

# Constitutional Instrumentalisation of Ancient Rights From 'Golden Liberty' to 'Golden Age'

American Constitutionalism (1764-1776) and Polish Republicanism (1573-1831)



*Warsztat Antona Möllera, Sprawiedliwości koniec XVI w.*

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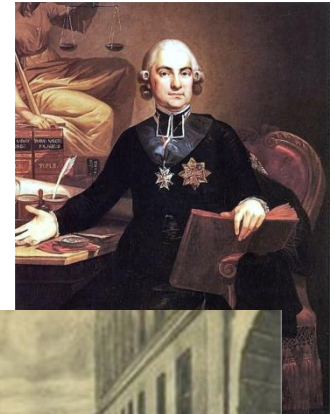


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# I. Constitutional Instrumentalisation of Ancient Rights

## 1. Polish Longing for a ‘gentle’ Revolution

“All hope in the gentle revolution, which the present Parliament should bring us”.  
(Hugo Kołłątaj, Do Stanisława Małachowskiego, referendarza koronnego. O przyszłym sejmie Anonima listów kilka, cz. 1: O podźwignięciu sił krajowych, List Pierwszy, Biblioteka Polskiej Akademii Nauk, Rkp. 176, k. 6.)



Wikimedia Commons;  
Pacta Conventa (Poland -  
Lithuania)



Wikimedia Commons; Golden Liberty



Black Procession,  
<https://historiamniejznanaizapomniana.files.wordpress.com/2015/12/czarna-procesja-1789-e1449066038613.png>

## 2. Transatlantic Constitutional Concert

In the American and in the Polish case the instrumentalisation of the ancient liberties was the legal argument that **there was no illegal (revolutionary) breach of existing law.**

## II. Common Law Origins of American Constitutionalism

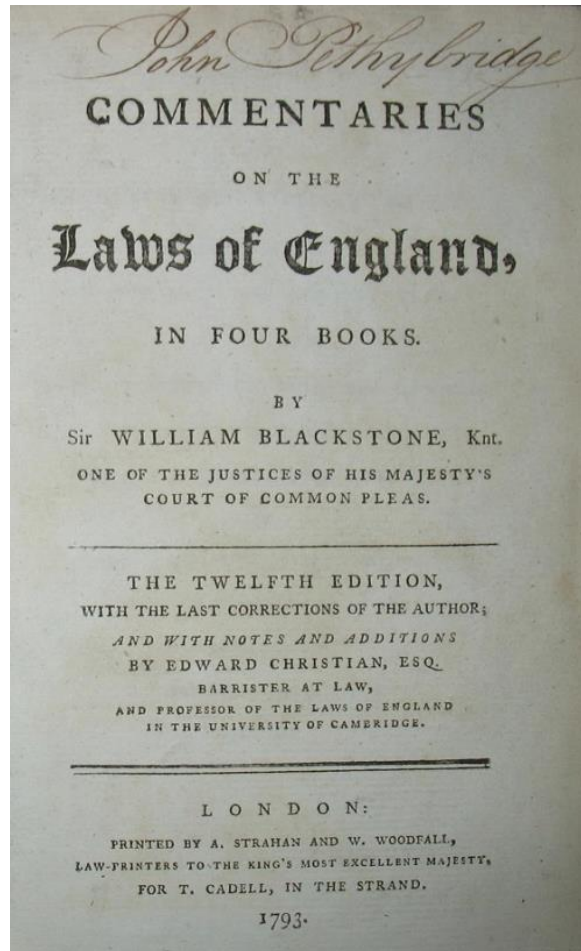
### 1. American Colonies' Cases as a Common Law Litigation (1764-1776)



