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Whither Communism: A Comparative Perspective on Constitutionalism in a Postsocialist Cuba

Jon L. Mills

University of Florida Levin College of Law, mills@law.ufl.edu

Daniel Ryan Koslosky

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**WHITHER COMMUNISM:
A COMPARATIVE PERSPECTIVE ON
CONSTITUTIONALISM IN A
POSTSOCIALIST CUBA**

JON MILLS* AND DANIEL RYAN KOSLOSKY†

I.	INTRODUCTION	1220
II.	HISTORY AND BACKGROUND	1222
	A. <i>Cuban Constitutional Law</i>	1223
	1. Precommunist Legacy	1223
	2. Communist Constitutionalism	1225
	B. <i>Comparisons with Eastern Europe</i>	1229
	1. Nationalizations in Eastern Europe	1230
	2. Cuban Expropriations	1231
III.	MODES OF CONSTITUTIONALISM: A SCENARIO ANALYSIS .	1234
	A. <i>Latvia and the Problem of Constitutional Inheritance</i> .	1236
	1. History, Revolution, and Reform	1236
	2. Resurrecting an <i>Ancien Régime</i>	1239
	B. <i>Czechoslovakia and Poland: Revolutions from Below</i> ..	1241
	1. Poland's Solidarity	1241
	2. Czechoslovakia's Velvet Revolution	1244
	3. New Constitutionalism	1248
	C. <i>Hungary's Gradual Decline and Decay</i>	1251
	1. Goulash Communism	1251
	2. Reforming the Unreformable	1254
	D. <i>Cuba's Postsocialist Pathways</i>	1256
IV.	EXTRAPOLATING A U.S.-CUBAN CLAIMS SETTLEMENT FRAMEWORK	1259
	A. <i>American Responses to Cuban Nationalizations</i>	1259
	B. <i>The Politics of Reparation</i>	1262
	C. <i>Prospects for a U.S.-Cuban Agreement</i>	1265
V.	CONCLUSIONS AND IMPLICATIONS	1268

* Dean Emeritus and Professor of Law, University of Florida Levin College of Law; Director, Center for Governmental Responsibility, University of Florida; Honorary Doctor of Laws 1986, Stetson University; J.D. 1972, University of Florida College of Law; B.A. 1969, Stetson University.

† Senior Fellow, Institute for Human Rights, Peace, and Development, University of Florida; J.D. 2007, University of Florida College of Law; M.Sc. 2006, London School of Economics and Political Science; B.A. 2002, University of Florida.

I. INTRODUCTION

The rapid collapse of communism in Eastern Europe led many in academic and policy circles to accept that capitalism had emerged as the default global economic *modus operandi*.¹ Remarkably, ten of the former Warsaw Pact countries succeeded in joining the European Union only fifteen years after the fall of the Berlin Wall. Their accession into global and regional markets and regulatory systems was an extraordinary feat considering their simultaneous political and economic transitions:² E.U. accession was conditioned upon both political and economic reform.³ Political scientists, legal theorists, and economists began to assess the applicability of the dual Eastern European transition model with past and future democratizations and economic liberalizations.⁴ Logically, a post-Castro Cuba raises questions about whether a similar evolution might occur.⁵

As an analogous socioeconomic and political evolution in the Caribbean seems ever more forthcoming, looking to the Eastern

1. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN*, xv, 25-29 (1992); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 27 (1991).

2. See Nicholas Barr, *From Transition to Accession*, in *LABOR MARKETS AND SOCIAL POLICY IN CENTRAL AND EASTERN EUROPE: THE ACCESSION AND BEYOND* 1, 1 (Nicholas Barr ed., 2005); LESZEK BALCEROWICZ, *SOCIALISM, CAPITALISM, TRANSFORMATION* 146 (1995); Claus Offe, *Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe*, 58 *SOC. RES.* 865, 868-69, 872-73 (1991).

3. ALAN MAYHEW, *RECREATING EUROPE: THE EUROPEAN UNION'S POLICY TOWARDS CENTRAL AND EASTERN EUROPE* 161-62 (1998); see James Hughes, Gwendolyn Sasse & Claire Gordon, *Conditionality and Compliance in the EU's Eastward Enlargement: Regional Policy and the Reform of Sub-national Government*, 42 *J. COMMON MKT. STUD.* 523, 524-25 (2004); Heather Grabbe, *European Union Conditionality and the Acquis Communautaire*, 23 *INT'L POL. SCI. REV.* 249, 249, 251 (2002).

4. A vigorous academic debate has emerged regarding the applicability of existing transition theory to Eastern Europe. Much of the focus has been on the inherent differences, similarities, and emerging patterns between Eastern Europe and South America. See, e.g., Sarah Meiklejohn Terry, *Thinging [sic] about Post-Communist Transitions: How Different Are They?*, 52 *SLAVIC REV.* 333 (1993); Philippe C. Schmitter & Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Attempt to Go?*, 53 *SLAVIC REV.* 173 (1994); Valerie Bunce, *Should Transitologists Be Grounded?*, 54 *SLAVIC REV.* 111 (1995); Terry Lynn Karl & Philippe C. Schmitter, *From an Iron Curtain to a Paper Curtain: Grounding Transitologists or Students of Postcommunism?*, 54 *SLAVIC REV.* 965 (1995); Valerie Bunce, *Paper Curtains and Paper Tigers*, 54 *SLAVIC REV.* 979, 979-87 (1995).

5. See, e.g., Kern Alexander & Jon Mills, *Resolving Property Claims in a Post-Socialist Cuba*, 27 *LAW & POL'Y INT'L BUS.* 137, 145-46 (1996) (using the resolution of property claims in East European nationalizations to outline what may happen in a postsocialist Cuba); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 *COLUM. J. TRANSNAT'L L.* 621, 621 (1996) (examining the "former U.S.S.R republics' approaches toward restitution of property seized during the Soviet era as a possible precedents for Cuba").

European transitions is quite tempting. With the resignation of Fidel Castro as president, and his personal hegemony in a state of decline, the political future of the *Partido Comunista de Cuba* (PCC) is far from certain. The outcome of the possible economic liberalization and privatization programs in Cuba is central to the regional interests of the United States. Thus, the form and substance of a settlement agreement of the outstanding property claims currently held against Cuba, along with basic political and economic reform, will affect the political and economic dynamics of U.S.-Cuban relations for decades to come.⁶

Virtually all Eastern European countries adopted constitutional and legal frameworks permitting them to integrate into the larger European Economic Community as well as the global marketplace.⁷ Establishing institutions for protecting property rights, defining those rights, and adjudicating outstanding property claims were all key to the reform packages introduced in Eastern Europe.⁸ Yet property rights and economic freedoms are predicated on the underlying constitutional framework. A key factor in ascertaining how compensation for expropriated property is calculated and distributed will be by how constitutionalism develops in postcommunist Cuba.

Cuba is an open market to most of the world, yet its biggest potential market, the United States, is unavailable. The people of Cuba have lived under the weight of political oppression and the omnipotent presence of the state in their daily lives. What lessons can be drawn from the Eastern European experiences with over fifteen years of hindsight? What role will the Cuban people have in creating a future Cuban democracy?

This Article seeks to answer these questions by analyzing the various constitutional experiences of Eastern Europe and their applicability to a possible Cuban democratization and economic transition. This Article examines the history and background of the Cuban economic system and its supporting legal framework in light of the various Cuban nationalizations. This Article also analyzes Cuban constitutionalism in light of the communist ideology as well as Cuban constitutionalism's provisions relating to public

6. See discussion *infra* Part IV.B-C.

7. See generally RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 110-93 (1996) (analyzing the drafting processes in Eastern Europe as well as the relative strengths of the new constitutions with civil rights protection and private property).

8. See *id.*

and private property rights. In Part II, Cuban constitutional law is explored in the broader context of its precommunist socioeconomic environment. Parallels are also drawn between the Eastern European socialist experiments. Part III explores the various constitutional modes of Eastern Europe and the likelihood of Cuba following analogous trajectories. Three primary scenarios have emerged from the Eastern European experience, each of which could directly affect Cuban restitution claims. Part IV constructs a model U.S.-Cuban settlement agreement based on the foregoing analysis. Concluding remarks follow.

II. HISTORY AND BACKGROUND

The political and economic history of Cuba is marred by dependency and exploitation. The island, with its climate and geostrategic importance, was at first subjugated to Spanish colonialism.⁹ Postindependence regimes relegated Cuba to economic subjugation within the global political economy.¹⁰ The tremendous economic power of the United States in industrial production was only equaled by its demand for raw materials and agro-goods. Cuba, as the closest producer of raw materials, primarily sugar, became economically tidal-locked with the cycles of U.S. economic performance.¹¹ The backlash to this system came in the form of Fidel Castro and the *Movimiento 26 de Julio* (26th of July Movement).¹² Communism, with its idyllic promise of an egalitarian future, entrenched itself only ninety miles from the U.S. coast, causing a multitude of political and economic repercussions.

The collapse of the Soviet Union, the Warsaw Pact, and the Council of Mutual Economic Assistance, however, signaled the end of the socialist splendor, as well as the principal source of economic support for Cuba.¹³ The classical model of communism has been constantly modified over time to account for market forces by incorporating market-oriented economic principles.¹⁴ As the charisma and political influence of Fidel Castro passes into the twilight of history, Cuba will likely face serious choices regarding its eco-

9. See generally JAIME SUCHLICKI, *CUBA: FROM COLUMBUS TO CASTRO AND BEYOND* 13-31 (4th ed. 1997) (discussing the conquest and colonization of Cuba by Spain).

10. See generally JAMES O'CONNOR, *THE ORIGINS OF SOCIALISM IN CUBA* 12-16 (1970) (describing the economic relationship between the United States and Cuba).

11. *Id.* at 15-16.

12. See generally HUGH THOMAS, *THE CUBAN REVOLUTION* (1977) (discussing the events leading up to and after the 1959 Cuban Revolution).

13. See discussion *infra* Part II.B.

14. See *infra* notes 57-61 and accompanying text.

conomic, legal, and political systems. Communist jurisprudence was focused on reaching the proverbial “utopian society”; the *realpolitik* of a post-Castro Cuba will likely dictate significant reforms. To fully comprehend Cuba’s options, as will be elaborated in Part III, it is important to familiarize oneself with the history and background of Cuban law and economics as it existed prior to and during the communist regime.

A. Cuban Constitutional Law

1. Precommunist Legacy

In Cuba, private property was constitutionally protected from 1901 up to the 1959 Communist Revolution; its status can be traced back to Spanish colonial policy.¹⁵ During the colonial period, small-scale independent farming yielded to large agricultural collectives as railroads and steam power were incorporated into the sugar industry.¹⁶ Land ownership became increasingly concentrated and came under the control of large agricultural companies.¹⁷ Indeed, the socioeconomic structure of Cuba during the colonial period favored Spanish settlers above all others in the societal hierarchy.¹⁸

Social disequilibrium and political disquiet eroded the status quo and resulted in the movement toward a more egalitarian distribution of wealth and an independent Cuba. The 1868 Cuban Declaration of Independence (*Grito de Yara*) recognized the natural rights of all peoples and viewed slavery as incompatible with this principle.¹⁹ Similarly, the Constitution of Baraguá, although never fully implemented, left a philosophical legacy subsequently utilized

15. See O’CONNOR, *supra* note 10, at 12-13.

16. See LOWRY NELSON, RURAL CUBA 92-97 (1951) (discussing the rise of the sugar latifundia); DUDLEY SEERS ET AL., CUBA: THE ECONOMIC AND SOCIAL REVOLUTION 75 (1964).

17. NELSON, *supra* note 16, at 95; SEERS ET AL., *supra* note 16, at 74-76.

18. MAX AZICRI, CUBA: POLITICS, ECONOMICS, AND SOCIETY 5 (1988). Notwithstanding the concentration of land ownership in large agricultural entities, the opportunities to extract income from agriculture were also prioritized along the social hierarchy. See SUCHLICKI, *supra* note 9, at 42-43. The *latifundia*—owners of large land holdings—were entitled to agriculturally-derived wealth first, followed by smaller landowners, and finally peasants. See *id.* In Matanzas Province for example, small farmers accounted for only 1 to 2 percent of the total income of the province. Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107, 113 (2000).

19. DECLARACIÓN DE INDEPENDENCIA (1868) (Cuba), reprinted in JUAN CLEMENTE ZAMORA, CUBA: COLECCION DE DOCUMENTOS SELECTOS PARA EL ESTUDIO DE LA HISTORIA POLITICA DE CUBA 210, 212 (1925). The philosophical underpinnings of the Declaration of Independence and the subsequent, related Guáimaro Constitution signaled a shift from the landed aristocracy to the larger population. See William T. D’Zurilla, *Cuba’s 1976 Social-*

by the communist government.²⁰ The then-revolutionary notion that the people, despite status, were the ultimate source of authority later served as a foundation for the egalitarian rhetoric of the 26th of July Movement.²¹

The first constitution of an independent Cuba was enacted in 1901.²² It firmly enshrined the right to possess and enjoy private property. Article 32 of the 1901 Constitution mandated that no person could be deprived of property without a valid public purpose and due compensation.²³ Despite the constitutional safeguards, land ownership remained highly concentrated under U.S. influence.²⁴ Sugar production dominated the Cuban economy, and the industry revolved around a few Havana-based, large-scale producers.²⁵

The 1940 Constitution confirmed the status of property as a natural right; the most important provisions in this respect were Articles 24 and 87.²⁶ Article 24 required the judiciary to ascertain whether a government taking was for a just cause pursuant to a public purpose.²⁷ Furthermore, it mandated that any individual whose property was subject to a government taking be compen-

ist Constitution and the Fidelista Interpretation of Cuban Constitutional History, 55 TUL. L. REV. 1223, 1227-28 (1981).

20. See D'Zurilla, *supra* note 19, at 1229-30. The Constitution of Baraguá suggested that constitutionalism in Cuba must serve as a mediator between the government and the people who are the ultimate source of authority. See *id.* at 1230.

21. See *id.* at 1230, 1243.

22. See CONSTITUCIÓN DE LA REPUBLICA DE CUBA [CONSTITUTION] (1901), translated in BRITISH AND FOREIGN STATE PAPERS 1900-1901, at 554 (Augustus H. Oakes & Willoughby Maycock eds., 1904).

23. *Id.* art. 32, at 558.

24. See MARIFELI PÉREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE, AND LEGACY 14-15 (1993). The Reciprocal Treaty of 1903 between the United States and Cuba, which provided for a 20 percent reduction on Cuban sugar tariffs in the United States, led to a seventeen fold expansion of the sugar industry between 1900 and 1925. *Id.* at 15. Made possible by the *latifundia* system, the retono [sprout] sugar production was based on a consolidated model of development requiring large, concentrated landholdings. SAMUEL FARBER, THE ORIGINS OF THE CUBAN REVOLUTION RECONSIDERED 13-14 (2006). By 1925, U.S. capital invested in Cuba totaled \$750 million, and U.S. investors controlled over 40 percent of all mills and 60 percent of sugar harvests. PÉREZ-STABLE, *supra*, at 15. Cuban interests, by comparison, owned less than one-third of all mills and led to minimal domestic capital accumulation. *Id.*

25. See NELSON, *supra* note 16, at 115-16.

26. See CONSTITUCIÓN DE LA REPUBLICA DE CUBA [CONSTITUTION] arts. 24, 87 (1940), translated in 1 CONSTITUTIONS OF NATIONS 610, 614, 626 (Amos J. Peaslee ed., 2d ed. 1956).

