see which ones are possible or more desirable, depending on the research being established. Przypkowski—and other Polish-Lithuanian radical theologians—have traditionally been viewed as theologians, rather than as social theorists, which seems to be missing much valuable insight and suggestions not only useful as broader commentaries on Polish-Lithuanian history, but in social theory as well.

C. *Liberum Veto*, Supermajoritarianism, Majoritarianism, and Reaching Consensus

One of the most decried aspects of Polish-Lithuanian constitutionalism was the *liberum veto*, for which the *szlachta* were heavily criticized as short-sighted and self-serving, leading to an anarchic political order. The question of supermajoritariansm vs majoritarianism is a topic that is often brought up in constitutional political economy research, with Buchanan and Tullock arguing in their *Calculus of Consent* weighing the benefits of unanimity vs simple majoritarianism, arguing that, in a democratic order as many decisions as possible should be made at either the unanimous or supermajoritarian level. If

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[1575] Supra, n 1369.

[1576] James M. Buchanan, and Gordon Tullock. 1962. *The Calculus of Consent: Logical Foundations of Constitutional Democracy*. Ann Arbor: University of Michigan, pg. 309.

[1577] James M. Buchanan. 1990. "The Domain of Constitutional Economics." *Constitutional Political Economy* 1(1), pg. 3.

those thresholds were too high for most events, politics could establish a set of rules that would be either unanimous or super-majoritarian to keep tyrannies of majorities and the fickle nature of popular support from constantly changing the political and economic system.[1578] Their ideas as well as the analytical tools that they used are still important standards for economists and political scientists today. There has been some work on applying Buchanan and Tullock's research paradigm on the *liberum veto* by Dalibor Roháč, especially how the *liberum veto* was used by religious minorities to protect themselves against tyranny of the majority.[1579]

Roháč's studies have produced generally positive appreciations of the *liberum veto* as a mechanism to defend individuals' rights and to ensure a more civil society, though one that could be problematic in essentially gumming up the works in times of military distress. He also suggests that the *liberum veto*'s usage was symptomatic of broader instability of its time, rather than a producer of them. We are sympathetic to Dankowski's[1580] and McKenna's[1581] studies of the *liberum veto* which also view it as a necessary mechanism for the *szlachta* to defend their rights in a difficult political situation, though both constrain their analysis to the 17th century. Thus, one the one hand one author is sympathetic to the *liberum veto* and interested in doing comparative work outside of its place and time, though is largely concerned on its usage to protect minority rights, whereas the other authors are keen to develop the *liberum veto* from a sophisticated and nuanced point of view but leave it in a very narrow historical context.

However, as far as the author is aware, no one has systematically explored the implications of the *liberum veto* as part of theories of voting, political behavior, and development of political institutions in general since Konopczyński,[1582] who was not only using an argument that was historiosophically flawed but was also writing over a century ago. Indeed, there was an intense discussion within Polish-Lithuanian political literature during the Wettin period about reforming the political system, including the *liberum veto*; the drafters of the 3 May Constitution were not merely the works of Rousseau, Kołłątaj, and Staszic on the subject, but a much wider tradition that was beyond the scope of our investigation. However, the post-World War II era has witnessed the emergence of many important international organizations that employ the unanimity principle: the UN Security Council, NATO, the EU, and the recent hysteria about abolishing the filibuster within the United States Senate. Given that the world appears to be in an era of Great Powers

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[1578] Buchanan and Tullock, *The Calculus of Consent*, *passim*.

[1579] Dalibor Roháč. 2008. "'It is by Unrule That Poland Stands': Institutions and Political Thought in the Polish-Lithuanian Republic." The Independent Institute 13(2): 209-224.
Dalibor Roháč. 2008b. "The unanimity rule and religious fractionalization in the Polish-Lithuanian Republic." Constitutional Political Economy 19(2): 111-128.

[1580] Michał Zbigniew Dankowski. 2019. *Liberum veto: chluba czy przekleństwo? Zrywanie sejmów w ocenach społeczeństwa drugiej połowy XVII wieku*. Jagiellońskie Wydawnictwo Naukowe: Toruń.

[1581] Catherine Jean Morse McKenna. 2012. *The Curious Evolution of the Liberum Veto: Republican Theory and Practice in the Polish-Lithuanian Commonwealth (1639-1705)*. Georgetown University Institutional Repository, Department of History, Graduate Theses and Dissertation, History. https://repository.library.georgetown.edu/handle/10822/557618 (Accessed 7 Dec. 2021).

