

## Essentially Contested Constitutional Revolutions

Mark A. Graber

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Mark A. Graber, *Essentially Contested Constitutional Revolutions*, 81 Md. L. Rev. 205 (2021)  
Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol81/iss1/6>

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

---

## Symposium

### The 2021 Maryland Constitutional Law Schmooze

#### ESSENTIALLY CONTESTED CONSTITUTIONAL REVOLUTIONS

MARK A. GRABER\*

“Constitutional Revolution” is an essentially contested concept that “inevitably involves endless disputes about . . . proper uses on the part of . . . users.”<sup>1</sup> The meaning of such essentially contested concepts as “constitutional revolution,” “democracy,” “liberty,” and the like depends on debatable normative propositions. Jeremy Waldron observes, “only normative concepts with a certain internal complexity are capable of being essentially contested.”<sup>2</sup> One cannot determine whether the United States is a democracy without assessing state equality in the Senate and the Electoral College. Whether a constitutional revolution has taken place depends on contested theories of constitutionalism and political development.

Both halves of “constitutional revolution” are essentially contested. “Constitutionalism” is an essentially contested concept. Walter Murphy maintains that constitutionalism is committed to protecting a set of fundamental liberties.<sup>3</sup> Ran Hirschl insists that constitutional theocracies that do not protect liberal liberties are as constitutional as constitutional democracies that do protect liberal liberties.<sup>4</sup> “Revolution” is as essentially contested a concept. A.E. Howard asserts that the American revolution was

---

\* Regents Professor, University of Maryland Carey School of Law. Thank you to Carly Brody and the *Maryland Law Review* staff. Special thank you to the contributors and all participants in the Schmooze.

1. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1955–56).

2. Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 LAW & PHIL. 137, 150 (2002).

3. See generally WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER (2007).

4. See generally RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).

not really a revolution. He noted, “the American revolution is a kind of oddity among revolutions. It was fought to preserve old values—indeed to preserve values which had sprung up from the very country rebelled against, but which that country had somehow forgotten.”<sup>5</sup> Gordon Wood responds that a real revolution took place in the United States during the late eighteenth century as monarchial social relations were replaced by republican social relations, which in turn were replaced by democratic social relations. “[T]he American Revolution was very different from other revolutions,” Wood admits, “[b]ut it was no less radical and no less social for being different.”<sup>6</sup> Murphy, Hirschl, Howard and Wood are not disputing facts about constitutional regimes. Differences over the place of human rights and the rule of law in constitutionalism drive the dispute between Murphy and Hirschl. Differences over the place of governance and social relations in revolutions, as well as over what counts as a fundamental change in social relations, drives the dispute between Howard and Wood.

Gary Jacobsohn and Yaniv Roznai’s magnificent *Constitutional Revolution*<sup>7</sup> demonstrates how combining two essentially contested concepts geometrically increases definitional complexity. Jacobsohn and Roznai insist that a constitutional revolution occurs when a fundamental change occurs “in the substance of a polity’s constitutional identity.”<sup>8</sup> Such a revolution may occur when a constitutional text is replaced or modified,<sup>9</sup> but as the case of Israel indicates, constitutional revolutions may occur by interpretation as well as by revision of fundamental laws.<sup>10</sup> This understanding of constitutional revolution owes much to Walter Murphy’s belief that constitutions were best understood in terms of certain fundamental commitments<sup>11</sup> rather than to a more classical view that understood constitutionalism in terms of commitments to fundamental law.<sup>12</sup>

Complexity reigns even within the Jacobsohn/Roznai paradigm. Constitutional regimes are notoriously disharmonic.<sup>13</sup> They contain different, often clashing, fundamental commitments. In such circumstances

---

5. A.E. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 203 (1968).

6. GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5 (1993). For an excellent discussion of whether the American Revolution was a real revolution, see Erin Ryan, *Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society*, 96 OR. L. REV. 123, 134–141 (2017).

7. GARY JEFFREY JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* (2020).

8. *Id.* at 37.

9. *Id.* at 59–101.

10. *Id.* at 183–223.