27. Article 24 provides in full: "Confiscation of property is prohibited. No one can be deprived of his property [except] by competent judicial authority and for a justified cause of public utility or social, and always after payment of the corresponding indemnity in cash, judicially fixed." *Id.* art. 24, at 614.

sated by an “indemnity in cash.”²⁸ Failure to abide by procedural due process rendered the taking invalid and entitled the dispossessed owner to restitution of the property.²⁹ Article 87 similarly recognized private property in its “broadest concept” and limited derogations from this maxim to only those arising from “public necessity” or “social interest.”³⁰

Moreover, Articles 285 and 286 of the 1940 Constitution outlined procedures for amending the Constitution. Article 285 provided for an amendment process to commence with the signatures of 100,000 literate citizens or one-quarter of the Congress.³¹ Under the literate-citizen procedure, the proposed amendment was required to have been submitted to a referendum at the subsequent general election.³² A complete revision of the Cuban Constitution, however, required a constitutional assembly whereby elected delegates would determine unresolved issues relating to a new constitutional order.³³ In short, private property enjoyed relatively stable and aggressive government protection in this period of Cuban history.

2. Communist Constitutionalism

In March 1950, General Fulgencio Batista repealed the 1940 Constitution and its provisions relating to the protection of private property after overthrowing President Carlos Prío.³⁴ Some sections of the Constitution were reenacted pursuant to a new constitutional amendment process.³⁵ Yet, the provisions relating to the protection of private property were not reincorporated into the jurisprudential or constitutional framework, effectively abrogating property protection.³⁶

28. *Id.*

29. *Id.*

30. Article 87 of the 1940 Constitution reads as follows: “The Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are established by law.” *Id.* art. 87, at 626. Articles 88-96 addressed other forms of property rights including intellectual property and *latifundios*. *See id.* arts. 88-96, at 626-27.

31. *Id.* art. 285, at 668.

32. *Id.*

33. *See id.* at 668-69.

34. Alexander & Mills, *supra* note 5, at 147.

35. *See id.* at 147-48 (noting that General Batista “appointed a Council of Ministers that had the power to amend the [constitution] by a two-thirds vote”).

36. *Id.* at 148.

Less than a decade later, Fidel Castro and the 26th of July Movement seized control of the country and subsequently formed a communist government.³⁷ The Fundamental Law of 1959 established the basis of the communist political and economic system.³⁸ Its provisions delineated the scope and nature of ownership as well as the manner in which the macroeconomy would be administered. The state was entrusted to administer the national economy in both agriculture and industry.³⁹ Moreover, currency and banking were assumed under state control.⁴⁰

Significantly, the Fundamental Law defined the nature and scope of private ownership. To a large extent it reestablished Article 24 of the 1940 Constitution. Large landholdings were eliminated and all real estate was subjected to government-imposed size limitations.⁴¹ Sugarcane planting and processing were also given particular attention by the Fundamental Law.⁴² The revolutionary government assumed the competence to regulate crop liens and agricultural contracts relating to the cultivation and production of sugar.⁴³

Although private property was recognized in its "broadest concept,"⁴⁴ the state was granted the power of "confiscating" property utilized by the previous government and its supporters.⁴⁵ The

37. See generally THOMAS, *supra* note 12 (discussing the events leading up to and after the 1959 Cuban Revolution). After an unsuccessful assault on the barracks at Moncada in 1953, Fidel Castro, Raúl Castro, Ernesto "Che" Guevara, Camilo Cienfuegos, and other supporters took refuge in the Sierra Maestra Mountains of Southeast Cuba. See *id.* at 108-18. After waging a successful guerilla campaign, forces of the 26th of July Movement entered Havana on New Year's Day 1959. See *id.* at 238-52. For a discussion of the military paradigms of the 26th of July movement, see Marta San Martín & Ramón L. Bonachea, *The Military Dimensions of the Cuban Revolution*, in CUBAN COMMUNISM 37, 37-58 (Irving Louis Horowitz ed., 6th ed. 1987).

38. See PAN AM. UNION, ORGANIZATION OF AMERICAN STATES, FUNDAMENTAL LAW OF CUBA 1959 (1959) [hereinafter FUNDAMENTAL LAW OF CUBA 1959].

39. *Id.* art. 222, at 68. The "planting and grinding of administration sugar cane" was also brought under the auspices of the state. *Id.* art. 226, at 69. Leases relating to sugar cane planting and share cropping that renounce rights promulgated by law were invalidated. *Id.* art. 225, at 69. The duration and standards of agricultural land leases was also governed by the state. *Id.*

40. *Id.* art. 231, at 70.

41. *Id.* art. 90, at 25. Article 90 also limited the purchase and possession of land by foreign persons. *Id.*

42. See *id.* art. 225, at 69.

43. *Id.*

44. *Id.* art. 87, at 25.

45. *Id.* art. 24, at 7. Article 24, in part, reads as follows:

Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy

manner of expropriation was, however, governed by law. Takings were required to be in furtherance of “public benefit” or out of the “social interest.”⁴⁶ Thus, the Fundamental Law and subsequent property laws authorized nonjudicial agencies to expropriate private property, albeit with compensation in the form of either bonds or cash.⁴⁷ In practice, however, the government did not provide compensation for takings.⁴⁸

The communist 1976 Constitution codified the unofficial policy of not compensating takings.⁴⁹ Article 9 signaled the ideological underpinnings of the socialist doctrine. It provided that the state is only bound by “socialist legality” that is to “echo only the will of the working people.”⁵⁰ Article 9 also granted the state broad powers to control most socioeconomic activities.⁵¹ The Cuban economy established, *inter alia*, “socialist ownership” of property, as well as the other legal mechanisms granting the state power to manage the economy.⁵²

Article 15 was of prime importance to the Castro regime’s expropriation of property. It outlined what properties had become “irreversibly established” as publicly-owned and state controlled, effectively precluding any assertion to any rights contained therein.⁵³ Specifically, Article 15 provided that socialist property

or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power.

Id.

46. *Id.*

47. See MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 71-76 (1976); Alexander & Mills, *supra* note 5, at 148.

48. Alexander & Mills, *supra* note 5, at 148.

49. CONSTITUCIÓN DE LA REPUBLICA DE CUBA [CONSTITUTION] art. 4 (1976), *translated in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 9 (Albert Blaustein & Gilbert H. Flanz eds., Pamela Falk trans., 1979).

50. *Id.* art. 9.

51. *Id.*

52. *Id.* Article 9 further provided for the public ownership of the “means of production” and for the “abolition of the exploitation of man by man.” *Id.*

53. *Id.* art 15. Article 15 of the 1976 Constitution provides the following:

The socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to the small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources and flora and fauna in the marine area over which it has jurisdiction, woods, the waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders and the bourgeoisie; as well as over the people’s farms, factories, enterprises and economic, social, cultural and sports facilities built, fostered or purchased by the state and those which will be built, fostered or purchased by the state in the future.

Id.

encompassed lands not belonging to small farmers, natural resources, transportation and communication networks, and sugar mills.⁵⁴ Moreover, Article 15 legitimized the Cuban expropriations by providing that public ownership covered expropriated property.⁵⁵ Despite the strong legal and ideological basis for public ownership and expropriations conducted by the communist regime, compensation for takings was not exclusively ruled out by the 1976 Constitution. Article 25 allowed compensation for properties taken pursuant to a public interest, with secondary law to dictate the amount and form of the payment.⁵⁶

The combination of declining economic performance and significant decreasing subsidization from the Russian Federation led the Cuban government to authorize the creation of limited forms of market socialism in 1992.⁵⁷ Article 23 of the 1976 Constitution was amended to include *empresas mixtas*—joint ventures with foreign business entities.⁵⁸ Foreign ownership interests of up to 49 percent were allowed, and the Cuban government retained the remainder.⁵⁹ Foreign capital was concentrated in certain industries, including mining, real estate, tourism, petroleum, sugar, and communications.⁶⁰ A subsequent liberalization of economic control occurred in 1995. Law 77 permitted three types of foreign investment into Cuba; *empresas mixtas* were perpetuated in addition

54. *Id.* The inclusion of all landholdings except for that of the small landholder can be seen as a backlash to the socioeconomic inequality under the both the 1901 and 1940 Constitutions. Recall that under the *latifundios*, virtually no residual or derived income was distributed to the rural populations. This was supported by the strong legal protections for private property that simultaneously allowed the landed aristocrat to thrive and income inequality to increase. See *supra* notes 15-25 and accompanying text.

55. CONSTITUCIÓN DE LA REPUBLICA DE CUBA [CONSTITUTION] art. 15 (1976). Article 15 provided that public ownership covered “those enterprises, banks, instillations and properties that have been expropriated and nationalized from the imperialists, the landholders and the bourgeoisie.” *Id.*

56. *Id.* art. 25. Article 25 read as follows:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized The law established the method for the expropriation and the bases on which the need for and usefulness of this action to be determined, as well as the form of the compensation taking into account the interests and the economic and social needs of the person whose property has been expropriated.

Id.

57. *Id.* art. 15.

58. CONSTITUCIÓN DE LA REPUBLICA DE CUBA [CONSTITUTION] art. 23 (1992).

59. Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 337, 366 (2004). The 1992 amendments also provided a complete income tax exemption and permitted transfers of real estate. *Id.* at 366-67.

60. See Nicolás J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba*, 5 *U. MIAMI Y.B. INT'L L.* 51, 62-63 (1996-97).

to the introduction of international economic associations and foreign-owned companies.⁶¹ As allowed under the 1992 Amendment, foreign investment was permitted in similar industries, including agriculture, textiles, real estate, and communications.

In sum, Cuban legal protection of property fluctuated over time. The 1901 and 1940 Constitutions provided for strong protection of property and required compensation for any takings or expropriations. This continued after the 1959 Fundamental Law established the legal and ideological foundations of communism. Property rights were effectively eviscerated, however, by the 1976 Constitution. It was not until the 1992 Amendments and subsequent secondary law that private investment began to reemerge. The limited reforms—*empresas mixtas* and other forms of hybrid corporatism—did not signal a decisive break with the past. Rather, they were a response to stagnating macroeconomic performance and changes in the geopolitical environment.

B. *Comparisons with Eastern Europe*

The collapse and subsequent multifaceted economic and political transition of the former Warsaw Pact prompted a vigorous literary debate as to its applicability in other contexts. Cuba has been among the contexts that have generated interest in utilizing the Eastern European transition models.⁶² Some parallels between the Cuban experience and that of Eastern Europe make such comparisons enticing. The communist governments in Eastern Europe came to power in the decade following World War II.⁶³ Similarly the PCC came to power less than a decade later. Moreover, both Cuba and the Warsaw Pact states, as members of the Council of Mutual Economic Assistance, received substantial economic aid from the Soviet Union.⁶⁴ Under this ideological, political, and eco-

61. Ley de la Inversión Extranjera, Ley Numero 77, art. 12 (Cuba), published in *Gaceta Oficial* (Sept. 6, 1995). See also Matias F. Travieso-Diaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, 35 GEO. WASH. INT'L L. REV. 903, 908-09 (2003).

62. See, e.g., Alexander & Mills, *supra* note 5, at 145-46.

63. See generally JOSEPH ROTHSCHILD, *RETURN TO DIVERSITY: A POLITICAL HISTORY OF EAST CENTRAL EUROPE SINCE WORLD WAR II* (2d ed. 1993) (describing the various means by which communist parties consolidated power in Eastern Europe).

64. See MARIE LAVIGNE, *THE ECONOMICS OF TRANSITION: FROM SOCIALIST ECONOMY TO MARKET ECONOMY* 56-57 (2d ed. 1999). It is important to note that Cuba joined the Council for Mutual Economic Assistance in 1972, nearly two decades later than its Eastern European counterparts. Although this official arrangement was not formally solidified, Cuba received considerable aid—economic and otherwise. See *id.* The desire of the Cuban government to diversify agricultural production led it to enter into sugar agreements with the Soviet Union. *Id.* at 56. Cuba's trade concentration with the Soviet bloc was higher when

conomic arrangement, Cuba supplied sugar at subsidized prices to the Soviet Union and Eastern Bloc in return for petrochemicals, machinery, and consumer goods.⁶⁵ Thus, the political and economic alignment of Fidel Castro with that of the Soviet Union makes the past geopolitical connection between Cuba and the Soviet Union impossible to overlook.

The case studies of Eastern Europe are an attractive starting point for analyzing a possible Cuban transition because of their simultaneity; both the political and economic transitions occurred at the same time. At present, U.S. foreign policy presupposes a similar dual transition in Cuba prior to recognizing or conversing with the country.⁶⁶ The gradual marketizations in China and Vietnam could also potentially serve as a basis of analysis should subsequent administrations decide to shift U.S. policy towards recognizing a less-than-democratic or less-than-free-market Cuba. Assuming the general policy towards Cuba remains constant, however, the dual transitions in Eastern Europe provide by far the best starting point of analysis into Cuba's postsocialist pathways.

1. Nationalizations in Eastern Europe

Each country in Central and Eastern Europe had a distinct experience under communism and a different political and economic relation with the Soviet Union. After the communist seizures of power, governments in Eastern Europe began systematic programs of nationalization of industry and collectivization of agriculture. The economic systems implemented in Eastern Europe—like their Cuban counterpart—have a key commonality of subordinating economic and political administration to the communist party.⁶⁷

After the various communist parties gained control of the governments in Eastern Europe, it took a relatively short time for the state authorities to assume the means of production. By 1946, the various Soviet satellites had nationalized the vast majority of indus-

compared to its pre-revolutionary trade levels with the United States. Between 1946 and 1958 the United States accounted for 69 percent of total trade. Robert A. Packenham, *Cuba and the USSR since 1959: What Kind of Dependency?*, in *CUBAN COMMUNISM* 135, 139 (Irving Louis Horowitz ed., 7th ed. 1989). From 1961 to 1978, CMEA members accounted for an average of 73 percent of total Cuban trade. *Id.*

65. LAVIGNE, *supra* note 64, at 56.

66. *See infra* note 277 (outlining the political and economic criteria of the Helms-Burton Act in recognizing a democratically-elected government in Cuba).

67. *See* JÁNOS KORNAI, *THE SOCIALIST SYSTEM: THE POLITICAL ECONOMY OF COMMUNISM* 33-48 (1992) (discussing the relationship between the communist party and the administration of the state).

tries.⁶⁸ The nationalization processes were complete by the end of the decade.⁶⁹ For example, in Poland, the Soviet Union established organizations to administer the liberated territories prior to the close of World War II.⁷⁰ By the beginning of 1946 the Nationalization Law was implemented and mandated that all enterprises employing fifty or more workers were under state control.⁷¹ As a result, state economic-planning authorities administered 90 percent of all enterprises by the end of 1946.⁷² Similarly, in Czechoslovakia, the Soviets sought to nationalize all enterprises formerly administered by the Nazis.⁷³ Moreover, there were early calls for the nationalization of privately owned heavy industries, landholdings, and financial institutions.⁷⁴

2. Cuban Expropriations

The basis of Cuban expropriation claims lies in the nationalizations conducted by the revolutionary government of Fidel Castro. The overthrow of Fulgencio Batista and the enactment of the Fundamental Law of 1959 commenced a systematic policy of agricultural and industrial nationalization and redistribution.⁷⁵ The provisions in the Fundamental Law authorizing the expropriation of private property by nonjudicial government agencies were the principal legal device used to legitimize such takings.⁷⁶ The first nationalizations targeted the property of former officials in the

68. IVAN T. BEREND, *CENTRAL AND EASTERN EUROPE, 1944-1993*, at 72-73 (1996). At the end of 1946, 89 percent of Albania's economy was under state control. *Id.* at 73. Similar results were observed in Yugoslavia where the Tito-led government controlled 82 percent of the economy. *Id.* Likewise, approximately 80 percent of the economies of Poland and Czechoslovakia were directed and owned by the state. *Id.*

69. *See id.* By the end of 1948 all Czechoslovak enterprises employing more than 50 people were owned and administered by the State. *Id.* In Poland, state-owned enterprises accounted for approximately 97 percent of economic output. *Id.* By the end of the decade the overwhelming majority of both the Romanian and Bulgarian economies were administered by the state. *See id.*

70. *See* NORMAN DAVIES, *2 GOD'S PLAYGROUND: A HISTORY OF POLAND* 413 (2005); JAN B. DE WEYDENTHAL, *THE COMMUNISTS OF POLAND: AN HISTORICAL OUTLINE* 44-45 (Richard F. Staar ed., 1978).