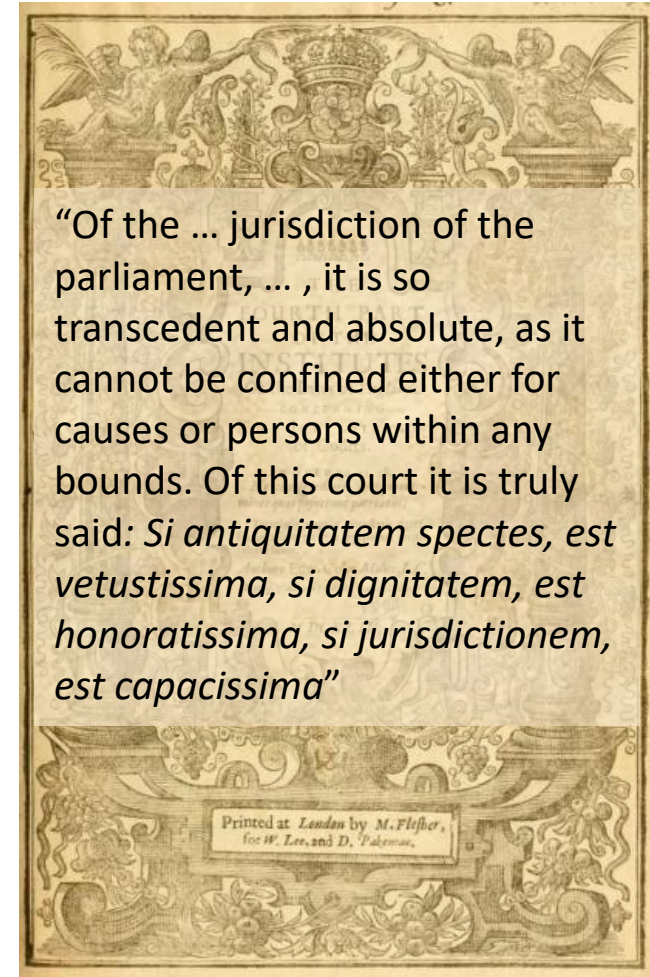
**Richard Bland, James Otis, Daniel Dulany, John Dickinson, Thomas Jefferson, John Adams, Alexander Hamilton, James Iredell, usw. Stephen Hopkins, Benjamin Franklin, Samuel Adams**  
James Bland [http://www.rbc.edu/library/SpecialCollections/Richard\\_Bland.htm#portrait](http://www.rbc.edu/library/SpecialCollections/Richard_Bland.htm#portrait); Portrait of James Otis (1725-1783) by Henry Blackburn; Daniel Dulaney the Younger by an unknown engraver. National Park Service. Monocacy National Battlefield. Ca. 1770; Portrait of John Dickinson, American politician (November 8, 1732 – February 14, 1808); The official portrait of Supreme Court Justice James Wilson; Official Presidential portrait of Thomas Jefferson; Official Presidential portrait of John Adams; The official portrait of Supreme Court Justice James Iredell; United States. Declaration of Independence; Hopkins, Stephen, 1707-1785; <https://upload.wikimedia.org/wikipedia/commons/c/cc/BenFranklinDuplessis.jpg> Emmet Collection of Manuscripts Etc. Relating to American History; Portrait of Samuel Adams (1722-1803); John Singleton Copley (all Wikipedia Commons)



Blackstone Commentaries (vol. 1, chap. II) literally repeat Coke's definition of the supreme jurisdiction of the High Court of Parliament:

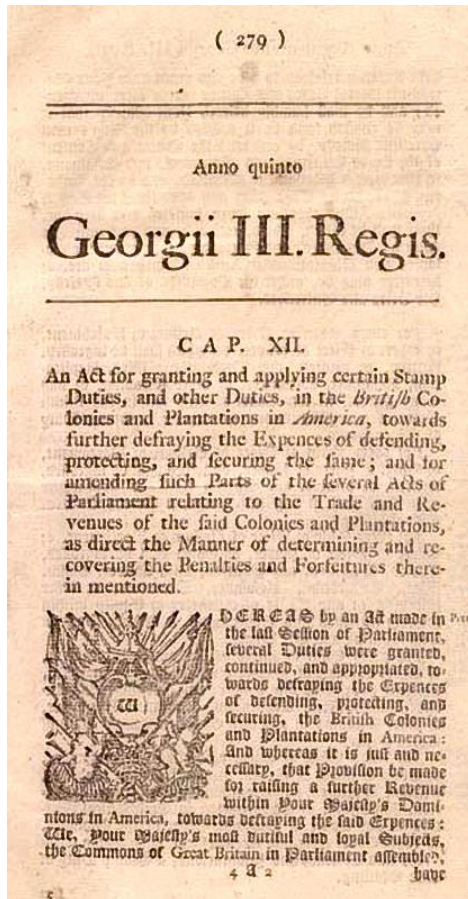


<https://archive.org/details/fourthpartofinst04coke>



(E. Coke, *The Fourth Part of the Institutes of the Laws of England concerning the Jurisdiction of Courts*, ed. E. and R. Brooke, London 1797, Part IV, 36).

## 2. Customary Old Liberties against Parliamentary Absoluteness



The central legal point of the colonists was the differentiation between “legal” and “constitutional”. Acts of Parliament, although legal, were against their ancient liberties under the common law and therefore unconstitutional.

Wikimedia Commons; Newspaper posting of Stamp Act; 1765; Library of Congress, Gwillhickers

### **a. American Sympathies for Coke's Supremacy of Law by Artificial Reason**

General Custom equals the Consensus of all. The authority of the collective knowledge of the judiciary (=reason of the law; artificial reason) replaces the popular consent (Coke, Part I, 97b).

Artificial reason of common lawyers prevails over natural reason of human beings as the monarch is (*Prohibitions del Roy* (1607 = Mich. 5 Jacobi) 12 Co.Rep. 64 = 77 ER 1343 per *Edward Coke, Chief Justice*).

The embodiment of the highest form of reason is Parliament, conceived as highest common law court.

### **b. The Conjunction of the Common Law Opposition against Stuart Absolutism with the Lockean Natural Law**

For the common law background of the Lockean fundamental law of nature existing a priori it is important to notice that Parliament's sovereignty claims against the royal prerogative have aimed at the ultimate interpretative authority on the reason of the law, and not at the absoluteness as legislator.



### 3. Instrumentalisation of custom for the Relationship of the Colonies to Britain

#### a. Imperial Constitution of Principled Customary Limitation

Another point of the American resistance was the self-reliance of the imperial constitution of principled customary limitation, differentiated by the 1760s from the British Constitution of parliamentary supremacy. The magna carta-freedom no taxation without representation got the nimbus of a fundamental law of nature as distinct from ordinary legislation.



Wikimedia Commons; Nathaniel Currier; "The Destruction of Tea at Boston Harbor", lithograph depicting the 1773 Boston Tea Party



Wikimedia Commons; Isaac Barre



*Wikimedia Commons; Portrait of Charles Pratt, 1st Earl Camden (1714-1794) by Nathaniel Dance-Holland*

According to Lord Camden, former Attorney General and then Chief Justice of Common Pleas, the sovereignty did not empower Parliament to act “contrary to the fundamental laws of nature, contrary to the fundamental laws of this Constitution.” (Camden’s speeches, House of Lords, Feb. 6, Mar. 7, 1766)



*Wikimedia Commons; William Pitt, 1st Earl of Chatham by Richard Brompton, (1766-1768) Prime Minister*

“This kingdom, as the supreme governing and legislative power, has always bound the colonies by her laws, by her regulations, and restrictions in trade, in navigation, in manufactures - in everything, except that of taking their money out of their pockets without their consent.” (Pitt’s Speech, House of Commons, Jan. 14, 1766). Cit. according to Greene, p.95.



## **b. Sullivan's Draft of the American Declaration of Rights October 14, 1774**

“Devoted to liberty, but to liberty according to English ideas, the Sullivan draft held the statutes [to be] **impolitic, unjust, and cruel, as well as unconstitutional , and most dangerous and destructive of American rights**”. (Edmund Burke, ed. By C. and J. Rivington, London 1826, vol III, 49)

“Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, declare, That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following rights:”

And then the enumeration of rights followed which are related to “the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”

It concludes with reference to the “undubitably” and “irreversibility of the rights and liberties” and conjures the “Americans as fellow-subjects in Great Britain” after the confession “to restore harmony between Great Britain and the American colonies”.