11. See MURPHY, *supra* note 3, at 9–10.

12. See MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 24–28 (2013).

13. See GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 1–33 (2010).

determining whether political figures are advancing a distinctive revolution or are merely agents of a previous revolution may be difficult. Consider Abraham Lincoln. Lincoln is often celebrated as the political figure who helped bring about the second American Revolution.<sup>14</sup> Lincoln, however, repeatedly denied that he was a revolutionary. He claimed the Constitution of the United States in 1857 was committed to the ultimate extinction of slavery.<sup>15</sup> Whether Lincoln was a revolutionary depends on a contested interpretation of the antebellum constitution of the United States.<sup>16</sup>

The participants in the 2021 Maryland Constitutionalism Schmooze play variations on constitutional revolution as an essentially contested conception. That Schmooze brings together scholars of all generations across the globe, representing political science, law, and other disciplines, for a weekend conversation on a subject of constitutional interest, in the case of 2021, constitutional revolution. As is typical for an academic conversation, linearity is often in short supply. Conversation wanders around important points rather than remaining focused on a narrow topic. The perspectives different scholars rooted in different disciplines from different generations from different parts of the world bring to conversations are rarely fully commensurate. Essentially contested concepts is the order of the day.

The representative samples of essays kindly published by the *Maryland Law Review* highlight the normative challenges of defining constitutional revolution. Some participants tackle conceptual matters directly. Sandy Levinson explores the American Independence and the Civil War as revolutions.<sup>17</sup> Howard Schweber looks at the difference between a constitutional revolution and a revolution in constitutionalism.<sup>18</sup> Several essays examine structures that might inhibit or further constitutional revolutions. Richard Albert and Yaniv Roznai examine various means for preventing precipitous constitutional amendments during emergencies.<sup>19</sup> Conor Casey studies presidential capacity to initiate a constitutional

---

14. See JACOBSON & ROZNAI, *supra* note 7, at 1–2, 7.

15. Abraham Lincoln, *First Debate with Stephen A. Douglas at Ottawa, Illinois*, in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 18 (Roy P. Basler ed., 1953).

16. For discussions of Abraham Lincoln as or a constitutional revolutionary, see Gary Jeffrey Jacobson, *Was Abraham Lincoln a Constitutional Revolutionary?*, 7 CONST. STUD. 77 (2021); Mark A. Graber, *The Post-Civil War Amendments as a Constitutional Revolution?*, 7 CONST. STUD. 1 (2021).

17. Sanford Levinson, *Are (American) Secessionists Necessarily Revolutionaries?*, 81 MD. L. REV. 217 (2021).

18. Howard Schweber, *Constitutional Revolutions: The People, the Text, and the Hermeneutic of Legitimation*, 81 MD. L. REV. 226 (2021).

19. Richard Albert and Yaniv Roznai, *Emergency Unamendability: Limitations on Constitutional Amendments in Extreme Conditions*, 81 MD. L. REV. 243 (2021).

revolution through control over the bureaucracy.<sup>20</sup> Julie Novkov explains how private actors may have done more to prevent a constitutional revolution during the American national election of 2020 than the institutional structures detailed in *The Federalist Papers*.<sup>21</sup> Other papers explore particular events that might or might not be considered constitutional revolutions. Rivka Weill examines whether the jurisprudence of the Israeli Supreme Court during Israel's recent succession crisis was revolutionary.<sup>22</sup> Carol Nackenoff details how the specter of minority control threatens a constitutional revolution that would obliterate constitutional democracy in the United States.<sup>23</sup> Whether the events of January 6, 2021, constituted a constitutional revolution provides the background for Jill Goldenziel's discussion of the problematic response to the mob taking over the Capitol.<sup>24</sup> Finally, several authors outline possibilities for what may or may not be a constitutional revolution. Rebecca Zietlow details how the Thirteenth Amendment provides the foundation for "a third Reconstruction."<sup>25</sup> Chris Chambers Goodman calls for a constitutional revolution that will provide for greater political equality in Congress.<sup>26</sup> Robinson Woodward-Burns throws some cold water on these proposals by detailing how counter-majoritarian Republican hardball may forestall progressive constitutional revolutions, while promoting what might be a conservative constitutional revolution.<sup>27</sup>