[1582] Władysław Konopczyński. 1918. *Liberum veto: studyum porównaczwo-historyczne* Głowne: S.A. Krzyzanowski: Kraków.

competition and very real tensions within NATO and EU member states, a deeper study of the usage of the *liberum veto* in the Rzeczpospolita as well as various proposed reforms of it seems to be an increasingly relevant need in comparative political science. In fact, several approaches mentioned earlier could be combined together to understand how and why each *liberum veto* was used and how and why various reformers proposed various solutions to the problem, e.g., using Seym diaries to careful analyze how *liberum veto*'s usage may have been prevented by skillful political negotiation or compromise.

D. Political vs Geographical Contextualism: the Role of the Frontier

Another thread that ran through Polish-Lithuanian philosophical thought is the weight of the Commonwealth's geography. The constant entanglement of the nation with enemies on virtually all sides was one of the factors that unified the *szlachta* together into an egalitarian, warrior class, similar to the Cossacks. The lack of natural boundaries all but ensured that no one group could rule for too long, and that there was a constant need for the king, the *magnaci*, the Church, and the *szlachta* to negotiate together in productive politics. Rousseau's solution was that the Rzeczpospolita was simply too big to be effectively ruled, whereas Ostrowski and Poniatowski wanted a stronger king and centralized institutions, whilst Kołłątaj and Staszic wanted a symbolic king and a powerful Seym balanced by seymiki and binding *instrukcje*. Kołłątaj and Staszic both envied Britain and America's natural boundaries to defend themselves as well as lack of real enemy nations to contend with as guarantors of her freedom. Indeed, it should be remembered that the fall of the Rzeczpospolita was not a unique event in the 16th-18th centuries, as many, smaller nation states with high levels of noble freedom and political decentralization were consumed by the growing expansionist powers of the Ottomans, Habsburg Austria, Muscovy, and, eventually, Prussia. While historians have remarked how these weaknesses of geography and political geography played a similar role in the collapse of the Commonwealth, it is generally not extrapolated to a European-wide pattern where by the end of the 18th century, the only non-absolutist nations were Britain protected by the Channel, Switzerland, Genoa, and France, with Switzerland about to be overrun by France and transformed into the Helvetic Republic, Genoa about to be overrun and transformed into the Ligurian Republic, and France about to fall under Napoleon's shadow.

The Polish-Lithuanian theorist who developed the most sophisticated theoretical approach to the role of geography and the development of a nation was Staszic, who was very concerned with the role of the "frontier" of the country, wherein the values of republicanism as well as the need to defend the nation from external enemies should be properly instilled. This concern with expansion of the nation and developing the political culture was also of great concern to the American colonies, who saw themselves surrounded by hostile tribes and there was still some concern about borders with England colonies to the north and nest and Spanish colonies to the south and west. The most sophisticated version of this combination of concern for the frontier, political geography, and the development of civic institutions was the "frontier hypothesis" by Frederick Jackson Turner, first published in 1896. In it, Turner was not particularly concerned with "the frontier" *per se*, but rather the closing of it. The frontier was not where democracy and political culture had to be spread, but it was rather on the frontier where democratic political culture could truly develop. It was

the American settler's journey further and further into the West, further away from the metropolis and the closer influence of European thought, that the American identity as a nation was established. Thus, while both men shared the same concern for the wilderness and the boundaries of the nation, particularly how they and their people needed to be tamed, one saw the wilderness as a place of security, whereas the other saw the wilderness as a place where the national spirit and identity were constantly being renewed. Both approaches also share something of a colonial spirit to them, with the "frontier" being a savage place that needed to be conquered. Turner was also concerned with the closing of the frontier, in that without the periphery and the new life that it brought to the nation, it would surely stagnate unless new ways of recapturing that adventuring spirit were found; for example, what was needed was internal development such as taking better care of the land or developing the inhabitants who lived there.

To compare their texts side-by-side:

But, if in border societies the rights of man are already violated, if with other nations only the name is already willed to remain, and the real will and supreme power is in the hand of one family, by which slanderous privilege of humanity the power of government there acquires inhuman bravery and secrecy—Then establishing a government in the Republic of Poland is incomparably more difficult. Not only must we pay attention to the inner whole of the citizen and the nation, but it is also necessary to apply the bravery of the government to the external countries of the union. Such is the deplorable fate of mankind today that there is no corner of the earth where people can think and consult about their happiness. But everywhere only give advice and think, forced to constantly protect yourself. A sign that mankind has mighty enemies among them!