(Sullivan Draft of the American Declaration of Rights October 14, 1774; Journals of the Continental Congress, 1774-1789, ed. Chauncey Ford, Washington D.C., Library of Congress 1904), I, 63-73)

## 4. Establishing Constitution as Law

### a. Natural Rights instead of „their Old Rights of Englishmen“

“That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to **justice, moderation, temperance, frugality, and virtue** and by frequent recurrence to fundamental principles.” Art. 1 section 15, Virginia Bill of Rights June 12, 1776

(cited according to: The Constitution of Virginia: Together with the Virginia Bill of Rights, Passed June 12, 1776, Richmond 1867, p. 5)



Wilhelm V



Warsztat Antona Möllera, Sprawiedliwości koniec XVI w.



Personification of patience

## Allusions to Ancient Virtues: The Artus Court's Tile Stove Figures



**Woman with Mirror**  
Jaël, figur of the Book  
of Judges



**Woman with Dagger**  
Roman Lucretia



**Undressing Woman  
with a Vase**  
Personification of  
Knowledge (Cognito)



**Woman with Chain**  
Personification of  
patience (Patientia)



## b. Constituent American People of the United Colonies

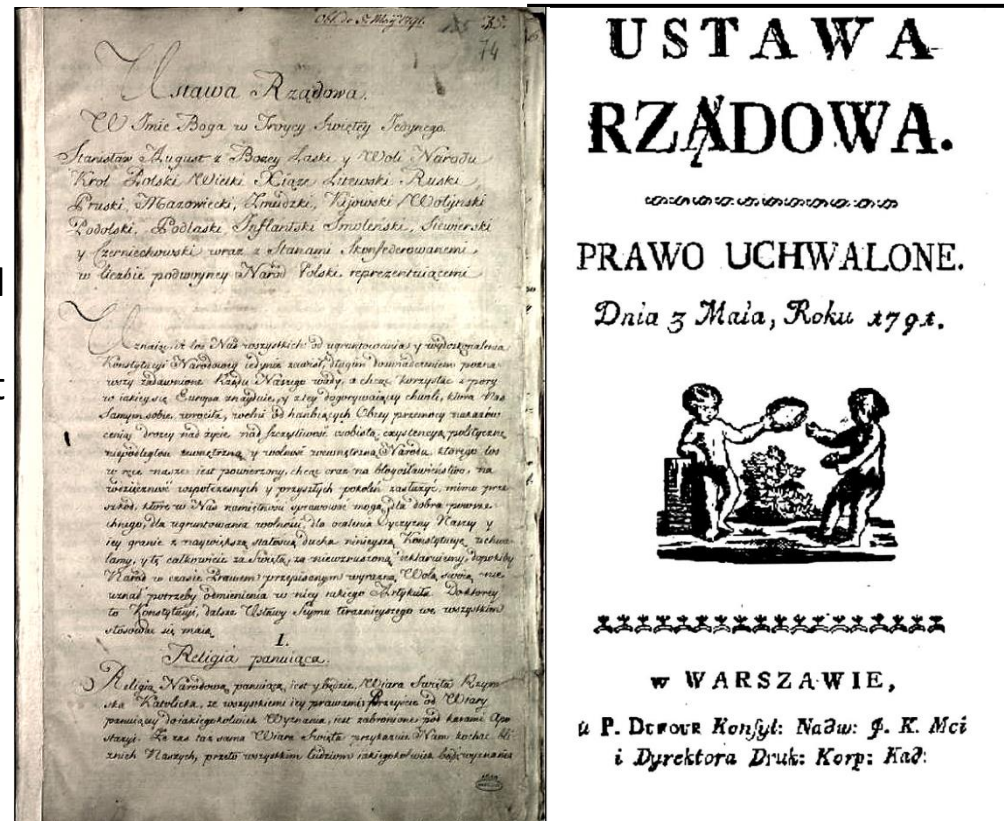
The declaration of independence July 4, 1776 postulates one American people, in the sense of a constitutional people: “When [...] it becomes necessary for one people to dissolve the political bands which have connected them with another, [...] they changed from the claim for old rights as Englishmen to the redress to the separate and equal station to which the Laws of Nature and of Nature’s God entitle them.” (cited according Jefferson’s autobiographical reports about the debates, in: Thomas Jefferson, Writings, ed. by Merrill D. Peterson, New York 1984, p. 13 et seq.= First edition of the Declaration of Independence from the 4<sup>th</sup> of July 1776, printed by John Dunlap, cit. according to Reports of the German Historical Museum 4 (1994), p. 58).