71. DAVIES, *supra* note 70, at 426.

72. *Id.*

73. *See* JOSEF KALVODA, *CZECHOSLOVAKIA'S ROLE IN SOVIET STRATEGY* 180 (1978).

74. *See* ROTHSCHILD, *supra* note 63, at 96.

75. GORDON, *supra* note 47, at 71-76.

76. *See* INT'L COMM'N OF JURISTS, *CUBA AND THE RULE OF LAW* 103-04 (1962); Matias F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 232 n.51 (1995); *see also* CARMELO MESA-LAGO, *THE ECONOMY OF SOCIALIST CUBA: A TWO-DECADE APPRAISAL* 12 (1981).

Batista regime.⁷⁷ Successive rounds of nationalizations were aimed at diversifying and disaggregating economic activity.⁷⁸

The failed industrialization policies of the Batista government resulted in persistent economic misallocations and national income stagnation.⁷⁹ Undercapitalized industries were unable to compete in competitive markets. Further, Batista's government extended tariff preferences to approximately 80 percent of U.S. exports to Cuba.⁸⁰ This limited the development of domestic industries and made the Cuban economy entirely dependent on the performance of U.S. corporations. The result of this asymmetric economic relationship was an overreliance on a highly concentrated agricultural sector, that is, on sugar production.⁸¹ Yet, about half of all Cuban sugar mills and processing facilities were owned by U.S. investors.⁸² Income was invested in neither Cuban infrastructure nor local economies, but rather back to U.S. shareholders.

After the revolutionary government had seized power, priority was given to the nationalization of agriculture and industry. The Agrarian Reform Law of 1959 was the primary legal mechanism whereby land was taken by the revolutionary government.⁸³ Large landholdings were prohibited; farmlands over 400 hectares in size were nationalized.⁸⁴ Nearly all of the sugarcane fields were expropriated by the revolutionary government, many of them owned by U.S. interests. Approximately 596 U.S.-owned farms—totaling

77. See FUNDAMENTAL LAW OF CUBA 1959, *supra* note 38, art. 24, at 4. Many of the assets confiscated from supporters of the Batista regime were forfeited during their mass exodus to the United States. See O'CONNOR, *supra* note 10, at 155.

78. See GORDON, *supra* note 47, at 72-73 & n.17.

79. See O'CONNOR, *supra* note 10, at 147. Per capita income levels had no significant increase in the period between independence and the Socialist Revolution. See *id.* at 17. The average per capita income was \$201 between 1903 and 1906. *Id.* Average income levels for 1956-1958, however, were \$200 per capita. *Id.*

80. *Id.* at 148.

81. See *id.* tbl.1, at 137. In 1953, approximately 41.5 percent of total workers were involved in agriculturally-related enterprises, as compared to 16.6 percent for manufacturing and 20.1 percent for services. *Id.* The agricultural sector was highly concentrated. Eighty-three individuals or companies owned the entire 161 sugar mills in Cuba. *Id.* at 136-37.

82. *Id.*

83. Ley de la Reforma Agraria (1959) (Cuba) art. 12, *published in* Gaceta Oficial (June 3, 1959).

84. MESA-LAGO, *supra* note 76, at 12. The Agrarian Reform Law limited private land ownership to small- and medium-sized farms and ownership structures deemed to be in the best interest of the Cuban economy. GORDON, *supra* note 47, at 75.

1,261,587 hectares—were expropriated in July 1960.⁸⁵ Similarly, large cattle ranches were nationalized by the state. A total of 1,100,000 hectares from 900 ranches were nationalized between 1959 and 1963.⁸⁶ By mid-1963 the Cuban government controlled over 81 percent of all farmland on the island.⁸⁷

Nationalizations also occurred in the industrial sector and in urban areas. The rental-housing market was brought under government control.⁸⁸ Factories, rental-housing units, and other properties deemed abandoned by citizens fleeing to the United States were confiscated.⁸⁹ Also nationalized were properties deemed to be owned by U.S. nationals.⁹⁰ Moreover, currency controls were implemented in September of 1959 to prevent capital flight and the transfer of funds abroad.⁹¹ By October 1960, the entire Cuban banking system was nationalized with various other industries in a massive expropriation program.⁹² By 1963, 77 percent of all Cuban workers were employed in state-owned industries.⁹³

Nationalizations occurred in successive years, bringing further economic change to the island. Economic and political relations were reoriented away from the United States toward the former Soviet Union and the Warsaw Pact members. The collapse of communism in Eastern Europe and the Soviet Union, however, signaled a fundamental shift for Cuba. Market-oriented reforms were implemented and trade relations were normalized with the global

85. O'CONNOR, *supra* note 10, at 322. This expropriation was followed by subsequent nationalizations. In October 1960, the Cuban government seized a further 910,547 hectares of cane fields from 2,537 farms owned by both American and Cuban interests. *Id.* In the period of 1959-1963, the Cuban government expropriated or purchased a total of 2,800,000 hectares of cane fields from 3,129 farms. *Id.*

86. *Id.*

87. *Id.* at 320.

88. The Urban Reform Law of October 14, 1960 authorized the expropriation of all rental housing. Ley de Reforma Urbana (1960) (Cuba), *published in* Gaceta Oficial (Oct. 14, 1960) *see* MESA-LAGO, *supra* note 76, at 12; Travieso-Diaz, *supra* note 76, at 219.

89. *See* MESA-LAGO, *supra* note 76, at 12.

90. Ley 851 (1960) (Cuba), *published in* Gaceta Oficial (July 6, 1960) (authorizing expropriation of all U.S.-owned property. *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 631 (5th ed. 2007) (discussing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

91. *See* GORDON, *supra* note 47, at 79.

92. Ley 890 (1960) (Cuba), *published in* Gaceta Oficial (Oct. 13, 1960). Included in this nationalization were "nineteen construction firms, eight railroads, . . . sixty-one textile plants, seven paper companies, eight container factories, and eighteen distilleries." O'CONNOR, *supra* note 10, at 165 n.42.

93. *See* O'CONNOR, *supra* note 10, at 167.

community, with the only exceptions being the United States and Israel.

III. MODES OF CONSTITUTIONALISM: A SCENARIO ANALYSIS

The inevitable end to Cuban *caudillismo*—the cult of personality of the political-military leader Fidel Castro—and a corresponding change in Cuba's international political and economic relations may usher in a new era of Cuban constitutionalism.⁹⁴ Of course an essential question is what form a new constitutionalism is going to take in light of Cuba's history and its experience under communism. Such a question has a potential impact of immense significance for the United States in light of the thousands of outstanding claims against the Cuban government for nationalizations without compensation, and for future economic relationships with the island.⁹⁵

Of course it is not inevitable that Cuba will progress along some path-dependent route and arrive at a preordained market-based economic model. Comparative "transology," however, may yield useful parallels by which potential legal, political, and economic reforms may be extrapolated. The various transitions in Eastern Europe provide a multitude of rich case studies that may shed light on the face of a post-Castro Cuba. Specifically, all Eastern European countries to emerge from communism share commonalities and differences in the way their transitions progressed. Differences among the transitions in Eastern Europe are particularly useful in an examination of the different constitutional structures that emerge from democratization. That is, the mode of constitutionalism can be analyzed in light of the specifics of a transition. The following sections look at various transitions and corresponding constitutional reforms. Three possibilities seem to emerge from the example of Eastern Europe: readopting a precommunist constitution, drafting a new postcommunist constitution, and reforming a communist constitution.

A multitude of scholarly attention has paid tribute to the importance of constitutions in the political and economic transitions in Eastern Europe.⁹⁶ Much of the focus has been on the factors that

94. See generally Paul C. Sondrol, *Intellectuals, Political Culture and the Roots of the Authoritarian Presidency in Latin America*, 3 GOVERNANCE 416, 423-24 (1990) (discussing the concept of *caudillismo*).

95. See discussion *infra* Part IV.A-B.

96. See, e.g., Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497 (2003); Simon

influence a successful democratization, including the level of mass mobilization,⁹⁷ the role of political elites,⁹⁸ and the form of the government.⁹⁹ The process of constitution drafting, however, is also of key importance to how the form and substance of the resultant constitution emerges.

The most radical constitutional changes occur as a result of cataclysmic sociopolitical events.¹⁰⁰ In Eastern Europe, all of the countries had some degree of mass mobilization and a normative frame seeking independence from the crumbling Soviet Union.¹⁰¹ All of the countries in Eastern Europe had political elites seeking to reconstitute their respective states into functional democracies and integrate them into the international community.¹⁰² Yet the way the constitutions were formed varied from modification to evisceration. The normative frame in which constitutional politics occurs is key to the mode of constitutionalism. That is, the politics of the constitution drafting largely determines the manner in which a new constitution is drafted. The politics of constitutionalism are

Johnson, John McMillan & Christopher Woodruff, *Property Rights and Finance*, 92 AM. ECON. REV. 1335 (2002); Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001); Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L L. 13, 13-14 (1995); Yuri Feofanov, *The Establishment of the Constitutional Court in Russia and the Communist Party Case*, 19 REV. CENT. & E. EUR. L. 623 (1993); Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57 (1993); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

97. See Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World*, 54 WORLD POL. 212, 226 (2002) (arguing that stable democracies emerge when the distribution of power is clearly in the democratic movement's favor at the time of transition).

98. See, e.g., Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 COMP. POL. 1, 8-9 (1990) (stating that transitions are a function of elite strength and strategies of compromise); John Higley & Michael G. Burton, *The Elite Variable in Democratic Transitions and Breakdowns*, 54 AM. SOC. REV. 17 (1989) (discussing the role of elite political actors in political transitions).

99. See, e.g., Shannon Ishiyama Smithey & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUNIST & POST-COMMUNIST STUD. 163 (2000) (discussing the institutional design of the judiciary in transition countries); Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 52 (1990) (arguing that parliamentary systems are more conducive to stable democracy than presidential systems).

100. See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 106 (2d ed. 1993) (arguing that "revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup" are some of the events which may cause new constitutional structures to emerge).

101. See *infra* notes 125-128 (Latvia), 148-157 (Poland), 191-194 (Czechoslovakia) and accompanying text.

102. See *infra* notes 131-133 (Latvia), 205-207 (Poland), 212-214 (Czechoslovakia), 246-253 (Hungary) and accompanying text.

influenced, *inter alia*, by constraints and opportunities facing political elites, the level of popular mobilization, and "regional contagion" effects.¹⁰³

The opportunity structures presented to elites as well as mass political participation fail to entirely encapsulate constitutional politics, however. For instance, the communist regimes of Latvia, Poland, Czechoslovakia, and Hungary all lost legitimacy.¹⁰⁴ Popular demonstrations were held on the streets of Warsaw, Riga, and Budapest. Yet the politics of constitution drafting produced dissimilar results. Indeed, each of these countries varied greatly not with respect to regime legitimacy but with respect to the normative frame in which policymaking occurred. More precisely, the variance among the Central European constitution-drafting processes was where the popular perception of illegitimacy was focused—on the state, on the government, or on policy.

The following sections examine three case studies of Eastern Europe transitions: Latvia, Poland-Czechoslovakia, and Hungary. Each of these cases illustrates the different ways a postcommunist constitutional system might develop. The dispositive factor in how the constitution-making process develops is how the regime is perceived as illegitimate. That is, the people of a country might perceive the policies of a government, the government itself, or even the entire state as illegitimate. In each case, the factors that led to a particular frame of illegitimacy are examined and then compared to the Cuban experience. From that, a picture emerges of how a postcommunist Cuban legal framework might materialize. Indeed, once the sociopolitical dynamics of Cuba are analyzed and compared with their Eastern European counterparts, one can then extrapolate how a number of property claims can be legally resolved.

A. *Latvia and the Problem of Constitutional Inheritance*

1. History, Revolution, and Reform

The Baltic countries generally adopted liberal post-World War I constitutional frameworks committed to the democratic ideals that inspired the creation of the League of Nations.¹⁰⁵ Latvia achieved

103. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 365 (1995).

104. See discussion *infra* Parts III.A.1, III.B.1, III.B.2, III.C.1.

105. ANATOL LIEVEN, *THE BALTIC REVOLUTIONS: ESTONIA, LATVIA, LITHUANIA AND THE PATH TO INDEPENDENCE* 64 (1993). All three Baltic states developed liberal constitutional frameworks in the interwar period. Lithuania adopted a "highly democratic" constitution

the status of an independent state for the first time in history with the 1920 Riga Peace Treaty.¹⁰⁶ The 1922 Latvian Constitution (*Satversme*) declared the Republic to be free and independent, with power vested in the people.¹⁰⁷ Of special significance was a constitutional proviso that the system of government could only be changed upon the consent of the people through a referendum.¹⁰⁸ The 1922 Constitution also secured strong guarantees of private property.¹⁰⁹ Minorities were given constitutional protections, and a liberal election law provided for secret, direct voting for proportional parliamentary representation.¹¹⁰ Taken together, precommunist Latvia secured the basic juridical and constitutional foundation for a liberal democracy.

The 1939 Molotov-Ribbentrop Pact, however, placed Latvia under the Soviet sphere of influence, albeit temporarily.¹¹¹ At the conclusion of World War II, Latvia was again absorbed into the Soviet Union. *Zhdanovschina*—the Soviet policy of asserting complete control through terror—was implemented throughout the Baltic States.¹¹² The omnipresence of the Soviet army reinforced the power of the Soviet communists.¹¹³ Moreover, to counteract the massive population losses during and after World War II, the Soviets recruited Russians to repopulate and settle the Baltics.¹¹⁴

that generally guaranteed individual rights and provided for the protection of minorities. THOMAS LANE, *LITHUANIA: STEPPING WESTWARD* 19 (2001). An independent Estonia can be traced to the Nystad Treaty of 1721. Dietrich André Loeber, *Regional and National Variations: The Baltic Factor, in TOWARD THE "RULE OF LAW" IN RUSSIA?: POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD* 77, 78 (Donald D. Barry ed., 1992). Interwar Estonia became a member of the League of Nations and the 1920 Constitution, like that of Lithuania and Latvia, provided for minority protections, separation of powers, and elaborate guarantees of civil liberties, which was considered advanced among the contemporary constitutions of that era. MARKKU SUKSI, *ON THE CONSTITUTIONAL FEATURES OF ESTONIA* 9-10 (1999).

106. See ANDREJS PLAKANS, *THE LATVIANS: A SHORT HISTORY* 120 (1995).

107. DAINA BLEIERE ET AL., *HISTORY OF LATVIA: THE 20TH CENTURY* 156 (Valdis Berzins et al. trans., 2006).

108. *Id.*

109. *Id.* at 155. This constitutional article codified a 1921 law passed by the Cabinet, which required judicial preapproval of all government takings. *Id.*

110. *Id.* at 156-57.

111. See PLAKANS, *supra* note 106, at 142-48.

112. LIEVEN, *supra* note 105, at 92.

113. See PLAKANS, *supra* note 106, at 153. The Soviets reestablished Riga as the headquarters of the Baltic Military Region. *Id.* As a result, there was a substantial presence of Soviet military personnel stationed in Latvia following World War II. See *id.*

114. *Id.* at 154; see generally Claire Messina, *From Migrants to Refugees: Russian, Soviet and Post-Soviet Migration*, 6 INT'L J. REFUGEE L. 620, 622-24 (1994) (discussing Soviet relocation policies in the decades following World War II). In Latvia, the first postwar economic program was implemented in 1945 and labor was recruited from other parts of the Soviet

Latvian jurisprudence and constitutionalism were replaced by the codes and laws of the Russian Soviet Federated Socialist Republic.¹¹⁵ Judicial harmonization between the Baltic States and the Russian Soviet Federated Socialist Republic was completed by the early 1950s and remained synchronized until independence.¹¹⁶ As was the case with all the republics within the Soviet empire, the Moscow-centered, Russian-dominated communist party administered and controlled all aspects of Latvian economics and politics.