A republic surrounded by despotic countries must necessarily feel the consequences of despotism. It is impossible in the midst of a fire not to be steamed, to exist, and not to be connected with things that surround things. It is not in the power of any nation that the fierce bravery of outside countries should not have any effect on it. Everyone must suffer because it is not in the power of any nation to destroy this external cause of violence.[1583]

Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions. The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people — to the changes involved in crossing a continent, in winning a wilderness, and in developing at each area of this progress out of the primitive economic and political conditions of the frontier into the complexity of city life. [1584]

American democracy was born of no theorist's dream; it was not carried in the Sarah Constant to Virginia, nor in the Mayflower to Plymouth. It came out of the American forest, and it gained new strength each time it touched a new frontier. Not the constitution, but free land and an abundance of natural resources open to a fit people, made the democratic type of society in America for three centuries while it occupied its empire. [1585]

[1583] Stanisław Staszic. 1790. *Przestrogi dla Polski z teraźnieyszch politycznych Europy związkó i z praw natury wypadające*. Michał Gröll: Warszawa, pg. 54.
[1584] Frederick J. Turner. 1953. *The Frontier In American History*. Henry Holt and Company: New York, pg. 2.
[1585] *Ibid.*, pgs.293.

It seems a worthwhile endeavor to juxtapose these two approaches to how a nation's expansion and development benefit their political culture, not merely national security. Staszic argues that the protection of borders is necessary and that the nation must build up its spirit of freedom, inculcating individuals with the desire to promote and protect their nation. Jackson's desire to internally develop the nation and to find a new spirit with which to ignite it follows a parallel development. There may yet be some room to apply Turner's ideas to enrich our understanding of Polish-Lithuanian political development, to provide a new lens with which to view it. Indeed, as the szlachta became politically indecisive and the magnaci grew throughout the middle of the 17th century, it was the Cossacks who were perhaps the closest to the cultural ideals of the egalitarian, noble warriors upheld by the szlachta. Though their theories disagree as to what role the frontier plays in the expansion of the nation, there seem to be some agreement as to what happens to a nation when its borders begin to contract. The inability of the szlachta to come to turn with the Cossacks thus led to the loss of a source of potential political rejuvenation for the nation, in addition with the physical loss of people, land, and resources. To put it briefly, more sophisticated approaches to the intersection of political culture and geography in the history of the Commonwealth is needed.

E. Faithless Electors, *Instrukcje*, and Balancing Political Hierarchies

A final point that may be of interest for comparative constitutional scholars is the unique way that the Commonwealth proposed to ensure that the Seym did not become too powerful and the national government threaten the freedom of the local government and citizens: to make seymiki *instrukcje* binding on representatives elected to the Izba Poselska. The 3 May Constitution did not address the question of *instrukcje* directly, but this was instead addressed by the Laws Concerning Deities, Sections XIV and XVI. According to Section XIV, the representatives had to obey the *instrukcje* that they received, either for or against a proposed law, whether that be the whole law or merely in part. Section XVI then describes how the representatives are bound to return to their constituents and to report what happened at the Seym and to make a report of the various projects that the seymik had tasked them with in their *instrukcje*. There are no punishments explicitly given for violating one's *instrukcje*, though Section XVI, ¶2 describes how representatives may be removed from office, and Section XVIII discusses various punishments for interrupting the seymiki, such as imprisonment, fines, and permanent removal of citizenship, so it is conceivable that—were a representative to ever break the will of their seymik—they could be punished in some way. As per the legal act:

In regard to the propositions sent by the King and the Council of Inspections, instructions shall be worded thus: "Our Nuncios shall vote *affirmative* to the "article N;" or, "Our Nuncios shall "vote *negative* to the article N,"—in case it is found contrary to the opinion of the Dietine: and should any amendment or addition be deemed necessary and agreed on, it may be inserted in the instructions at the end of the relative proposition.[1586]

At the meeting of the Dietines the Nuncios are bound to appear before their constituents, and to bring their report of the whole proceedings of the Diet; first, respecting the acts of legislature; next, with respect to the particular projects of their palatine or district, recommended to them by the instructions.[1587]