Professor Levinson's essay highlights the contested nature of both "revolution" and "secession." Americans in 1776 and Confederates in 1860, he points out, neither sought to take over a government nor repudiate the principles on which that government was based. George Washington and friends, Levinson notes, "were content to leave the British Empire as it was."<sup>28</sup> Americans, Thomas Jefferson maintained, were claiming only their inherited common law rights as Englishmen and were not seeking to create a

---

20. Conor Casey, *Political Executive Control of the Administrative State: How Much is too Much*, 81 MD. L. REV. 257 (2021).

21. Julie Novkov, *Donald Trump, Constitutional Failure, and the Guardrails of Democracy*, 81 MD. L. REV. 276 (2021). For those institutional structures, see especially Alexander Hamilton, James Madison, and John Jay, THE FEDERALIST NO. 51, at 320–25 (Clinton Rossiter ed., 1961).

22. Rivka Weill, *Judicial Intervention in Parliamentary Affairs to Prevent a Coup D'état*, 81 MD. L. REV. 297 (2021).

23. Carol Nackenoff, *What Makes an American Constitutional Revolution, and Are We Having One*, 81 MD. L. REV. 320 (2021).

24. Jill I. Goldenziel, "Revolution" at the Capitol: How Law Hindered the Response to the Events of January 6, 2021, 81 MD. L. REV. 336 (2021).

25. Rebecca Zietlow, *A Third Reconstruction*, 81 MD. L. REV. 351 (2021).

26. Chris Chambers Goodman, *Constitutional Revolution: A Path Towards Equitable Representation*, 81 MD. L. REV. 366 (2021).

27. Robinson Woodward-Burns, *Counter-Majoritarian Constitutional Hardball*, 81 MD. L. REV. 380 (2021).

28. Levinson, *supra* note 17, at 219.

new regime based on entirely new political principles.<sup>29</sup> Jefferson Davis and friends, Levinson continues, lacked “a professed aim to take over the American government” and did not “disaffirm[] the strictures of the United States Constitution.”<sup>30</sup> Davis and South Carolina fire-eaters insisted that the right of secession was baked into the Declaration of Independence and Constitution of the United States.<sup>31</sup> Commentators who claim that Americans in 1776 were revolutionaries rather than secessionists and that Confederates in 1860 were traitors do so on a contested reading, respectively, of the English constitution and Constitution of the United States. These contests over what constitutes secession and revolution leave Levinson wondering whether “these terms have any genuine analytic meaning or are instead merely terms of political invective that should not, perhaps for that reason, be taken seriously by academics.”<sup>32</sup>

Professor Schweber implies that neither the American Revolution nor the Civil War were constitutional revolutions by claiming that a transformation in the practice of constitutionalism is the defining characteristic of a constitutional revolution. He writes, “a constitutional revolution occurs when there is a change in the governing norms of interpretation that alters the terms of legitimation.”<sup>33</sup> Constitutional legitimation has two distinctive paths. The first relies entirely on a founding, “[a] past moment that was performative.”<sup>34</sup> “Legitimation,” Schweber claims, is “based on the assertion of ‘correct’ understanding.”<sup>35</sup> The second treats foundings as “material for performative intervention.”<sup>36</sup> Legitimation is a present act that understands the founding project to be “fundamentally incomplete, and hence always subject to supplementation.”<sup>37</sup> Government may operate in fundamentally different ways and pursue fundamentally different projects without a constitutional revolution when the practices of legitimation remain constant. Schweber observes, “a shift in the hermeneutic of constitutional legitimation may occur without any substantial change in

---

29. See Garry Wills, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* 49–64 (1978).

30. Levinson, *supra* note 17, at 219–220.

31. Jefferson Davis, President of the Confederate States, Inaugural Address of the President of the Provisional Government, *reprinted in* 5 *THE COMPLETE AMERICAN CONSTITUTIONALISM* pt. 1, at 156–57 (Mark A. Graber and Howard Gillman eds., 2018); *Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, *reprinted in* 5 *THE COMPLETE AMERICAN CONSTITUTIONALISM* pt. 1, *supra*, at 70–71. See Levinson, *supra* note 17, at 228–29.