Latvia also remained plugged into the Soviet military and economic apparatus until the Gorbachev *perestroika-glasnost* reforms of the late 1980s. Dissent and disillusionment plagued the cadres of the Latvian Communist Party (LKP) in the 1970s, however.¹¹⁷ The "systematic Russification" of the LKP became an issue of contention, as did the economic stagnation and chronic shortages of consumer goods.¹¹⁸ Thus, a political space was created by Gorbachev's reformist edicts allowing the relatively low-level dissension within the party structure and intermittent acts of public defiance to morph into a massive opposition movement.¹¹⁹

Small elements of civil society began to emerge and publicly demonstrate against the government.¹²⁰ Within the plethora of interests—for example, the environment and freedom of the press—advocated by the various dissident groups, the utilization of Latvian history and tradition was nearly universal.¹²¹ That is,

Union to fulfill demand for technical expertise. PLAKANS, *supra* note 106, at 154. By the end of 1955, 535,000 non-Latvian immigrants had resettled in Latvia, increasing the ethno-Russian population to 2 million. LIEVEN, *supra* note 105, at 183. By 1993, ethnic Russians and Latvians composed approximately 34 and 53.5 percent of Latvia's population, respectively. PLAKANS, *supra* note 106, tbl.3, at 158.

115. See Loeber, *supra* note 105, at 79.

116. See SUKSI, *supra* note 105, at 16-17.

117. See PLAKANS, *supra* note 106, at 163-64.

118. See *id.* at 164-65.

119. See *id.* at 168-70.

120. See Jan Arveds Trapans, *The Sources of Latvia's Popular Movement*, in TOWARD INDEPENDENCE: THE BALTIC POPULAR MOVEMENTS 25, 27 (Jan Arveds Trapans ed., 1991); Rasma Karklins & Brigita Zepa, *Political Participation in Latvia 1987-2001*, 32 J. BALTIC STUD. 334, 335 (2001); PLAKANS, *supra* note 106, at 170-72. New Political organizations included the Latvian Writers Union, the Latvian National Independence Movement (LNNK), the Environmental Protection Club (VAK), and Helsinki-86. *Id.* In 1988, the Latvian Writers Union and the VAK observed the anniversary of the Stalinist deportations resulting from collectivization programs in the 1940s; the VAK gathering led to a demonstration for Latvian Independence. *Id.* at 170-72. The human rights group Helsinki-86 marked the anniversary of the Molotov-Ribbentrop Pact in August of 1987 and the anniversary of the first Latvian declaration of independence. LIEVEN, *supra* note 105, at 221.

121. See LIEVEN, *supra* note 105, at 221-23 (describing Latvia as the "pathbreaker in patriotic demonstrations"). The demonstrations by Helsinki-86 took place at monuments of special historical significance. The protest to mark the deportations took place at the

mobilization of the Latvia citizenry was achieved by channeling anger toward the LKP through the lens of history—the lens of a previously independent Latvia. The LKP was constructed as a foreign—that is, Russian—entity, as opposed to something that was legitimately Latvian.¹²² This enabled the various civic groups, with their continuum of interests, to coalesce into an opposition to the LKP in the classic sense. This opposition came in the form of the Latvian Popular Front.¹²³

Membership in the organization was as diverse as the name suggested; communists, environmentalists, and dissidents all included themselves within its ranks.¹²⁴ Successive mass demonstrations, previously unthinkable in scale and message, were becoming increasingly common in the streets of Riga.¹²⁵ The lack of a military response to regime change in Eastern Europe signaled that there would not be a military crackdown in the Baltics. The Latvian Popular Front won an overwhelming majority of seats in the Latvian Supreme Soviet Elections in March 1990.¹²⁶ Moreover, the LKP split along a loyalist-independent fault.¹²⁷ On May 4, 1990, the Latvian Supreme Council voted to separate from the Soviet Union and restore the Republic of Latvia.¹²⁸

2. Resurrecting an *Ancien Régime*

The process of recreating an independent Latvian republic, with corresponding institutions of government, was not without problems. Unlike the Warsaw Pact nations in Eastern Europe that were dominated by communist governments, Latvia as a state did not exist during the Cold War. Independence was both a political independence from the communist ideological monopoly and an

Freedom Monument in Riga. *Id.* at 221. Ostensibly, these demonstrations were to mark a Stalinist crime, which the Gorbachev-led Soviet government had been actively denouncing. *Id.* These demonstrations, however, also served to link the past with the future of Latvia through a lens of independence and nationalism. *See id.* Further incidents of history-driven dissidence included raising the white and crimson flag of independent Latvia, as well as keeping identity and independence at the center of organizational meetings. *See* PLAKANS, *supra* note 106, at 170-76.

122. *See* LIEVEN, *supra* note 105, at 228.

123. *See* PLAKANS, *supra* note 106, at 172-73. For more information on the establishment of the Latvian Popular Front, see Andrejs Penikis, *The Third Awakening Begins: The Birth of the Latvian Popular Front, June 1988 to August 1988*, 27 J. BALTIC STUD. 261 (1996).

124. PLAKANS, *supra* note 106, at 173.

125. *Id.*

126. *Id.* at 176.

127. *See id.* at 176-77.

128. *Id.* at 177.

emergence of a country that only had a brief pre-World War II existence.

Thus, the politics of the constitution-drafting process, with its opportunities and constraints, were a function of the normative frame in which they took place—the common opposition linkage of a Latvian identity, as opposed to one being a Russian or Soviet.¹²⁹ In Latvia the illegitimacy of communism was focused on the state itself. The fact that the Soviet Union was neither a valid nor legitimate entity became the foundation upon which the break with communism took place and upon which the subsequent republic was resurrected. Thus, the illegitimacy of the state became the constitution drafter's biggest opportunity: establishing a distinct identity of an independent Latvia and, through that, political legitimacy.¹³⁰

The construction of the Soviets as outsiders through the use of nationalism and history allowed constitutional legitimacy to be forged from a Soviet legacy by readopting the 1922 Constitution. Thus, the "problem of constitutional inheritance"¹³¹ was addressed in August 1991 when the Supreme Council adopted a law on "The Renewal of the Independence of the Republic of Latvia," declaring the Soviet annexation null and restoring the 1922 Constitution.¹³² Enumerated guarantees of civil liberties and the protection of private property were among the provisions contained in the 1922 Constitution.¹³³

129. See *supra* notes 121-22 and accompanying text.

130. See generally BLEIERE ET AL., *supra* note 107, at 456-59 (discussing the issue of legal continuity).

131. See *id.*

132. See LIEVEN, *supra* note 105, at 243; JOHN HIDEN & PATRICK SALMON, *THE BALTIC NATIONS AND EUROPE* 189 (rev. ed. 1994). The "restoration of sovereignty" was welcomed by the European Community as well as the United States without significant delay following the declaration of independence. See *id.* The Republic of Latvia was admitted membership in the United Nations on September 17, 1991. G.A. Res. 46/5, U.N. Doc. A/RES/46/5 (Sept. 17, 1991).

133. The Latvian Constitution provides as follows:

Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.

SATVERSME [CONSTITUTION] art. 105 (Lat.).

B. Czechoslovakia and Poland: Revolutions from Below

1. Poland's Solidarity

In similar vein to its Baltic neighbors, Polish society never fully accepted communist rule. Communism was associated with Russia, a historical adversary of Poland.¹³⁴ During the closing months of World War II, the Soviets established the "Lublin Committee" to administer the territories liberated from German occupation.¹³⁵ The Committee was transformed into the provisional government at the close of the war and was eventually recognized abroad as the official government of liberated Poland.¹³⁶ Indeed, the country was effectively incorporated into the greater Soviet security zone prior to the conclusion of hostilities.¹³⁷

Establishing a legitimate government in the eyes of the Polish people was, however, a more difficult task than simply gaining Western acquiescence to Soviet domination.¹³⁸ The return of the Polish government-in-exile was met with great popularity, putting the existence of a future communist government in doubt.¹³⁹ As a result, the Soviets repeatedly delayed free elections until a 1946 referendum was held on the future political and economic composition of the country.¹⁴⁰ The highly questionable returns gave the communists—the Polish United Workers Party (PZPR)—the aura of legitimacy they had previously lacked and the means to marginalize political opposition.¹⁴¹

134. ROTHSCHILD, *supra* note 63, at 79.

135. DAVIES, *supra* note 70, at 413. The Lublin Committee—officially the Polish Committee of National Liberation—was created in Moscow in early 1944. *Id.* at 413-14. The committee's manifesto was effectively an edict from the Soviet government calling on the populace to cooperate with the Soviets and indicating an intention to enact future land reforms. WEYDENTHAL, *supra* note 70, at 45.

136. *See* DAVIES, *supra* note 70, at 413. The London-based Polish government-in-exile was unrecognized by the United States and Britain in July 1945. *Id.* at 431.

137. *See* BEREND, *supra* note 68, at 7-10.

138. *See generally* ROTHSCHILD, *supra* note 63, at 79-80 (discussing that the Polish Communist leadership in the immediate postwar years lacked ideological conviction, genuine popularity, or vivid achievement).

139. *See id.* at 81-82. Notwithstanding the de-legitimization of the government-in-exile by British and American foreign policy in 1945, the membership of the anti-Soviet Polish Peasant Party, led by Stanislaw Mikolajczyk, grew to 600,000 by 1946. *Id.*

140. DAVIES, *supra* note 70, at 424. The referendum proposed to abolish the Senate, incorporate the new western territories into the Polish state, and enact land reforms and nationalizations. WEYDENTHAL, *supra* note 70, at 51.

141. *See* DAVIES, *supra* note 70, at 426; WEYDENTHAL, *supra* note 70, at 51-52. Mikolajczyk's Polish Peasant Party was marginalized along with the other non-communist opposition parties. *See id.* at 52.

The PZPR was, however, unable to eliminate all forms of civil society in Poland. Prior to the late 1970s, Polish civil society was driven by the position of the Catholic Church in the country's social hierarchy.¹⁴² The Church was the *de facto* keeper of national identity after the partition of Poland among Russia, Prussia, and Austria, and was of paramount importance during communism in that it served as an alternative source of legitimate authority for society.¹⁴³ That is, the communist government was never able to monopolize itself as the only source of social legitimacy.¹⁴⁴ The communist government oscillated between policies of appeasement and attack with respect to the Church.¹⁴⁵ During the 1970s, however, the PZPR became increasingly reliant on the Church as a moderator of social unrest.¹⁴⁶ As a result, the Church was able to expand its size while the PZPR was in power, and it remained somewhat autonomous from direct governmental interference.

In a similar vein to its policy regarding the Catholic Church, the PZPR pursued a policy of harassment rather than annihilation when it came to quasi-dissident private organizations.¹⁴⁷ The social disquiet of the late 1970s ushered in numerous independent civic groups, the Committee for the Defense of Workers (KOR) being the most significant.¹⁴⁸ The KOR and its sister groups were not opposition in the traditional sense. Rather, these groups were supportive, or at least conveyed their support of Marxist ideology, and

142. See GALE STOKES, *THE WALLS CAME TUMBLING DOWN: THE COLLAPSE OF COMMUNISM IN EASTERN EUROPE* 31 (1993).

143. See Mirella W. Eberts, *The Roman Catholic Church and Democracy in Poland*, 50 *EUR.-ASIA STUD.* 817, 817-18 (1998).

144. See JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION* 256-57 (1996) (discussing the ability of the Catholic Church to maintain a degree of ideological autonomy during the reign of the PZPR); ROTHSCILD, *supra* note 63, at 87 (noting that the Catholic Church "became the only national institution that managed to checkmate its attempted subordination by the Communist regime and to retain a strong autonomous role in public life").

145. See Eberts, *supra* note 143, at 819.

146. See *id.* at 819-20. This reliance was also, in large part, due to the election of Cardinal Karol Wojtyła, Archbishop of Kraków, as Pope John Paul II in 1978. STOKES, *supra* note 142, at 31. The Pope's message of human dignity and redemption reached millions of Poles and helped reestablish a spiritual identity in large segments of the population. See *id.* at 33-34; ROTHSCILD, *supra* note 63, at 197-98 (discussing the "nationalism, self-confidence, and euphoria" that Pope John Paul II's visit brought to Poland as well as the damage it caused to the legitimacy of the communist government).

147. See STOKES, *supra* note 142, at 27-28 (discussing the Gierek regime's inability or unwillingness to eliminate opposition groups and underground publications in their entirety).

148. See ROTHSCILD, *supra* note 63, at 198-99. Other groups included the Movement in Defense of Human and Civil Rights, the Polish League for Independence, and the Confederation of Independent Poland. STOKES, *supra* note 142, at 30.

demanded only limited reforms within the existing political and economic system.¹⁴⁹ The government's acquiescence in permitting these groups to function with only limited interference allowed them to coalesce into what was to become *Solidarnosc* (Solidarity).¹⁵⁰

Solidarity quickly became the only independent organization in the Soviet bloc to challenge the legitimacy of the state on such a massive scale.¹⁵¹ Founded in Gdańsk in 1980, Solidarity became the first representative of the working class outside of the party-state structure.¹⁵² Strikes were held throughout the country as the union articulated demands for better wages, merit-based promotions, and worker self-governance.¹⁵³ The affront to state power led to a military coup of December 1981, the declaration of martial law, the illegalization of trade unions, and the persecution of its members.¹⁵⁴ "Normalization" in Poland did not, however, take the form of neo-Stalinism. Rather, the PZPR military government attempted to counterbalance the persecution of Solidarity by allowing alternative quasi-independent institutions.¹⁵⁵ Yet, the PZPR never fully recognized how illegitimate it had become in the eyes of large segments of the Polish populace.¹⁵⁶

The existence of civil society outside the realm of the communist-party apparatus, and the willingness of the PZPR to respond to KOR and later Solidarity, created a space where pluralism could be cultivated. Moreover, this was done in the context of the communist party being considered an illegitimate, external entity. The PZPR recognized that there would be opposition as a matter of fact

149. See DAVIES, *supra* note 70, at 472. The primary demand of Committee for the Protection of Workers and other independent organizations was for the party-state to abide by its constitutional obligations openly. *Id.*; see Marcia A. Weigle & Jim Butterfield, *Civil Society in Reforming Communist Regimes: The Logic of Emergence*, 25 COMP. POL. 1, 7 (1992) (stating that the activities of independent organizations, such as KOR and Charter 77, were limited to "providing social groups with aid against state oppression" and "holding the state responsible for its own articulated duties").

150. See ROTHSCHILD, *supra* note 63, at 199; STOKES, *supra* note 142, at 28.

151. See DAVIES, *supra* note 70, at 482-84. Solidarity's demand for an independent trade union was a revolution for 1980 Eastern Europe. No government in the Eastern Bloc conceded that workers could organize independent of the state. *See id.* at 483-84. The precise number of Solidarity members by mid-1981 is unknown but some estimates put the figure at 10 million, with another 3 million rural members. BEREND, *supra* note 68, at 258.

152. For an account of the events leading to and culminating in the formation of Solidarity, see TIMOTHY GARTON ASH, *THE POLISH REVOLUTION: SOLIDARITY* 41-72 (Yale Univ. Press 2002) (1983).

153. *See id.* at 73-76.

154. *See STOKES, supra* note 142, at 43-44.

155. *Id.* at 103.