### III. Polish May Constitution between Aristocratic Republicanism and Sovereign Self-Determination

#### 1. Between pacta conventa, Cardinal Laws and Precedence of Constitution

The constituent Polish nation of the May Constitution is not meant to be the sovereign people of free and equal citizens, but the nation of the nobility. The affirmation of the old-Republican pacta conventa in Art. 7 perfectly fits into the picture. As constitutional contract between the estates' assembly representing the nation and „Stanisław August by the Grace of God through the will of the nation King of Poland“ it does not establish „the basis and foundation of government“.



Wikimedia Commons; Constitution of May 3, 1791

## 2. Decision-making on the Road to May 3, 1791: Particularities of Enacting the Polish May Constitution

### Official Drafts

- December of 1789 – Principles to improve the form of government: draft by Ignacy Potocki turned down as too liberal, finally adopted a very conservative version
- August 1790 – work on the extended “Form of Government Draft”. First Chapter entitled “Constitutional laws, among them cardinal ones “ including 89 articles. Only 11 articles got adopted after discussion for months.

### Secret Agreement

- Alliance between the liberal camp (Hugo Kollataj, Ignacy Potocki, Aleksander Linowski, Stanisław Malachowski – the future Association of Friends of the (Governing) Constitution) and the King Stanisław August Poniatowski
- The royal secretary and lector Scipione Piattoli as the trusted “middleman”



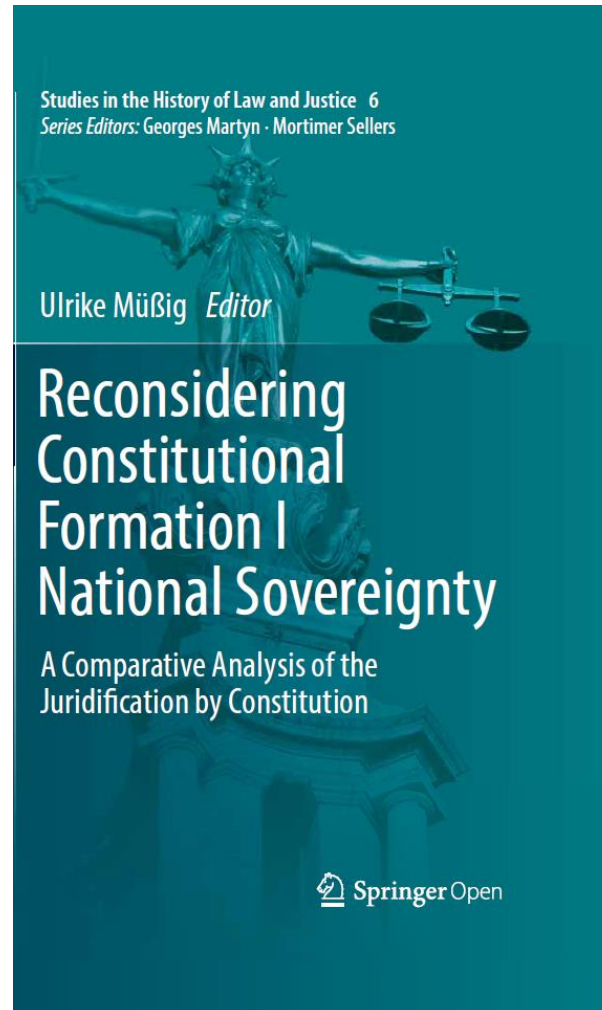
Great, or Four-Year, Sejm (1788-1792) and Senate adopt Constitution of May 3, 1791, at Warsaw's Royal Castle. Wikimedia Commons; Constitution of May 3, 1791