These laws are clearly a reflection of Kołłątaj and Staszic's views on the importance of ensuring that the Seymy would stay aligned with the general view of the seymiki and are unique as a constitutional device in that they essentially create a mechanism wherein the lower governments within a hierarchical order are able to restrain governments higher in the order into some form of compliance. In the original United States Constitution, local governments elected their senators, which made that state's senators beholden to the will of the state, while the members of the House of Representatives were always elected by direct popular vote. However, the passage of the 17th Amendment made senators elected directly by popular vote, which in turn weakened the power of the state government. It is not surprising that the next 75 years witnessed a gradual expansion of the federal powers vis-à-vis the decline of state governments and the rise of populism, before political conservatism began to embrace "states' rights" once again.

[1586] Laws Concerning Dietines, or primary Assemblies of Poland, Section XIV: Concerning Instructions, ¶6.
[1587] Laws Concerning Dietines, or primary Assemblies of Poland, Section XVI: Dietines of Report (Relationis), ¶1.

The United States recently went through a process in strengthening of states' rights courts in the unanimous Supreme Court decision *Chiafalo v. Washington*,[1588] which determined that states had the constitutional right to punish electors if they voted against the popular will of the state at the Electoral College during a presidential election. In other words, if the popular will of the state decided to elect a person for the presidency, the presumption was always that the state's electors would vote for that same person, though they technically always had the right to vote however they wanted. Though it is quite a rare phenomenon in American politics and has never been the decisive vote to determine an American election, sometimes electors break with the will of their state, which is referred to as being a "faithless elector". *Chiafalo* decided that even though an individual technically has the right to vote for whomever they want, this does not in fact protect them from potential consequences if they break with the will of their state.

The solution produced in the Laws Concerning Deities is thus more general than the American solution, and thus more powerful. In fact, since the American Civil War questions of the states' power to nullify federal law or to secede from the union have been clearly and categorically denied. But this does not suggest that there are not other more effective mechanisms that may exist, and greater ability of states to punish their representatives for not complying with their will provides opportunities for deeper comparison as well as reflection on multiple subspecies of federalism. Perhaps reviving mechanisms such as *instrukcje* would improve these various federal political systems, which appear to have drifted off from the theoretical work done by Rousseau to make sure that the general will is made to compatible with local institutions.

A Final Word Caveat: the Necessary and Inherent Idealism of Systematic Investigation

At the end of the day, a potential critic may argue that attempting to reorganize and study the development of Polish-Lithuanian constitutionalism is overly sophisticated and ultimately a pointless task, given that the *szlachta*, even if they did attempt to thoroughly organize their constitutional system—which is certainly not clear, given many *szlachcice* resisted attempts to codify or systematize laws throughout the lifespan of the Commonwealth—they did so in their own time and place and in a manner that is thus unrecoverable for us now. In other words, this entire endeavor is a failure from the beginning in that it is yet another idealized, reconstruction of the past, which is ultimately unknowable.

To that we enclose, to a certain degree every science is an idealized recreation of the world, even the physical sciences included. Ferguson wrote how institutions, even whole societies, could arise as a result of repeated, iterative human reactions with each other, that is "of Human Action but not of Human Design".[1589] That is, we can systematize our study of human behavior and the institutions human beings built, because human beings' working together are perfectly able to—and quite frequently have—produced phenomena *as if* they were being carefully designed and planned out. The constitutional hermeneutics employed throughout is akin to every other social science. Most humans do not use Excel spreadsheets or calculators when they go to supermarkets, but that does not mean that patterns of consumer behavior are irrational and cannot be understood in a meaningful, objective, and comparable way. Language is an emergent phenomenon inherent to humanity as a species absent a centralized designer, yet each language has its own grammatical rules and patterns, and linguistics and philology exist as disciplines, studying language *as if* they were specifically created according to a centralized plan. In short, there is no *a priori* reasoning that law generally—and comparative constitutionalism more precisely—cannot wield more sophisticated and precise models for understanding the growth and development of human societies.

To that end, the long and storied history of the Polish-Lithuanian commonwealth still has much to give, new horizons to be traversed, old assumptions and stereotypes that need to be transgressed, and new stories yet to be told.

[1588] *Chifalo v. Washington*, 591 US__ (2020)
[1589] *Supra*, n 193.

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