32. Levinson, *supra* note 17, at 218.

33. Schweber, *supra* note 18, at 230.

34. *Id.* at 240.

35. *Id.*

36. *Id.*

37. *Id.* at 241.

the arrangement or operations of political institutions and without dramatic change in the content of legal rules; conversely, political and legal revolutions may not constitute revolutions in constitutionalism.”<sup>38</sup> If Thomas Jefferson and King George III claimed to be the true heir to the Glorious Revolution of 1688, and Abraham Lincoln and Jefferson Davis claimed to be the true heir of the Declaration of Independence, then what took place in 1776 and 1861 was merely a bloody squabble over how to interpret a past revolution rather than a distinctive, new constitutional revolution.

The means for forestalling possible constitutional revolutions, Professors Albert and Roznai suggest, are as problematic as the definition of constitutional revolution. Their essay discusses possible restrictions during emergencies on the constitutional amendment process that might prevent autocratic or ill-considered reforms that undermine constitutional democracy. “History has shown,” they point out, “that amendments in emergency contexts sometimes generate a ‘constitutional revolution.’”<sup>39</sup> Restrictions on constitutional amendments in emergencies may serve as vital means for “protecting rights,” “frustrating abuses of power,” and “preserving the constitutional order.”<sup>40</sup> Undemocratic constitutional revolutions might be forestalled, Professors Albert and Roznai detail, if judiciaries review constitutional amendments for consistency with fundamental constitutional principles, if all constitutional amendments passed in emergencies sunset after a short period, or if those amendments remain good constitutional law only if reaffirmed after the emergency.<sup>41</sup> Professors Albert and Roznai recognize that no restriction on amendments is a perfect panacea for what might ail constitutional democracy.<sup>42</sup> Besides, sauce for the goose is sauce for the gander. Just as good people may forestall less democratic constitutional revolutions, so bad people may forestall constitutional changes that fulfill desirable constitutional aspirations. Consider the fate of the Thirteenth Amendment, passed in an emergency, had the United States adopted any of Professors Albert and Roznai’s proposals.

Executives adapt more conventional means for undermining constitutions by capturing national bureaucracies. Professor Casey notes a constitutional revolution occurred at the turn of the twentieth century with the development of the administrative state. “Civil servants began to be appointed on the basis that they were not mere tools of an incumbent political executive but had an overriding duty to serve the state and public interest.”<sup>43</sup>

---

38. *Id.*

39. Albert & Roznai, *supra* note 19, at 250.

40. *Id.* at 248–51.

41. *See id.* at 252–55.

42. *See id.* at 256.

43. Casey, *supra* note 20, at 258–59.

The result was “a kind of internal separation of powers between political actors and civil service personnel”<sup>44</sup> that complimented the traditional separation of powers between the executive and legislature as a means for preserving democratic regimes. Professor Casey details how this regime is being undermined throughout the world by executive attempts to crush bureaucratic independence by controlling an increased number of appointments, interfering with daily operations, and managing budgets. While he properly notes an untrammelled bureaucracy threatens responsive constitutional government,<sup>45</sup> Professor Casey warns too much presidential control “can be used as a potentially revolutionary pathway to hollow out well-established principles associated with constitutional government, like the rule of law, robust prosecutorial independence, freedom of speech, freedom of the press, and free and fair electoral competition with a genuine chance of party rotation of power.”<sup>46</sup>

Professor Novkov moves the analysis from textual and governmental guardrails against constitutional revolutions that undermine constitutional democracy to the crumbling cultural foundations of constitutional democracy in the United States. She points out that “[c]onstitutional discourse depends upon a shared vision of constitutionalism and a shared framework for constitutional choice.”<sup>47</sup> The Trump litigation campaign against the result of the 2020 presidential election, Novkov details, was an assault on this shared understanding of politics. Trump’s lawyers were more interested in creating a public convinced against all evidence that the election was stolen than in convincing mandarin justices.<sup>48</sup> Their appeal to “race-based identity nationalism”<sup>49</sup> came very close to succeeding. A peaceful transition of power occurred on January 20, 2021 (as opposed to January 6, 2021), only because such groups as the Chamber of Commerce, Facebook, and the AFL-CIO jointly helped organize a powerful campaign that helped maintain the legitimacy of now-President Joseph Biden’s victory. A constitutional revolution in the United States was averted, Novkov explains, “by private companies that either portrayed their interests as taking a stand for democracy or actions that limited their own potential liability in light of the threat of legal actions against them.”<sup>50</sup>

---

44. *Id.* at 258.