156. *Id.* at 105.

from the mid-1980s onward.¹⁵⁷ President Wojciech Jaruzelski offered “round table talks” as an effort to incorporate Solidarity as a component of the communist party-state.¹⁵⁸ Solidarity was legalized and permitted to field candidates in an election designed to ensure that the communists maintained their political supremacy.¹⁵⁹ The returns yielded an overwhelming victory for Solidarity in June 1989; Solidarity candidates won virtually all of the seats contested in the Sejm and Senate.¹⁶⁰ Soon thereafter, economic “shock therapy”—macro-stabilization, convertible currency, privatizations—was implemented alongside further political reforms.¹⁶¹ The watchword of reform was speed; pluralism and capitalism ushered Polish communism into the chronicles of history with a stroke of a pen.¹⁶²

2. Czechoslovakia's Velvet Revolution

In stark contrast to the Latvian and Polish perceptions of the Soviets as a foreign occupier, Czechoslovak collective memory saw the Russians as a historical ally.¹⁶³ The preindependent Czechoslovak government had close ties to the Bolshevik leadership in Moscow, and a less than stellar rapport with the Americans.¹⁶⁴ Political

157. *Id.* at 122; see TIMOTHY GARTON ASH, *THE USES OF ADVERSITY: ESSAYS ON THE FATE OF CENTRAL EUROPE* 272 (1990). Negotiations with the Solidarity leadership began as early as 1987. DAVID OST, *SOLIDARITY AND THE POLITICS OF ANTI-POLITICS: OPPOSITION AND REFORM IN POLAND SINCE 1968*, at 172 (1990).

158. STOKES, *supra* note 142, at 124-25.

159. *Id.* at 125. The accord between Solidarity and the Polish United Workers Party designated 65 percent of the Sejm to be allocated to communist candidates with the remainder being up for a free, unrestricted, contested election. *Id.* at 126. A bicameral legislature was reestablished; the Senate's composition was determined entirely by contested elections. *Id.* Political reforms were supplemented by promises of greater freedoms for the judiciary and the media. *Id.* at 125.

160. DAVIES, *supra* note 70, at 503-04.

161. *Id.* at 505; see LAVIGNE, *supra* note 64, at 101.

162. See BALCEROWICZ, *supra* note 2, at 157. Balcerowicz argues that in extreme cases of macroeconomic instability, stabilization must occur quickly and that there are important interlinkages between reforms, which makes implementation a prerequisite for successful transition. *See id.* On a political level, radical economic reforms should be introduced during a “period of extraordinary politics.” *See id.* at 160-61. This “special state of mass psychology” is one whereby the public is more willing to make personal sacrifices for the greater good when foreign domination ends or domestic political liberalization occurs. *Id.* at 161. Thus, reforms can be locked in without a high probability of reversal.

163. ROTHSCHILD, *supra* note 63, at 89.

164. See KALVODA, *supra* note 73, at 8-9. During World War I, the Czech delegation in Moscow perceived the Leninists as “internationalist” and as “represent[ing] an all-European rather than purely domestic Russian problem.” *Id.* at 8. The Czech leadership appealed to the United States to recognize the new Bolshevik government but was rebuffed when President Wilson refused to receive the Tomáš Masaryk during his prearranged visit to Washington, D.C. *See id.* at 9-10.

alliances between the Czechoslovak government-in-exile and the Soviets continued throughout the interwar period.¹⁶⁵ Prior to the conclusion of World War II, the Soviet Union made clear that a liberated Czechoslovakia was to be a “real democracy.”¹⁶⁶ In Soviet parlance, this meant that the Communist Party of Czechoslovakia (KSČ) would administer all aspects of society—cultural, political, and economic—and that the Czechoslovak state would be bound to a policy of unwavering friendship with the Soviet Union.¹⁶⁷ The historical friendship was utilized to forge a cognitive link between the KSČ, their Soviet masters, and the Czechoslovak people.¹⁶⁸

Also unlike the Latvian experience, the Soviet Union did not immediately absorb Czechoslovakia into its sphere of influence. The government that was sculpted in Moscow returned to Prague with several noncommunist cabinet members.¹⁶⁹ Although the Soviets proposed to expropriate all economic resources that were under German control,¹⁷⁰ and although parallel calls were made by Marxist Czech political parties to nationalize banks, heavy industry, and large landholdings, no drastic socioeconomic transformation occurred in the immediate postwar period.¹⁷¹ Yet, the cooperative communist model came to a crash in 1947. After political developments in Italy and France, declining domestic opinion of communist rule, and the perception that Czechoslovak communism was not being molded in classical form, the Soviets proceeded to purge noncommunist government officials.¹⁷² In February 1948, the majority of the noncommunist cabinet resigned and was replaced by hard-line socialists who favored pursuing closer ties with the

165. See IGOR LUKES, *CZECHOSLOVAKIA BETWEEN STALIN AND HITLER* 50 (1996). The Czechoslovak-Soviet Pact of May 16, 1935 formalized the partnership between the Soviet and Czechoslovak governments. *Id.*; see ROTHSCHILD, *supra* note 63, at 5. During World War II, the Czech government-in-exile fully co-opted the Soviets in an attempt to gain popularity among the leftist political elements within their political spheres. See KALVODA, *supra* note 73, at 175.

166. KALVODA, *supra* note 73, at 179.

167. *Id.* The Soviets insisted that key positions in government were filled by communist loyalists, including the heads of the Ministries of Defense and the Interior. *Id.* at 180.

168. See *id.* at 7. The use of history to justify communist rule was embodied in the rhetoric of the first communist president of Czechoslovakia, Klement Gottwald. He often attributed the existence of Czechoslovakia to Soviet Russia, stating that “[w]ithout the Great October Socialist Revolution there would be no independent Czechoslovakia.” *Id.*

169. See ROTHSCHILD, *supra* note 63, at 89-90. The Communists held four ministerial positions. *Id.* at 90. The Social Democrats, the non-Marxist National Socialists, and the Czech Populists, however, each held three ministerial positions. *Id.*

170. See KALVODA, *supra* note 73, at 180.

171. ROTHSCHILD, *supra* note 63, at 91.

172. See *id.* at 93.

Soviets and a communist model along the lines advocated by Moscow.¹⁷³

The years subsequent to the communist assumption of power saw the Stalinization of the Czechoslovak state-party structure.¹⁷⁴ Purges of the upper echelons of the KSČ were accompanied by numerous show trials and a strict adherence to the most radical brand of Soviet communism.¹⁷⁵ Even the rejection of Stalinism by Khrushchev was not a sufficient impetus to quell the totalitarian *modus operandi* of the Czechoslovak party-state.¹⁷⁶ When reformists aimed to create "Socialism with a Human Face" in spring 1968, the full extent of the hard-line elements of the communist government became apparent.¹⁷⁷ The slight thaw of political and economic control and rigidity prompted a mass cathartic revulsion of Stalinism, stagnation, and the instruction of the omnipresent state in every aspect of social and individual existence.¹⁷⁸ The reformist government promulgated its "Action Program," a sequence of sweeping reforms designed to culminate in a new constitution.¹⁷⁹ The reform momentum was brought to a drastic halt when Warsaw Pact tanks, at Moscow's direction, rolled into the streets of Prague

173. See *id.* at 94-95.

174. See ABBY INNES, CZECHOSLOVAKIA: THE SHORT GOODBYE 24 (2001).

175. ROTHSCHILD, *supra* note 63, at 135-36. Between 1952 and 1954, 273 Communist party officials were tried for a multitude of offenses. INNES, *supra* note 174, at 24. The most notable of these trials was that of Rudolf Slánský, the Secretary-General of the Czechoslovak Communist Party, and thirteen others who were convicted as "Troskyist-Zionist-Titoist-bourgeois-nationalist" enemies of socialism. ROTHSCHILD, *supra* note 63, at 136. Much of Moscow's impetus to purge moderate and reformist elements of the communist parties of the Eastern Bloc did not come from opposition within those countries, but rather came from Josef Tito's independence in the face of Stalin's belligerent rhetoric. See *id.* at 132.

176. See ROTHSCHILD, *supra* note 63, at 166-67 ("Throughout the 1950s, the country remained sealed against any spillover from the contemporaneous Soviet 'thaw' and the New Course decompressions that were agitating, lacerating, and/or exhilarating the other people's democracies.").

177. See BEREND, *supra* note 68, at 140-45. In response to economic crisis, the Czechoslovak Central Committee initiated market-oriented economic reforms which were subsequently approved by the 13th Party Congress. *Id.* at 137; see also ROTHSCHILD, *supra* note 63, at 168 (noting that the reforms of the mid-1960s entailed "less rigid control indicators for plant managers, more flexible prices, and realistic incentives"). Central economic administration was replaced by a mixture of economic planning and marketization. BEREND, *supra* note 68, at 137. Moreover, censorship was abolished, and for the first time since the First Republic, the political leadership was receptive to dissent and criticism from the masses. ROTHSCHILD, *supra* note 63, at 170. The political momentum of the reform process came to an apex when the principle advocate of reform, Alexander Dubcek, replaced the hard-line Antonín Novotný as Party First Secretary. *Id.* at 169.

178. See ROTHSCHILD, *supra* note 63, at 170.

179. BEREND, *supra* note 68, at 141.

in August 1968.¹⁸⁰ The communist leaders were arrested in their offices and deported to Moscow as criminals.¹⁸¹ Hard-line communists filled virtually all positions of power and established one of the most repressive governments in Eastern Europe.¹⁸²

As political disquiet spread among the countries in Eastern Europe in the summer and fall of 1980, all remained relatively tranquil on the streets of Prague and Bratislava.¹⁸³ The primary dissident movement in Czechoslovakia—Charter 77—did not gain the political strength of Poland’s Solidarity.¹⁸⁴ Moreover, the KSC was not fractured between reformist and hard-line camps like its Hungarian counterparts.¹⁸⁵ The government of Gustáv Husák remained steadfast in its rejection of any meaningful reform, including those originating from the Soviet Union itself.¹⁸⁶

In the early months of 1989, a few minor protests were met with brutal repression by the state.¹⁸⁷ The façade of the state’s omnipresent power would, however, yield to mass mobilizations the subsequent fall. On November 17, an officially sanctioned ceremony was organized to mark the anniversary of the death of Jan Opletal, a Czech student murdered by the Nazis.¹⁸⁸ The crowd did not disperse as planned, however, and began to call for democratic reform and the replacement of the communist leadership.¹⁸⁹ The police met the procession with the usual level of violence and arrests.¹⁹⁰ Within forty-eight hours, the loose dispersal of opposition organized under the rubric of the *Občanské Fórum* (Civic Forum).¹⁹¹ Hundreds of thousands demonstrated in the streets of

180. See *id.* at 144-45 (describing the events surrounding the Warsaw Pact invasion).

181. See *id.* at 145.

182. See BERNARD WHEATON & ZDENEK KAVAN, *THE VELVET REVOLUTION: CZECHOSLOVAKIA, 1980-1991*, at 6-9 (1992) (outlining the policies of “normalization” following the Prague Spring); ROTHSCCHILD, *supra* note 63, at 209-10 (describing the Czechoslovak government’s policies toward opposition movements and dissidents).

183. See STOKES, *supra* note 142, at 148-49.

184. See ROTHSCCHILD, *supra* note 63, at 209; Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 520-21 (1991) (noting that Charter 77 never grew beyond 1,200-1,300 signatures).

185. ROTHSCCHILD, *supra* note 63, at 207, 211.

186. See *id.* at 211; STOKES, *supra* note 142, at 148-49.

187. STOKES, *supra* note 142, at 154.

188. See WHEATON & KAVAN, *supra* note 182, at 41 (describing the events surrounding “Black Friday”).

189. See *id.* at 43-44.

190. See *id.* at 44-47.

191. See *id.* at 56. The Civic Forum was less of a political party and more of a coalition of dissident groups, similar in design to the Latvian Popular Front, aimed at opening a dialogue about the future of Czechoslovakia. See *id.* The demands of the Civic Forum were modest: (1) the resignation of the Czechoslovak Communists who assisted in the Soviet

Prague, Bratislava, and cities across the country.¹⁹² On November 27, a nationwide two-hour general strike was organized.¹⁹³ The communist party abdicated its power monopoly two days later.¹⁹⁴

3. New Constitutionalism

The illegitimacy of the communist party largely defined the normative frame in which the constitution drafting processes took place in both Poland and Czechoslovakia. The illegitimacy of the communist party in the Latvian SSR, in its protoethnic form, concentrated on the illegitimacy of the state itself, however.¹⁹⁵ That is, the communist party could not be distinguished between conceptualizations of being Russian or Soviet. The illegitimacy of the latter led to the illegitimacy of the former.

Poland, by contrast, could not channel political discontent along ethnic lines. The PZPR was in fact composed of Poles. Moreover, the PZPR, albeit with Soviet involvement, arose from within the country, as distinct from being imposed externally.¹⁹⁶ The political legitimacy of the PZPR was directed at the party's role in the state, as opposed to the state itself. Indeed, the political confrontation to the PZPR was made easier by the presence of a relatively strong civil society found in the Catholic Church and a semi-independent trades union.

The Catholic Church provided an ideological space autonomous from communist doctrine. Indeed, the Church and state were engaged in a pattern of continuous "reciprocal power recognition."¹⁹⁷ This process of negotiation, renegotiation, and recognition of the mutual power of the Church and communist party legitimized the Church vis-à-vis the state. As a result, the state was not viewed as monolithic. This allowed Solidarity to occupy a political space independent of the state during the early 1980s. Indeed, in November 1981 a study found that 60 to 80 percent of those polled favored a "polycentric power model . . . limited central plan-

invasion of 1968; (2) the resignation of Communist Party officials responsible for routing the November 17 student demonstration; (3) the establishment of a commission to investigate the conduct of police at the student demonstration; and (4) the release of all "prisoners of conscience" as well as the incarcerated participants of the November 17 demonstration. *Id.* at 202-03.

192. See ROB McRAE, RESISTANCE AND REVOLUTION: VÁCLAV HAVEL'S CZECHOSLOVAKIA 147-49 (1997) (discussing the general strike and the events preceding it).

193. *Id.*

194. See *id.* at 154-55.

195. See *supra* notes 121-22, 130 and accompanying text.

196. See *supra* notes 138-141 and accompanying text.

197. LINZ & STEPAN, *supra* note 144, at 256.

ning, increased participation of the Church in social life and curtailment of Party rule.”¹⁹⁸ Furthermore, 70 percent of the respondents favored the activities of the independent Solidarity.¹⁹⁹ Pope John Paul II was the power voice calling for re-legalization of Solidarity after the 1981 crackdown and for subsequent “normalization.”²⁰⁰ Gradually, Solidarity reconstituted itself from a coexistent of the government to a challenge to it.²⁰¹

The demand for an independent trade union turned into a demand for political pluralism; that is, the PZPR’s monopolization of political power was illegitimate. The focus of illegitimacy was on the communist party and not the state *per se*. Thus, it was universally accepted that a new constitution would set the foundation for political pluralism and marketization.²⁰² When the new Solidarity government convened, minor amendments were made to the 1952 Communist Constitution to allow for political pluralism.²⁰³ There was no effort, however, to substantively alter the 1952 Constitution *en masse*.²⁰⁴ The new legitimacy of a multiparty political system necessitated a new constitution to codify it. Thus, in early 1990, a Constitutional Committee was charged with drafting the document.²⁰⁵ Political deadlock resulted in the adoption of an interim constitution in 1992; however, the final version was adopted in 1997.²⁰⁶ Among the civil guarantees was the right to possess and use private property.²⁰⁷

198. Ireneusz Bialecki, *What the Poles Thought in 1981*, in *CRISIS AND TRANSITION: POLISH SOCIETY IN THE 1980s*, at 26, 30 (Jadwiga Koralewicz, Ireneusz Bialecki & Margaret Watson eds., 1987).

199. *Id.*

200. See LINZ & STEPAN, *supra* note 144, at 265.

201. See Michael Bernhard, *Civil Society and Democratic Transition in East Central Europe*, 108 *POL. SCI. Q.* 307, 314-17 (1993) (discussing Solidarity’s transformation from a dissident group to an opposition movement); see also Weigle & Butterfield, *supra* note 149, at 11-14 (describing the “defensive” and “emergent” stages in the formation of Solidarity).

202. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 *U. CHI. L. REV.* 595, 601 (1991).