Jan Matejko. Wikimedia Commons; Constitution of May 3, 1791



### 3. Adoption of the Law on “Our free Royal Cities in the States of the Rzeczpospolita” of April 18, 1791 in Art. III of the May Constitution



## **4. Procedural Openness of the Polish May Constitution**

- a. Partnership of legal and parliamentary ministerial responsibility**
- b. Executive separated between hereditary monarch and the state council (straż praw, guardian of the rights) in accordance to Montesquieu's dépôt des lois**
- c. Two chamber legislative body out of Messengers' and Senators' Chamber, separated from the executive**
- d. Constitutional Amendments**

## IV. American Influences on the Discourse during the Great Sejm (1788-1792)

### 1. Role Model of the American Lack of Estate Ranks in the Gazeta Narodowa i Obca and Pamiętnik Historyczno-Polityczny

- Gazeta Narodowa y Obca / National and Foreign Newspaper (1791-1792)
- Pamiętnik Historyczno-Polityczny / Historical-Political Diary (1782-1792)



Phot. Anna Tarnowska, Biblioteka Uniwersytecka w Toruniu



## 2. References to America in *Journal Hebdomadaire de la Diète, Gazeta Warszawska, Gazety Wilenskie, Gazette de Varsovie*

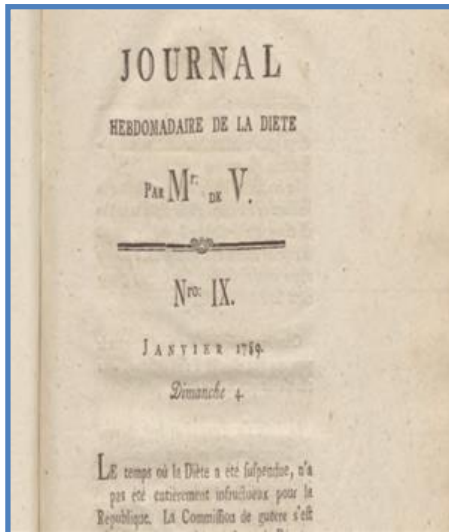
Journal

Hebdomadaire de la  
Diète

Gazeta  
Warszawska

Gazety Wilenskie

Gazette de Varsovie



<http://jbc.bj.uj.edu.pl/dlibra/publication?id=328891&tab=3>



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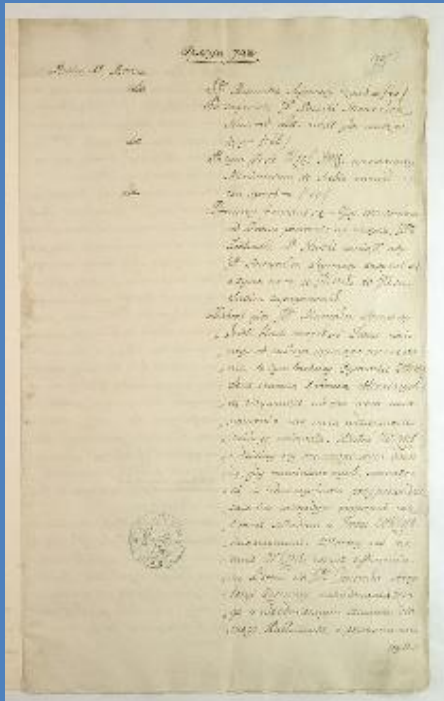
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<http://ebuw.uw.edu.pl/dlibra/doccontent?id=60053>