45. *Id.* at 273–74.

46. *Id.* at 273.

47. Novkov, *supra* note 21, at 288. Professor Schweber makes a similar argument.

48. *Id.* at 279–80.

49. *Id.* at 288 (quoting Gwendoline Alphonso, “One People, Under One God, Saluting One American Flag”: *Trump, the Republican Party, and the Construction of American Nationalism*, in *AMERICAN POLITICAL DEVELOPMENT AND THE TRUMP PRESIDENCY* 55 (Zachary Callen & Philip Rocco eds., 2020)).

50. *Id.* at 290.

Professor Weill's exploration of the Israeli Supreme Court's decision to demand an immediate vote on the Speaker of the Knesset<sup>51</sup> demonstrates that contests over which party to a constitutional dispute is the true revolutionary faction remain vibrant. Weill regards the Israeli justices as "revolutionary"<sup>52</sup> because their intervention in parliamentary affairs was unprecedented. The incumbent Speaker's decision to delay a vote, she details, was "in accordance with the Knesset's practice, which has a binding status according to Basic Law: Knesset."<sup>53</sup> Professor Weill nevertheless acknowledges that the effort by Likud partisans to maintain in office an indicted prime minister, Benjamin Netanyahu, also threatened the constitutional foundations of Israel. Proponents of the Israeli court's decision, she notes, believed with reason that Netanyahu's "continued rule amounts to raising a black flag over Israel's democracy."<sup>54</sup> Perhaps the best interpretation of recent Israeli constitutional politics is that in unprecedented times, all political actors must to some degree be revolutionaries in the sense that all political actors must push policies that vary to some degree from the previous commitments of the inherited regime. The central teaching of the Weill essay is that courts should proceed far more carefully than the Israeli Supreme Court in inherently revolutionary times. She writes, "[j]udicial politicization risks undermining the Court's legitimacy because intervention in blatantly political matters might paint the Court as partisan" and "might weaken political institutions . . . from fully realizing the political process."<sup>55</sup>

Professor Nackenoff details the possibility of a constitutional revolution in the contemporary United States. The Constitution of the United States, in her view, "includes a textual or moral commitment to expanding equality and democracy."<sup>56</sup> Majority rule is at the core of that constitutional order. "A commitment to popular democracy," Nackenoff writes, "is incompatible with entrenching minority control of election outcomes."<sup>57</sup> That minority control may be upon the United States. Nackenoff points out how equal state representation in the Senate,<sup>58</sup> gerrymandering in House and state legislative elections,<sup>59</sup> and a Supreme Court packed by Republicans that "has given a green light to states that want to introduce restrictions on ballot access"<sup>60</sup> are

---

51. H CJ 2144/20 *Movement for Quality Gov't in Israel v. Knesset Speaker*, Nevo Legal Database (Isr.) (Mar. 23, 2020).

52. Weill, *supra* note 22, at 305.

53. *Id.* at 307.

54. *Id.* at 310.

55. *Id.* at 314.

56. Nackenoff, *supra* note 23, at 332.

57. *Id.*

58. *Id.*

59. *Id.* at 332–33.