203. See *id.*

204. *Id.*

205. *Id.*

206. See DAVIES, *supra* note 70, at 512.

207. The 1997 Polish Constitution provided the following:

1. Everyone shall have the right to ownership, other property rights and the right of succession.
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] art. 64(1)-(3) (Pol.).

The Czechoslovak constitutional experience was similar to that of Poland. Like its Polish counterpart, the KSČ had lost legitimacy in the eyes of the public after the 1968 Prague Spring.²⁰⁸ The KSČ, however, was able to suppress civil society in Czechoslovakia to a far greater extent than the PZPR.²⁰⁹ Like their Polish counterparts, Charter 77 espoused the illegitimacy of the communist party rather than the state.²¹⁰ Thus, when the mass protest and popular discontent in Czechoslovakia reached a critical mass in November 1989, the political dynamic was analogous to that which occurred in Poland. A political space opened allowing the marginal dissident movements to become a popular affront to the KSČ; political disquiet channeled its energy at an illegitimate communist party.

As such, Czechoslovakia and Poland had similar would-be modes of constitutionalism. The 1920 Czechoslovak Constitution was based on Western liberal democracy, committed to separation of powers and the protection of civil rights.²¹¹ Thus, a viable document was available to the Czechoslovak government to follow a Latvian constitutional path. Despite this option, the Czechoslovak National assembly appointed a constitutional commission charged with drafting an entirely new document.²¹² Soon after the commencement of the constitution drafting process, however, historical divisions between the Czechs and Slovaks based on differing cultural and institutional asymmetries resulted in partition of the country.²¹³ The "velvet divorce" negotiated between Václav Klaus and Vladimír Mečiar resulted in the Czech and Slovak Republics adopting new constitutions in 1992.²¹⁴

208. See ROTHSCHILD, *supra* note 63, at 172 (observing that the previous sense of linkage with the Soviet Union "was shattered" after the Soviet invasion); see generally STOKES, *supra* note 142, at 4 (noting that the Prague Spring "ended any realistic hopes that the system of central planning . . . could reform itself").

209. See *supra* notes 182-186 and accompanying text.

210. See DECLARATION OF CHARTER '77 (Czech), *reprinted and translated in* COMMISSION ON SECURITY AND COOPERATION IN EUROPE, HUMAN RIGHTS IN CZECHOSLOVAKIA: THE DOCUMENTS OF CHARTER 77, 1982-1987 (1988).

211. See Cutler & Schwartz, *supra* note 184, at 513-14.

212. *Id.* at 521.

213. See INNES, *supra* note 174, at 27-30.

214. For an account of the politics and dynamics of the constitution drafting processes in the Czech and Slovak Republics, see Jon Elster, *Transition, Constitution-Making and Separation in Czechoslovakia*, 36 EUR. J. SOC. 105 (1995).

C. Hungary's Gradual Decline and Decay

1. Goulash Communism

The communist seizure of power in Hungary was more gradual than the immediacy of the Polish, Latvian, and Czechoslovak cases.²¹⁵ The postwar provisional government was composed of relatively fewer communists compared to its Czechoslovak and Polish counterparts.²¹⁶ Moreover, the Soviet socioeconomic program was moderate as compared to other Eastern European programs.²¹⁷ The Hungarian Communist Party (MKP) exhibited patience and compromised politically with opponents.²¹⁸ The MKP and other political parties maintained a genuine coalition government until 1949.²¹⁹

The MKP became a brutal Stalin apologist under the leadership of Mátyás Rákosi.²²⁰ From the early 1950s onward, however, hard-line elements in the MKP were counterbalanced by Premier Imre Nagy. Nagy's "New Course" was aimed at reorienting the economy from forced industrialization and collectivization to promoting living standards, consumption, and administrative decentralization.²²¹ A leadership crisis ensued that ended with the Soviet invasion of Hungary in 1956.²²²

Unlike Czechoslovakia following the Prague Spring of 1968 though, the communist party—renamed the Hungarian Socialist Workers Party (MSzMP)—did not perpetuate neo-Stalinist political

215. See LÁSZLÓ BORHI, HUNGARY IN THE COLD WAR, 1945-1956: BETWEEN THE UNITED STATES AND THE SOVIET UNION 53 (2004).

216. ROTHSCHILD, *supra* note 63, at 97.

217. *Id.* The only significant initial development of the reform was the landed estate system. *Id.* Military personnel and installations were dismantled in preparation of a Soviet withdrawal from Hungary in 1945. *Id.*

218. See BORHI, *supra* note 215, at 61 (noting that the Kremlin directed "patience before moving ahead with full speed").

219. See ROTHSCHILD, *supra* note 63, at 101-02.

220. See *id.* at 153-54; BORHI, *supra* note 215, at 203-14 (outlining Mátyás Rákosi's Stalinist government and the politics of terror used to compel social obedience).

221. See BORHI, *supra* note 215, at 232-34.

222. See generally JÖRG K. HOENSCH, A HISTORY OF MODERN HUNGARY, 1867-1994, at 210-23 (Kim Traynor trans., 2d ed. 1996) (discussing the failure of the "New Course" and the popular uprising of October 1956). Rákosi was replaced with Erno Gero, an equally hard-line Stalinist. *Id.* at 218. Protests took place throughout the country and a Twelve Point program demanded that Soviet troops withdraw from Hungary, a genuine multi-party system be created, and that the perpetrators of Stalinist state terror and brutality be punished. *Id.* at 219. Nagy opted to declare Hungarian neutrality and withdraw from the Warsaw Pact on November 1-2, 1956. *Id.* at 221. Soviet tanks rolled into Budapest on November 4 to quell opposition and the reformist elements in the MKP. See *id.* at 221-22. Estimates place the death toll at 3,000, with another 2,000 executions to follow. *Id.* at 222. Imre Nagy was executed on June 16, 1958. *Id.* at 231.

and economic systems. Under the leadership of Janos Kádár, Hungary established the most reformist government within the Warsaw Pact after a period of brutal “normalization” following the 1956 invasion.²²³ By 1965 Hungary was trading extensively with non-Council of Mutual Economic Assistance members.²²⁴ Beginning in January 1968, Hungary implemented the New Economic Mechanism, a comprehensive economic reform package aimed at incorporating market information into the economic system.²²⁵ A combination of a fixed and floating pricing system was introduced.²²⁶ Compulsory crop deliveries were abandoned in the early 1960s, and cooperatives were permitted to self-mechanize.²²⁷ “Auxiliary enterprises” were permitted to function autonomously from direct state control.²²⁸

Individuals were also permitted greater latitude than in other European citizens to generate income from activities outside the planned economy. Shops and restaurants were permitted to open, and “family work organizations” were established, effectively incorporating family-oriented private activity into the planning system.²²⁹ Even further, industrial workers were permitted to bargain with factories over working hours, schedules, and vacation time.²³⁰ The MSzMP determined in 1980 to allow further autonomous eco-

223. *See id.* at 222 (noting that in addition to the 2,000 executions that took place following the 1956 invasion, approximately 20,000 Hungarians were summarily sentenced to prison and “thousands” more sent to Soviet forced labor camps).

224. *See* ANDREW FELKAY, HUNGARY AND THE USSR, 1956-1988: KADAR'S POLITICAL LEADERSHIP 183 (1989). By 1965 Hungary was exporting goods to approximately 120 countries worldwide and receiving imports from over 65 countries. *Id.* Hungary imported about 33 percent and exported about 30 percent with non-Council of Mutual Economic Assistance members. *See id.*

225. *See id.* at 181, 191.

226. *Id.* at 189-90.

227. STOKES, *supra* note 142, at 81.

228. *Id.* Auxiliary enterprises were not governed by the same rules as industries but rather as part as collectives. *Id.* Examples of such enterprises include: food processing, furniture making, quarries, and lumber. *Id.*

229. *See id.* at 81-82. In the first year of the reform, approximately 11,000 new private companies were formed. BEREND, *supra* note 68, at 268. Private firms accounted for 10 percent of Hungarian gross domestic product in 1980 and increased to 20 percent in 1989. *Id.*

230. STOKES, *supra* note 142, at 83. This “semi-private” sector of the economy became the dominant component of the Hungarian economy. BEREND, *supra* note 68, at 269. Approximately 75 percent of wage earners and about half of the population were involved in some form of semi-private economic activity. *Id.* Approximately 60 percent of the service industry and 80 percent of the construction industry were composed of private enterprises. *Id.*

conomic activities.²³¹ Hungary became a member of the International Monetary Fund and World Bank in 1982.²³² Administrative procedures for establishing spin-off business were simplified, numerous “intermediate property forms” were legalized, and financial intermediaries were created to fund joint ventures created under a liberal legal framework.²³³ Indeed, as early as 1972, the Hungarian judiciary was entirely restructured to provide guarantees of legal rights to its citizens.²³⁴

The MSzMP itself was also not a communist party in the same vein as its Czechoslovak, Polish, or Soviet counterparts. Rather than being a rank-and-file political apparatus, the MSzMP was split among hard-line and reform camps.²³⁵ The impetus of reform was never fully stopped after the 1956 revolution. When the Twelfth Party Congress assembled in 1980, dissension within the party cadres was openly voiced.²³⁶

The “reform-from-within” movement coalesced around Rezső Nyers and Imre Pozsgay.²³⁷ Pluralism became the new catchphrase; independent candidates were permitted to run in the 1985 election along with the party slate.²³⁸ Publications originating from within the party advocated long-term economic and political change,²³⁹ and by 1988 the aging Kádár was replaced by a reformist government.²⁴⁰ A proliferation of nonparty civic and political orga-

231. See FELKAY, *supra* note 224, at 252 (“During their spare time, a certain percentage of the workers participate in work that is useful to the national economy and to the individual. This is a supplementary source of our development that contributes to satisfying ever-widening and changing demands and at the same time enhances the growth of the nation’s wealth.”).

232. STOKES, *supra* note 142, at 80.

233. *Id.* at 84.

234. HOENSCH, *supra* note 222, at 247.

235. *See id.* at 251.

236. *See id.* at 254-55. For instance, Sándor Gáspár, leader of the Central Council of Trade Unions, said: “We can best strengthen the country’s economic power, if we rely on democracy, on the clash of opinions and interests, and on the increased participation of the working population.” *Id.* Much of the dissatisfaction with the Hungarian Socialist Workers Party was targeted at the failure of the New Economic Mechanism and the economic stagnation of the late 1970s. *See* ROTHSCHILD, *supra* note 63, at 238-40.

237. *See* STOKES, *supra* note 142, at 90.

238. *Id.*

239. *Id.* at 91. The most influential of these was the 1986 study, *Turning Point and Reform*. The study, commissioned by Pozsgay, called for political pluralism, the protection of individual rights, and an independent judiciary. *Id.* The study also proposed economic reforms. The introduction of profit incentives, the reduction of Council of Mutual Economic Assistance trading, and the protection of private property were all contemplated as the next generation of economic restructuring. *Id.*

240. *Id.* at 96-97.

nizations began appearing.²⁴¹ Hungarian nationalism was used by the party to repudiate Stalinism and the legitimacy of Soviet domination of Eastern Europe.²⁴²

The Hungarian roundtable talks of 1989 saw the reformist MSzMP accept free elections and the existence of rival parties.²⁴³ It was agreed that a new presidential and parliamentary vote be held in November 1989. The MSzMP renamed the country the "Republic of Hungary" and changed its own name to the Hungarian Socialist Party.²⁴⁴ All of this happened despite no opposition group having the complete backing of society as Solidarity did in Poland or the Civic Forum in Czechoslovakia.²⁴⁵

2. Reforming the Unreformable

Reconstituting the state as a liberal, market-oriented democracy preoccupied the roundtable discussions.²⁴⁶ Like other nations in Central and Eastern Europe, framing a new constitutional system was central to the transition. Hungary, however, is distinct as the only country that retained the existing communist constitution for an extended period. No commission was charged with drafting a new document. Rather, the roundtable talks produced a series of amendments to the communist 1949 Constitution.²⁴⁷

An independent constitutional court was created.²⁴⁸ Provisions were added to the constitution curtailing state power, guaranteeing

241. *Id.* at 97-98.

242. The rejection of Soviet domination of Hungary, interestingly, was predicated on historical memory. The party reformers released a report calling for a "popular uprising against an oligarchic system of power which had humiliated the nation." *Id.* at 100. Pozsgay himself further asserted that the Stalinist system was founded on "bloody dictatorship, bureaucratic centralism, fear and retribution" and was thus invalid. *Id.* Imre Nagy was given a ceremonial reburial, and communist holidays were replaced by nationalist celebrations. *Id.*

243. *Id.* at 133.

244. *Id.* at 135.

245. *See id.* at 134.

246. *See* Gábor Halmai, *The Reform of Constitutional Law in Hungary After the Transition*, 18 *LEGAL STUD.* 188, 189 (1998); Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 *BYU L. REV.* 41, 50 (1992).

247. Klingsberg, *supra* note 246, at 50.

248. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] art. 32/A (Hung.); *see* Klingsberg, *supra* note 246, at 50 (discussing the creation of the Hungarian Constitutional Court). The preamble of the constitution states the following:

In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted.

religious freedom, and protecting property.²⁴⁹ The constitutional amendments also permitted the adoption of a new constitution and outlined the procedure to do so.²⁵⁰ Yet, despite this grant of authority, no new document emerged. Subsequent amendments to the constitution in addition to the 1989 language have been largely procedural.²⁵¹

Amending the 1949 Constitution was, unlike Hungary's Latvian, Polish, and Czechoslovak counterparts, sufficient to establish the legitimacy of Hungarian democracy. In Hungary, a political space was opened within the party hierarchy rather than being relegated externally. The communists of Poland and Czechoslovakia refused to allow dissension within the party.²⁵² In Hungary, dissension could be manifested within the party ranks, which allowed opposition to manifest within the government in addition to external to it.

The result was that reformers and dissidents could openly challenge communist policies from within the system. Questions of legitimacy were less seldom focused at the communist party as a discrete entity than the policies of the MSzMP. Thus, when it was time to reconstitute the state into a liberal democracy with a market-oriented economy, the state was not perceived as illegitimate as it was in Latvia. Moreover, the MSzMP did not suffer from the same crisis of legitimacy as did its Czechoslovak and Polish counter-

A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] pmb1 (Hung.).

249. See, e.g., A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] art. 9(1) (Hung.) ("The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law."); *id.* art. 13(2) ("Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation."); *id.* art. 60 ("In the Republic of Hungary everyone has the right to freedom of thought, freedom of conscience and freedom of religion."); *id.* art. 61 ("In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest."); *id.* art. 62 ("The Republic of Hungary recognizes the right to peaceful assembly and shall ensure the free exercise thereof."); *id.* art. 70/A(1) ("The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever."); see also Klingsberg, *supra* note 246, at 50.

250. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] art. 19 (Hung.); Klingsberg, *supra* note 246, at 52.

251. Klingsberg, *supra* note 246, at 52. Subsequent amendments were enacted but were either of a procedural nature or of incidental importance, including requiring that the parliamentary committee responsible for the Constitutional Court nominations contain a member of each party represented in Parliament. *Id.* at 52 n.17.

252. See *supra* notes 140-141, 185 and accompanying text.

parts.²⁵³ Nationalism was utilized by the *party itself*. By creating a political space for dissidence and reform within the communist party, the party shifted the focus of opposition and dissident groups from the party itself to the policies of the communist regime. As such, the 1949 Constitution, once amended to incorporate political and economic freedoms, was perceived as a legitimate basis of state authority.

D. *Cuba's Postsocialist Pathways*

When one begins to compare the social, political, and economic history of Cuba with its Eastern European counterparts, certain patterns begin to emerge. First, and most apparent, Cuba does not fit comfortably into a Latvian mode of constitutionalism. Constitutional inheritance is not as significant a problem for Cuba as it was for Latvia. A number of factors support this conclusion. First, the requisite norm of occupation and subjugation that was present in Latvia is absent in the Cuban context. The Cuban revolution was not imposed by a foreign power; rather, the 26th of July Movement was a phenomenon primarily conducted by Cubans. Thus, constructing the Cuban government as "others" or "outsiders," rather than as something inherently Cuban, lacks historical foundation.