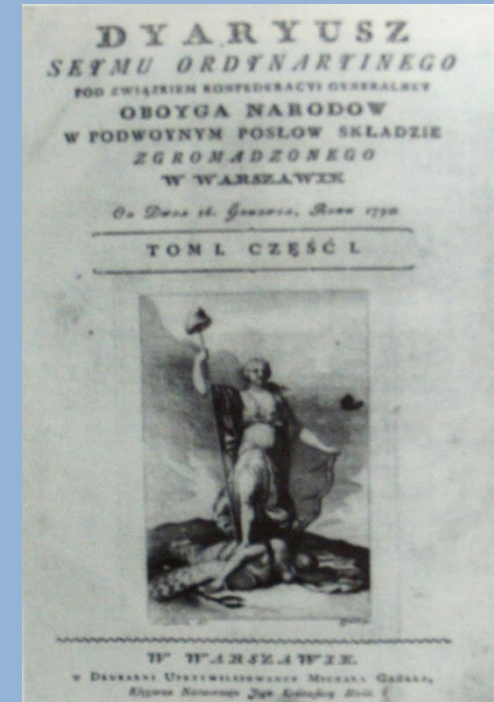
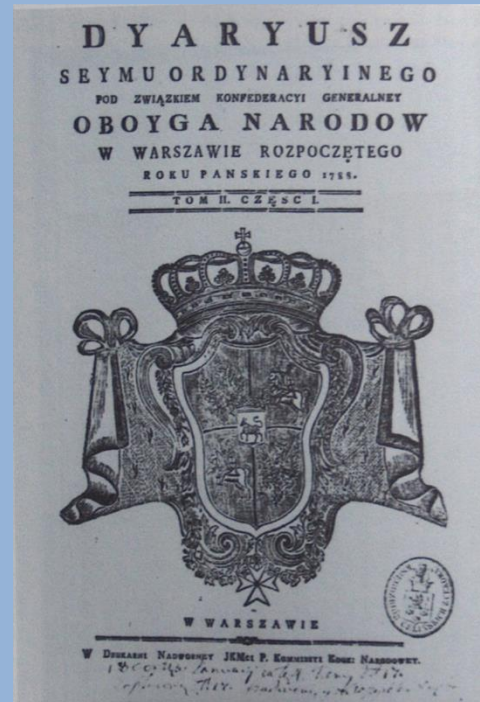
### 3. Ancient Republican Praise of America by Sweryn Rzewuski

#### The handwritten Diary of the Sejm



AGAD (Central Archives of the Historical Records), Warsaw

#### The Diary of the Ordinary Diet (Sejm) of Two Nation, 1788 – 1790



AGAD (Central Archives of the Historical Records), Warsaw

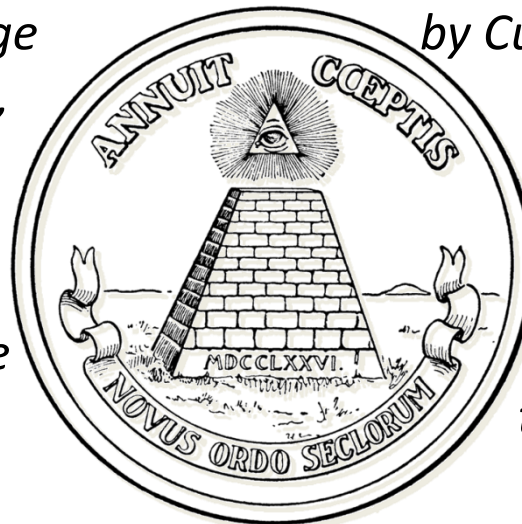


## V. End



Wikimedia Commons; The Golden Age, ca. 1530; Lucas Cranach the Elder (1472 – 1553)

*“Now the last age  
Has come and gone,  
Of circling centuries  
Justice returns, returns  
With a new breed of men  
Only do thou, at the  
The iron shall cease,*



*by Cumae's Sibyl sung  
and the majestic roll  
begins anew:  
old Saturn's reign,  
sent down from heaven.  
boy's birth in whom  
the golden age arise.”*

(Virgil's *Eclogue IV*, The Poems of Virgil, Translated Into English Verse Translations by James Rhoades 2006 by Pomona Press)