60. *Id.* at 333.

undermining democratic processes in the United States. This “constitutional rot”<sup>61</sup> is fueled by polarization. The most salient constitutional revolution in the United States may be the disintegration of the commons necessary for any constitutional regime. Nackenoff concludes, “[i]f different components of the citizenry support the Constitution but embrace such dramatically different visions of constitutional values and meanings that common ground is neigh-impossible to find, there may be no ‘people.’”<sup>62</sup>

The contested nature of “constitutional revolution” affected the immediate response in the United States to the effort by Trump supporters on January 6, 2021, to interfere with congressional counting of Electoral College votes. In an essay that appropriately puts “Revolution” in scare quotes, Professor Goldenziel details how the “complicated web of authorities and regulations contributed to the lack of a coherent response by the [Department of Defense], National Guard, and law enforcement to the Capitol siege.”<sup>63</sup> Many problems concerned “[t]he layers of bureaucracy necessary to deploy the National Guard.”<sup>64</sup> Others concerned a statutory framework that bars federal troops from engaging in law enforcement,<sup>65</sup> but permits the President to use federal troops during an insurrection.<sup>66</sup> Who was in charge and what they could do depended on contested descriptions of what was happening at the Capitol. Was January 6 normal lawbreaking, an insurrection, or a constitutional revolution, each of which is governed by different legal rules?<sup>67</sup> Professor Goldenziel concludes with the intriguing observation that January 6 threatened a constitutional revolution not imagined by either Trump supporters or those who watched their television sets in horror. A presidential order “deploy[ing] federal troops on U.S. soil,” she observes, “would have changed constitutional norms of civil-military relations in the United States forever,” so that “the greatest constitutional revolution at the Capitol on January 6 is the one that did not occur.”<sup>68</sup>

Professor Zietlow champions far more democratic political change than the January 6 mob. Her call for “a third Reconstruction” in the United States driven by electoral politics<sup>69</sup> illustrates the challenges in describing political transformations that are grounded by reinterpretations of existing

---

61. See generally Jack M. Balkin, “Constitutional Crisis and Constitutional Rot,” 77 MD. L. REV. 147 (2017).

62. Nackenoff, *supra* note 23, at 335.

63. Goldenziel, *supra* note 24, at 336.

64. *Id.* at 349.

65. 18 U.S.C. § 1385; see Goldenziel, *supra* note 24, at 338.

66. 10 U.S.C. §§ 331–35; see Goldenziel, *supra* note 24, at 339.

67. See Goldenziel, *supra* note 24, at 349–50.

68. *Id.*

69. Zietlow, *supra* note 25, at 364–65.

constitutional text.<sup>70</sup> Professor Zietlow's anticipated reconstruction requires "structural change to advance racial equality" and "improving the lives of low-wage workers."<sup>71</sup> "Structural change" would appear to suggest a social revolution, but Zietlow does not advocate for altering the constitutional text. The Thirteenth Amendment provides the foundation for her third reconstruction. Zietlow observes, "[a]busive policing and the subordination of low-wage workers of color are both manifestations of the involuntary servitude that continues to plague our nation almost two centuries after the abolition of slavery."<sup>72</sup> So conceptualized, the third Reconstruction might be best conceptualized as part of the ongoing revolution initiated by the civil war amendments<sup>73</sup> or even, as such Republicans as Abraham Lincoln insisted, the ongoing revolution initiated by the Declaration of Independence.<sup>74</sup>

Professor Goodman's call for a constitutional revolution that will "more effectively guarantee equitable representation"<sup>75</sup> provides a related window into the contested nature of constitutional revolutions. She first proposes a federal statute increasing the number of representatives in the House that would provide greater equity in the number of constituents represented by each House member.<sup>76</sup> She then proposes a constitutional amendment that would substantially alter representation in the Senate so as to eliminate the present representational advantage presently enjoyed by small states that are far more rural and far more white than larger states.<sup>77</sup> Professor Goodman acknowledges that whether constitutional changes are revolutionary is in the eye of the beholder.<sup>78</sup> Her concluding sentence, which speaks of "a reconception of the notion of democratic representation,"<sup>79</sup> suggests the

---

70. See JACOBSON & ROZNAI, *supra* note 7, at 143–82.

71. Zietlow, *supra* note 25, at 352.

72. *Id.* at 355.