Second, Cuba was never fully absorbed into another country. The island retained its independence as a nation with a change of government. Moreover, the change of government could be viewed as establishing greater autonomy of the island in its international relations. Before Castro came to power, Cuba was economically locked with the United States.²⁵⁴ Ironically, the communist revolution can thus be viewed as gaining independence from the economic dependency of the United States. Conversely, Cuban independence may also be seen as a departure from the past economic support and dependency of the Soviet Union. Cuba has had no subsequent benefactor of equal measure to that of the Soviet Union during the Cold War including support from the Russian Federation and Venezuela. With the Cuban economy having sharply declined after the fall of communism, only to stabilize in 1996,²⁵⁵ the case that independence would result in a normative

253. See *supra* notes 157-160, 187-194 and accompanying text.

254. See O'Connor, *supra* note 10, at 12-16.

255. See Ernesto Hernández-Catá, *The Fall and Recovery of the Cuban Economy in the 1990s: Mirage or Reality*, in 10 CUBA IN TRANSITION 24, 24 (Jorge F. Pérez-López & José F. Alonso eds., 2000).

context of breaking former Soviet political and economic links is relatively weak.

Thus, the political frame in which a potential political opposition to the current Cuban government, or reformist majority within the communist party, would compose a constitution is likely to be substantially different from that of Latvia's. Calls for democracy and human-rights protections by current opposition groups are not calls to resurrect Batista's Cuba.²⁵⁶ Lacking is a Cuban concept as "otherness"; that the PCC is distinct from something that is Cuban. Thus, a legitimate constitutional framework in a post-Castro Cuba does not need to be based on readopting either the 1901 or 1940 Constitutions as a return to independence from a foreign power. The resurrection of a pre-Castro constitutional framework is likely possible for either political expediency or for political deadlock over a new constitution.

Cuba seems more likely to follow a mode of constitutionalism comparable in form to Poland and Czechoslovakia rather than Latvia. First, the assertion of illegitimacy will likely be targeted at the communist party rather than at the state itself. Indeed, the PCC was an organic political movement—as were the communist parties in Poland and Czechoslovakia, at least ostensibly so.²⁵⁷ There is no cognitive base of foreign domination as was present in the case of Latvia. Interestingly, any conceptualization of foreign domination may be directed at the United States in light of pre-1959 political and economic relations serving to legitimize the communist government.²⁵⁸

A Polish-Czechoslovak mode of constitutionalism, however, is based upon a viable opposition movement to the government. The most common form of opposition in Cuba is "informal dissidence"—noncompliance with the rules of the state by individuals in the everyday course of their private lives.²⁵⁹ Organized opposition groups are less common in Cuba. The Cuban government acknowledged the presence of approximately 50 opposition groups

256. See Gerardo Otero & Janice O'Bryan, *Cuba in Transition? The Civil Sphere's Challenge to the Castro Regime*, *LATIN AM. POL. & SOC'Y*, Winter 2002, at 29, 39-40 (noting that among the opposition groups in Cuba, "[h]uman rights groups are . . . the largest group type").

257. See *supra* notes 140-141, 165-169 and accompanying text.

258. The Cuban economy was effectively locked into the American business cycles with profits being highly concentrated in the hands of a landed aristocracy, carrying with it at least the perception of economic and political exploitation. See *supra* notes 10-11, 24-25 and accompanying text.

259. Otero & O'Bryan, *supra* note 256, at 37. Examples of "informal dissidence" include workplace absenteeism, graffiti, black market activities, and voicing grievances to official youth and intellectual organizations. *Id.* at 37-38.

with about 1,000 members in the early 1990s.²⁶⁰ As of 1996, the *Concilio Cubano* (Cuban Council) was composed of a coalition of 140 unofficial dissident groups.²⁶¹ As of yet, these groups have not been able to transform into a viable political alternative to the PCC. Political activity outside officially-sanctioned channels has met consistent and fierce repression, including harassment, arrest, imprisonment, torture, executions, and targeted assassinations.²⁶²

A popular mobilization and subsequent new constitutionalism are certainly not precluded in Cuba. A political space must be created, however, to enable a viable opposition to form as a viable alternative to the PCC. Until the opposition groups can effectively channel dissent and discontent into a viable political affront to the communist government, it will be difficult for Cuba to follow a mode of constitutionalism analogous to Poland or Czechoslovakia.

The other mode of constitutionalism that Cuba most likely will follow is analogous to that of Hungary. As Cuba moves beyond the cult personality of Fidel Castro, the dispositive question will become whether the subsequent government will allow a degree of dissension within the party sufficient for reformist communists to vocalize their dissent from the official party position. Indeed, Cuba seems to be on a somewhat similar path as Hungary was economically. A concoction of market incentives and central planning has been introduced to attract foreign investment and stimulate a stagnating economy.²⁶³ *Empresas mixtas* have been allowed since the early 1990s, and the Cuban government has gradually allowed a greater degree of foreign investment into certain economic sectors.

Despite the limited economic reforms, there seem to be at present no signs of a corresponding political reform. Yet recent overtures from the Obama administration may foster a loosening of extracommunist political constraints. The key question for Cuba's successful democratic transition is whether the PCC will allow political dissent and reformist views to emerge. If it allows such dissent and views, the question then becomes whether reform comes from within or outside the party. If dissent originates in a manner completely separate or exterior to the party apparatus—as was the case

260. *Id.* at 39.

261. *Id.* at 40.

262. *Id.* at 42-. In March 2003, the Cuban government summarily tried and imprisoned 75 suspected dissidents for supposed crimes against Cuba's security. Theresa Bond, *The Crackdown in Cuba*, FOREIGN AFF., September/October 2003, at 118, 118.

263. *See supra* notes 57-61 and accompanying text.

of Czechoslovakia and Poland—then the PCC itself will more likely become the target of dissent and illegitimacy.²⁶⁴ Moreover, the constitutional framework underpinning the regime will likely suffer a corresponding crisis of legitimacy and be replaced wholesale. If by contrast, Cuba allows political dissent to form within the party, as did Hungary, then there is a possibility that the PCC can reassert itself as a legitimate posttransition political party. The 1992 Constitution could be amended to accommodate new political pluralism while remaining in force under a democratic Cuba.

IV. EXTRAPOLATING A U.S.-CUBAN CLAIMS SETTLEMENT FRAMEWORK

A. *American Responses to Cuban Nationalizations*

The story of Cuba's nationalizations is incomplete without elaborating on the give-and-take between the Castro government and various U.S. administrations. After the 1959 revolution and the passage of the Fundamental Law, the Cuban government engaged in a systematic expropriation program.²⁶⁵ Tensions reached a high point on July 6, 1960. In response to the revolutionary government's economic policy, the U.S. Congress passed a new sugar law granting discretionary power to the president to adjust sugar quotas.²⁶⁶ On the same day, Castro promulgated Law 851 authorizing the nationalization of all properties owned by U.S. nationals.²⁶⁷ Subsequent nationalizations extended to most Cuban industries, all foreign-owned refineries, and all U.S.-owned properties.²⁶⁸

The failed Bay of Pigs invasion and appropriations of 1961 led the U.S. government to break diplomatic relations with Cuba in 1961 and impose a trade embargo in 1962.²⁶⁹ In 1964, Congress authorized the Foreign Claims Settlement Commission (FCSC) to oversee and adjudicate all domestic claims for expropriated prop-

264. See discussion *supra* Part III.B.3.

265. See discussion *supra* Part II.B.2.

266. See An Act to Amend the Sugar Act of 1948, Pub. L. No. 86-592, § 3(b)(1), 74 Stat. 330, 330-31 (1960) (terminated 1974). President Eisenhower used this power on the same day to lower U.S. sugar quotas drastically. See Proclamation No. 3355, 25 Fed. Reg. 6,414 (July 8, 1960). This proclamation set the annual quota at 39,752 tons, reduced from the previous level of 739,752. *Id.*

267. See GORDON, *supra* note 47, at 98 & n.95; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401-03 (1964) (discussing Law 851 and the expropriation of property belonging to American nationals).

268. See *supra* notes 83-93 and accompanying text.

269. Cuban Democracy Act of 1992, 22 U.S.C. §§ 6000-6010 (2006).

erty in Cuba.²⁷⁰ By the time the FCSC issued its 1972 final report, a total of 8,816 claims were filed and \$1,851,057,358 was awarded to aggrieved persons and corporations for takings by the Castro government.²⁷¹

The mutual animosity between the Cuban and U.S. governments has not waned over time. On the contrary, successive legislative enactments have reinforced and indeed strengthened the terms of the embargo. The Cuba Democracy Act of 1992²⁷² provides that any country assisting the Cuban government shall be ineligible for debt relief and other forms of economic assistance.²⁷³ The Helms-Burton Act,²⁷⁴ in addition to reaffirming the prohibition on direct and indirect support of the Cuban government,²⁷⁵ authorizes the president to provide support to individuals and nongovernmental

270. See Cuban Claims Act of 1964, 22 U.S.C. §§ 1643-1643m (2006). In 1964, Congress authorized the FCSC to administer and adjudicate against the Cuban government expropriation claims belonging only to U.S. nationals or companies organized under U.S. law whose claims arose on or after January 1, 1959. *Id.* § 1643b(a). The section provides:

The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba . . . arising since January 1, 1959 . . . for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States

Id.

271. FOREIGN CLAIMS SETTLEMENT COMM'N, DEP'T OF JUSTICE, 2005 ANNUAL REPORT, pt. III(A)(5)(b) (2005), available at <http://www.usdoj.gov/fcsc/annrep05.htm> [hereinafter FCSC, 2005 ANNUAL REPORT].

272. See 22 U.S.C. §§ 6001-6010.

273. Section 6003(b)(1) provides as follows:

The President may apply the following sanctions to any country that provides assistance to Cuba: (A) The government of such country shall not be eligible for assistance under the Foreign Assistance Act of 1961 or assistance or sales under the Arms Export Control Act. (B) Such country shall not be eligible, under any program, for forgiveness or reduction of debt owed to the United States Government.

Id. §§ 6003(b)(1)(A)-(B). The stated policy of the Cuban Democracy Act is "to seek a peaceful transition to democracy and a resumption of economic growth in Cuba through the careful application of sanctions directed at the Castro government and support for the Cuban people." *Id.* § 6002(1); see Berta Esperanza Hernández Truyol, *Out in Left Field: Cuba's Post-Cold War Strikeout*, 18 FORDHAM INT'L L.J. 15, 40 (1994) (arguing that the Cuban Democracy Act "aims at promoting democracy in Cuba by forcing the collapse of the Castro regime via economic strangulation").

274. See Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. §§ 6021-6091 (2006) [hereinafter Helms-Burton Act].

275. See, e.g., *id.* § 6033(a) ("[N]o loan, credit, or other financing may be extended knowingly by a United States national, a permanent resident alien, or a United States agency to any person for the purpose of financing transactions involving any confiscated property the claim to which is owned by a United States national as of March 12, 1996, except for financing by the United States national owning such claim for a transaction permitted under United States law.").

organizations to “support democracy-building efforts for Cuba.”²⁷⁶ The act also forbids recognition of a democratic Cuba under the leadership of either Fidel or Raul Castro.²⁷⁷ The U.S. Agency for International Development has awarded \$65.4 million in grants and other cooperative initiatives aimed at fostering civil society in Cuba.²⁷⁸ Similarly, the State Department Bureau of Democracy, Human Rights, and Labor provided \$8.1 million for democracy

276. *Id.* § 6039(a). Under this provision, the President may provide:

- (1) Published and informational matter, such as books, videos, and cassettes, on transitions to democracy, human rights, and market economies, to be made available to independent democratic groups in Cuba.
- (2) Humanitarian assistance to victims of political repression, and their families.
- (3) Support for democratic and human rights groups in Cuba.
- (4) Support for visits and permanent deployment of independent international human rights monitors in Cuba.

Id.

277. *Id.* §§ 6065(a)(7), 6066. The criteria for the recognition of a transition government in Cuba is a government that:

- (1) has legalized all political activity;
- (2) has released all political prisoners and allowed for investigations of Cuban prisons by appropriate international human rights organizations;
- (3) has dissolved the present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and
- (4) has made public commitments to organizing free and fair elections for a new government -
 - (A) to be held in a timely manner within a period not to exceed 18 months after the transition government assumes power;
 - (B) with the participation of multiple independent political parties that have full access to the media on an equal basis, including (in the case of radio, television, or other telecommunications media) in terms of allotments of time for such access and the times of day such allotments are given; and
 - (C) to be conducted under the supervision of internationally recognized observers, such as the Organization of American States, the United Nations, and other election monitors;
- (5) has ceased any interference with Radio Marti or Television Marti broadcasts;
- (6) makes public commitments to and is making demonstrable progress in -
 - (A) establishing an independent judiciary;
 - (B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation;
 - (C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the International Labor Organization, and allowing the establishment of independent social, economic, and political associations;
- (7) does not include Fidel Castro or Raul Castro; and
- (8) has given adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.

Id. § 6065(a)(1)-(8).

278. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-147, FOREIGN ASSISTANCE: U.S. DEMOCRACY ASSISTANCE FOR CUBA NEEDS BETTER MANAGEMENT AND OVERSIGHT 1 (2006).

assistance in Cuba.²⁷⁹ The Commission for Assistance to a Free Cuba has recommended further increases in such funding.²⁸⁰

There has recently, however, been a significant shift of American policy toward Cuba and the Americas.²⁸¹ The Obama Administration recently announced an end to restrictions on family travel and remittances.²⁸² U.S. telecommunication providers are also now able to establish satellite and fiber-optic links between the United States and Cuba as well as provide satellite television and satellite radio services.²⁸³ The Obama Administration also expanded the scope of donations for humanitarian purposes.²⁸⁴ Whether these developments are the beginning of a new era of U.S.-Cuban relations based on a constructive reciprocal political dialogue and producing concrete results or whether the developments will prove a mere footnote of history is still quite uncertain.

B. *The Politics of Reparation*

A conclusion to the outstanding question of Cuban property reparations will likely be a long time in the making. The first and

279. *Id.*

280. COMM'N FOR ASSISTANCE TO A FREE CUBA, REPORT TO THE PRESIDENT 20 (2006) (recommending the appropriation of \$80 million over two years to "increase support for Cuban civil society, expand international awareness, break the regime's information blockade, and continue developing assistance initiatives to help Cuban civil society realize a democratic transition").

281. See Scott Wilson, *Obama Closes Summit, Vows Broader Engagement With Latin America*, WASH. POST, Apr. 20, 2009, at A06; Eric Schmitt & Damien Cave, *Obama to Loosen Cuba Policy Restrictions*, N.Y. TIMES, Apr. 5, 2009, at A10.

282. Memorandum from the White House Office of Press Secretary to the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce, Promoting Democracy and Human Rights in Cuba §§ (a)-(b) (Apr. 13, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-Promoting-Democracy-and-Human-Rights-in-Cuba/.

283. *Id.* §§ (c)-(f).

284. *Id.* § (h). Specifically the White House expanded "donations eligible for export through license exceptions" by:

1. Restoring clothing, personal hygiene items, seeds, veterinary medicines and supplies, fishing equipment and supplies, and soap-making equipment to the list of items eligible to be included in gift parcel donations;
2. Restoring items normally exchanged as gifts by individuals in "usual and reasonable" quantities to the list of items eligible to be included in gift parcel donations;
3. Expanding the scope of eligible gift parcel donors to include any individual;
4. Expanding the scope of eligible gift parcel donees to include individuals other than Cuban Communist Party officials or Cuban government officials already prohibited from receiving gift parcels, or charitable, educational, or religious organizations not administered or controlled by the Cuban government; and
5. Increasing the value limit on non-food items to \$800.