73. See JACOBSON & ROZNAI, *supra* note 7, at 7.

74. *Id.* Thaddeus Stevens, when discussing Section 1 of the Fourteenth Amendment, declared, "I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other, in our Declaration of organic law." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). See Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 15, at 169 (declaring with respect to the Declaration of Independence: "The assertion of that *principle*, at that time, was the word, '*fitly spoken*' which has proved an 'apple of gold' to us. The *Union*, and the *Constitution*, are the *picture of silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple — - *not* the apple for the picture"); see also Gary Jeffrey Jacobson, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993).

75. Goodman, *supra* note 26, at 366.

76. *Id.* at 372–76.

77. *Id.* at 376–79.

78. *Id.* at 368–70.

79. *Id.* at 379.

fundamental change in constitutional identity that Jacobsohn and Roznai think is the defining characteristic of constitutional revolution. The second paragraph, which asks Americans to “fulfill these promises”<sup>80</sup> made in the Preamble to the Constitution of the United States, suggests Professor Goodman’s proposed constitutional reforms are better conceptualized as faithful to the constitutional revolution that began in 1776.

Professor Zietlow’s and Professor Goodman’s dreams of progressive constitutional reconstructions or revolutions may run aground on the shoals of the counter-majoritarian constitutional hardball documented by Professor Woodward-Burns. Mark Tushnet first coined the phrase “constitutional hardball” to describe behavior inconsistent with previously understood constitutional norms or conventions, but not inconsistent with existing constitutional law.<sup>81</sup> Professor Woodward-Burns notes how the Republican party has responded to the demographic changes that might support a progressive constitutional revolution by a combination of court-packing and gerrymandering designed to keep government in Republican hands rather than by seeking means to expand the party’s base. “The modern Republican Party,” he observes, “frequently defeated in contests for the national popular vote, is not clearly a populist coalition, but rather one that uses hardball to inflate and entrench legislative seat share, increasing the likelihood of counter-majoritarian outcomes in federal and state legislative elections.”<sup>82</sup> The counter-majoritarian constitutional hardball Woodward-Burns describes is not unique to the United States. Poland and Hungary have also witnessed gross manipulation of constitutional and statutory rules to provide a right-wing party with far more power than the party’s popular support justifies.<sup>83</sup>

One common theme in several papers is the importance of political culture. Most authors agree that societal commitments are the best guardrail against bad constitutional revolutions. “Codified constitutional rules can achieve their objectives,” Professors Albert and Roznai note, “only if they are reinforced by an underlying political commitment rooted in respect for the rule of law and for the presumably democratic procedures that led to their enactment.”<sup>84</sup> Professor Nackenoff agrees. She points out that “[t]he Framers knew that institutional design alone could not maintain the Constitution. Cultivating and maintaining support and even veneration for

---

80. *Id.* at 366.

81. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

82. Woodward-Burns, *supra* note 27, at 393.

83. See GABOR HALMAI, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 243 (Mark A. Graber et al., eds., 2018); Wojciech Sadurski, *Constitutional Crisis in Poland*, in CONSTITUTIONAL DEMOCRACY, *supra*, at 257.

84. Albert & Roznai, *supra* note 19, at 256.

the Constitution among the populace, and internalization of norms among elites, would be essential.”<sup>85</sup>

At this point, the essentially contested nature of constitutional revolution is both a blessing and a curse. Essentially contested concepts invite dialogue. They provide a shared vocabulary for discussing politics, even if we dispute their meaning.<sup>86</sup> Essentially contested concepts also invite more vigorous forms of contestation. Schweber observes, “where two incommensurate versions of constitutional coexist, the text for constitutional revolution becomes something more disturbing; a test for conditions of the possibility of constitutional civil war.”<sup>87</sup> “[W]hen men differ in taste as to kind of world they want,” Holmes chillingly wrote, “the only thing to do is to go to work killing.”<sup>88</sup>

---

85. Nackenoff, *supra* note 23, at 330.

86. See generally HOWARD SCHWEBER, *THE LANGUAGE OF LIBERAL CONSTITUTIONALISM* (2007).

87. Schweber, *supra* note 18, at 242.

88. Letter from Oliver Wendell Holmes, J., to Harold Laski (Dec. 3, 1917), in 1 *Holmes-Laski Letters* 85 (Mark DeWolfe Howe, ed., 1963).