Id. See also Expansion of the Gift Parcel License Exception Regarding Cuba to Authorize Mobile Phones and Related Software and Equipment, 73 Fed. Reg. 33671 (June 13, 2008).

foremost obstacle to a U.S.-Cuban settlement agreement is the sheer size of the claims. The FCSC has certified claims totaling approximately \$1.85 billion.²⁸⁵ By comparison, the final agreement between Hungary and the United States totaled a mere \$18.9 million,²⁸⁶ and Poland settled its outstanding claims for \$40 million.²⁸⁷

Another issue that deserves attention is the complexity and time involved in negotiating settlement agreements. The Czechoslovak settlement agreement is illustrative. After a series of property confiscations in the late 1940s, the hard-line communist government effectively abolished private property in Czechoslovakia by the 1950 Civil Code.²⁸⁸ The terms of an early settlement agreement were reached in November of 1946.²⁸⁹ Yet this agreement was breached by the successive communist government. Because of stalled negotiations, the FCSC was given authority to adjudicate claims for U.S. nationals with regard to expropriated property in Czechoslovakia.²⁹⁰ The FCSC awarded a total of \$113,645,205 for 2,630 successful claims in 1962.²⁹¹ Yet in 1963 the U.S. government was prepared to settle for less than 20 percent of the value of claims certified by the FCSC.²⁹² No agreement was reached, however, until 1981 whereby the communist government paid \$81.5 million to the U.S. government for outstanding settlement claims, 35 years after the negotiations first commenced.²⁹³

In the case of Czechoslovakia, subsequent restoration laws passed by the postcommunist Czechoslovak government compounded the complexity of property restoration. The 1991 Large Restitution Law returned expropriated property to “entitled per-

285. See FCSC, 2005 ANNUAL REPORT, *supra* note 270, pt. III(A)(5)(b).

286. *Id.* pt. III(A)(3)(c).

287. *Id.* pt. III(A)(1)(c).

288. See Štefan Kočvara, *Property Rights of Aliens under the Legal Order of the Czechoslovak Socialist Republic*, in 1 CZECHOSLOVAKIA: PAST AND PRESENT 556, 559 (Miroslav Rechcigl, Jr. ed., 1968) (noting that the political purpose of creating three different types of ownership in the 1950 Civil Code was to deprive individuals and non-socialist entities of their property).

289. Vratislav Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 AM. J. INT'L L. 639, 642 (1982).

290. 22 U.S.C. § 1642c (2006).

291. Jeffrey J. Renzulli, *Claims of U.S. Nationals Under the Restitution Laws of Czechoslovakia*, 15 B.C. INT'L & COMP. L. REV. 165, 175 (1992).

292. Pechota, *supra* note 289, at 642 n.18.

293. Renzulli, *supra* note 291, at 176; see Czechoslovakian Claims Settlement Act of 1981 § 2(a), Pub. L. No. 97-127, 95 Stat. 1675 (codified in scattered sections of 22 U.S.C.) (approving the 1981 settlement agreement between the United States and the Czechoslovak Socialist Republic).

sons.”²⁹⁴ That is, only persons who were citizens or permanent residents of Czechoslovakia were entitled to seek domestic-based restitution.²⁹⁵ Moreover, those seeking restitutions were required to negotiate with those in current possession of the expropriated property.²⁹⁶ If negotiations were unsuccessful, only then could the claimant seek judicial adjudication in Czechoslovak courts.²⁹⁷ Similarly the Small Restitution Law of 1990 provided that persons entitled to seek restitution of property were those who could document that they were the owners on the date of expropriation.²⁹⁸ The Small Restitution Law, however, provided that companies with foreign ownership were prohibited from asserting claims.²⁹⁹ Moreover, persons who participated in an “interstate property agreement”—that is, the FCSC—were not entitled to assert a claim in Czechoslovak courts.³⁰⁰

Of course, the Czechoslovak case presupposed negotiating with the communist government. Negotiations began under the semidemocratic Beneš government and continued throughout successive hard-line communist regimes.³⁰¹ Under current U.S. policy, the U.S. government will not engage a Cuban government under the leadership of Fidel or Raul Castro.³⁰² That is, current legislation requires a dual Cuban transition: democratization and marketization in the model of Central and Eastern Europe in the late 1980s.

Thus, the current position of the U.S. government precludes negotiating with a Cuba that has undergone economic liberalization without a corresponding political transition. Notwithstanding the settlement agreements with communist Hungary, Czechoslovakia, Poland, Bulgaria, and Romania, the FCSC has adjudicated claims with countries with authoritarian governments, yet with a higher degree of economic openness. One such case was the Socialist Republic of Vietnam. Congress authorized the FCSC to adjudicate property claims arising from takings occurring from

294. Renzulli, *supra* note 291, at 179-80.

295. *Id.* at 180.

296. *Id.* at 181.

297. *Id.*

298. *Id.* at 178.

299. *Id.* at 179.

300. *Id.*

301. *See supra* notes 289-293 and accompanying text.

302. Helms-Burton Act, 22 U.S.C. §§ 6021-6091, 6065(a)(7), 6066 (2006).

1975 onward.³⁰³ The FCSC completed its adjudications in 1986 and awarded a total of \$99,471,983.51 to 192 claimants.³⁰⁴ The U.S. government reached a settlement agreement with Vietnam in January 1995.³⁰⁵

C. Prospects for a U.S.-Cuban Agreement

The Czechoslovak example is illustrative of the enormous complexities of settling outstanding property claims against a foreign government. Indeed there is no right under international law for compensation of property seized by one's own government.³⁰⁶ When a foreign government defaults on an obligation to a citizen of the United States, the claimant may only be able to seek restitution through the U.S. government.³⁰⁷ As the Czechoslovak case demonstrates, the laws of the foreign government often preclude nonnationals from seeking independent restitution in that country, or, at a minimum, the laws make it logistically very difficult to do so. The president, however, has no obligation to take up a national's claim and present it diplomatically to a foreign government.³⁰⁸

Of course the politics of U.S.-Cuban relations further adds to the complexity of a potential settlement agreement. At present, any future Cuba-United States property settlement presupposes a dual political and economic transition. As such, the prospect for a settlement agreement in similar vein to China or Vietnam seems presently precluded.³⁰⁹ The change in American Cuban policy from the Obama Administration, however, may increase the likelihood

303. *Id.* § 1645b (2006); see H.R. REP. NO. 96-915, at 2 (1980) (stating that the purpose of the legislation was to conclude a settlement agreement with Vietnam "through future direct Government-to-Government negotiation of private property claims").

304. FCSC, 2005 ANNUAL REPORT, *supra* note 271, pt. III(A)(7).

305. *Id.* The settlement agreement provided that a total of \$203,504,248 be disbursed for the principal amount plus an annual 4.8 percent interest from the date of the taking to the agreement date. *Id.*

306. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (N.D. Ill. 1982); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir. 1967) (per curiam); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 n.9 (1987).

307. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 244 (Cl. Ct. 1983); see *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981).

308. See *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1394-95 (Cl. Ct. 1970).

309. The first China Claims Program began in 1966 for losses resulting from expropriation and nationalizations. See Pub. L. No. 89-780, 80 Stat. 1365 (1966) (codified at 22 U.S.C. § 1643 (2006)). The program was completed in July 1972 and a formal agreement between the People's Republic of China and the United States was reached in May 1979 for a total of \$80.5 million. FCSC, 2005 ANNUAL REPORT, *supra* note 271, pt. III(A)(5)(a).

of commencing negotiations.³¹⁰ Thus, the modes of constitutionalism in the dual transitions of Central and Eastern Europe are the best case studies that may shed light on a possible future legal framework for a democratic Cuba.

The first and least likely possibility is readopting either the 1901 or 1940 Cuban constitution. Recall that both constitutions guaranteed the right to possess private property without government interference.³¹¹ Yet the prerequisite normative frame present in Latvia—the conceptualization of the state as illegitimate—is absent in Cuba. The 26th of July Movement was an organic phenomenon seemingly precluding a social construction of the PCC as outsiders or otherwise non-Cuban. Further, popular memory may indeed see the precommunist Cuban political economy as economic imperialism on the part of the United States, thus bolstering support for the PCC. This is not to say that some of the provisions of either the 1901 or the 1940 Cuban constitution are precluded from being reinstated prior to or in a subsequent constitution. With the technical legitimacy of the Cuban state intact, however, it seems unlikely that the 1901 or 1940 Cuban constitution will be readopted to relegitimize the state.

Cuba is more likely to adopt an entirely new document if a crisis of legitimacy is focused on the PCC rather than the state itself. This was the path taken by Czechoslovakia and Poland. In Poland, the Catholic Church precluded the party from monopolizing its claims as the legitimate source of power in society.³¹² As a result a political space was created enabling Solidarity to form and eventually oppose the government. Similarly, in Czechoslovakia, Charter 77 and later the Civic Forum were able to focus popular discontent at the regime in the wake of the government crackdown and repressions.³¹³

The repressive Cuban government, however, has been able to prevent a viable opposition movement from coalescing. Further, the PCC has prevented a strong civil society from forming independent of the state and party.³¹⁴ To the extent that a Polish-Czechoslovak mode of constitutionalism is contingent upon a viable opposition forming independent of the state apparatus, it appears that the extraordinary politics and new constitutionalism of Poland

310. See *supra* notes 281-284 and accompanying text.

311. See *supra* notes 22-30 and accompanying text.

312. See *supra* notes 142-146 and accompanying text.

313. See *supra* notes 208-210 and accompanying text.

314. See *supra* notes 259-262 and accompanying text.

and Czechoslovakia will not be repeated in Cuba. This certainly is not to say that a massive popular mobilization is impossible; on the contrary, the Czechoslovak experience demonstrates how quickly both a population can mobilize itself and a repressive regime can capitulate. Yet without a core dissident group around which a challenge to the government can coalesce, it is difficult, although not impossible, for Cuba to follow a path comparable to that of Poland and Czechoslovakia.

Hungary is the Eastern European country that offers the best insight into a postsocialist Cuban constitutionalism. Recall that the MSzMP was not a traditional rank-and-file communist party vis-à-vis its Eastern European neighbors. On the contrary, open dissidence was allowed within the party ranks, and market mechanisms were integrated into the system of central planning. The “reform-from-within” strategy of the party allowed the party to escape the full force of the legitimacy crisis. Rather, the focus of the illegitimacy of communism shifted onto communist policies as opposed to the party or the state. As a result, neither the state nor the government required a cathartic resurrection to be legitimate through a constitution drafting process. Instead, the monopoly of MSzMP power was changed as were the constitutional provisions declaring socialism to be the basis of government and authority.

Whether the PCC will allow minority views to be heard from within the government is a matter of conjecture. There have been several parallels between Hungary’s New Economic Mechanism and Cuban economic reforms, however. Both the introduction of *empresas mixtas* into economic activity and increasing levels of foreign investment have demonstrated at least a slight adaptation on the part of the Cuban government to the modern economic climate.³¹⁵

Yet, there still appears no willingness on the part of the PCC to accept political dissent and reformist views to emerge within the party. Should the PCC allow limited political pluralism and reform-minded voices to be heard in response to U.S. overtures to repair its political relationship with the island, then a Hungarian constitutional dynamic is certainly possible. If such should occur, gradual amendments to the 1976 Constitution could reinstitute property protections, guarantee political and civil rights, eliminate the PCC’s monopoly on political power, and allow a settlement agreement conducted under its terms. Should dissent originate

315. See *supra* notes 57-61 and accompanying text.

external to the government, however, then a new constitutional system may be more likely to develop with the guarantees of property protection and property restitution occurring under its terms. The multitude of factors determinative of Cuba's political future make it difficult to forecast. It can be said, however, that concluding a U.S.-Cuban settlement agreement would be a very significant accomplishment.

V. CONCLUSIONS AND IMPLICATIONS

It must have been a sobering sight: Soviet tanks rolling down the cobblestone of Prague to the unmistakable sound of grinding metal and diesel engines. That night—August 20, 1969—signified, as Václav Havel put it simply, that “[t]he fun was definitely over.”³¹⁶ Indeed he was right. The Soviet invasion ended the Prague Spring, Dubček's reforms, and “socialism with a human face.”³¹⁷ Yet the Soviet invasion also exposed the impossibility of sustainable socialist reforms. The invasion marked the beginning of the end of the communist experiment. Perhaps July 31, 2006, will also be recorded in the annals of history. It was the beginning of the end for communism in Cuba; it was the day Fidel Castro relinquished power to another.

Indeed, it does appear that Cuba is at a crossroads in its history. Cuba's post-Castro experience is anything but ordained. There are multitudes of factors that may influence a future Cuban constitutionalism, and from there, the prospect of a settlement agreement. This Article has attempted to demonstrate the various trajectories a future Cuban constitutional order may take. That future depends on international dynamics as well as Cuba's economic, political, and cultural context.

There appears to be three possible modes of a future constitutionalism with varying degrees of likelihood. First, Cuba may readopt a precommunist constitution. This is the most unlikely scenario, though, considering Cuba's past. The requisite social and historical dynamic is lacking. While provisions of preexisting constitutions may be copied, it is more likely that a completely new constitutional framework will be established. Should an opposition form outside the party, either through a vibrant civil society or through a coalescing of dissident groups, there is a greater likelihood of a new constitutional system and break with the past. Insti-

316. VÁCLAV HAVEL, *Second Wind*, in *OPEN LETTERS: SELECTED WRITINGS 1965-1990*, at 3, 9 (Paul Wilson ed. & trans., 1991).

317. See BEREND, *supra* note 68, at 145-46.

tutions for property protections and other functions of governance would need to be established anew, with a minimal role for the existing communist administrative structures. Indeed, notwithstanding the Obama Administration's policy changes, current U.S. foreign policy seems to favor this outcome. The current funding of Cuban civic groups may help them coalesce into a viable opposition to the PCC.³¹⁸ There has yet to be evidence, however, that these groups have gained traction as a vibrant civil society completely exterior to the communist party-state in the manner that effected change in Eastern Europe. Should the PCC allow internal dissension within its ranks, there is a greater likelihood that the system can gradually reform itself into a more open, market-oriented economy. Should this be the case, existing institutions may be transformed to recognize private ownership, permit domestic entrepreneurship, and encourage foreign investment. This, however, is at present, speculative.

While Eastern Europe is a helpful analogy, a transition in Cuba will be occurring at a very different place and time. Currently, there is no mass mobilization in opposition, there is no solid organized political opposition, there is no major infrastructure or alternative source of moral authority outside the PCC like the Catholic Church in Poland, nor is there a basis to revolt against the PCC as a tool of intervention of a foreign power. Moreover, neither is there a surrounding regional transformation to reject communism like that which flowed through Eastern Europe in the early '90s. Cuba is an island, literally and politically, notwithstanding the anti-American populist rhetoric of several Latin American leaders. But just as each of the nations in Eastern Europe found its own path based on its own circumstance, it seems logical to think that political and economic transitions in Cuba will draw on these lessons and come up with their own strain of change.

Thus, whether Raul Castro's leadership will transform into another cult of personality is unknown as is his outlook on political and economic reform. Some of the government's policies offer opportunity for reform, such as *empresas mixtas* and greater foreign investment.³¹⁹ Yet, whether these reforms will continue or stagnate under a new regime is also only speculative.

The principal lesson, though, from the contemporary history of Eastern Europe may be that change is a history of people. The breakdown of the communist system was facilitated by those who

318. See *supra* notes 278-279 and accompanying text.

319. See *supra* notes 57-61 and accompanying text.

had the courage to face Kalashnikov-wielding troops on the streets of Riga and Prague with rocks and bottles. Thus, those wishing to speculate on the future political economy of Cuba must realize that it will be individuals—communist and capitalist alike—who shape the future of that island. That is, there will always be another factor that the academic community cannot adequately account for: human fallibility and the strength of the individual. Yet, in the end, the strength of the human spirit and the character of the Cuban people will determine these alternatives.