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Democracy, Violence, and Constitutional Revision in the Shadow of Democratic Revolution Theory

DEMOCRACY, VIOLENCE, AND CONSTITUTIONAL REVISION IN THE SHADOW OF DEMOCRATIC REVOLUTION THEORY

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Professor Richard Albert's ambitious article *Democratic Revolutions* argues that elements of political revolution long thought by social scientists to be essential—mass mobilization, rapidity, violence—are not, in fact, the *sine qua non* of revolution.¹ The term “revolution” captures a broader political and legal phenomenon than just the episodic, violent, mass-mobilized political conflagration.² Traditional political taxonomists, contenting themselves with classifying revolutions based on the supposed procedural criteria, neglected to acknowledge that not all revolutions are created equal.³ Albert responds to this value-free approach by advancing a normative theory of “democratic revolution” that attempts to distinguish legitimate democratic revolutions, such as the American Revolution, from illegitimate, non-democratic ones, such as the Russian Revolution.⁴ To this end, Albert relies on Emmanuel Sieyès's concept of the People as *le pouvoir constituant* (constituting power) and proposes a need for “continuing” legitimacy, i.e., a revolution is democratic when the People have consented to the revolution as a legitimate course of action, and consented to and framed institutions that advance liberal democratic rights on an ongoing basis.⁵ Ultimately, his project seeks to rehabilitate, to legitimate, to *justify* the democratic revolution, which has been sullied by its inattentive grouping with its undesirable, undemocratic cousin, and to make clear what is essential to a democratic revolution.⁶

This response essay identifies two objections to this thesis. In Part I, I argue that the “democratic” in democratic revolution is greatly overrated. Democracy is one desirable aspect of Western democratic governance, but it is in considerable tension with other features of constitutional government, including the protection of minority interests. In particular, democracy harbors the risk of unruly and ill-informed majoritarianism. In Part II, I develop the argument that, generally speaking, whether or not violence or its threat is a *sine qua non* of democratic revolution-hood, violence, or at the very least its threat, very often *does* accompany revolution. Several of Professor Albert's cited historical episodes do not sup-

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1. Richard Albert, *Democratic Revolutions* 2, 9–14 (Mar. 20, 2011) (unpublished manuscript) (on file with author).

2. *Id.*

3. *Id.* at 2, 8.

4. *Id.* at 7–9.

5. *Id.* at 33–36.

6. *Id.* at 3–4, 5.

port, and indeed undermine, his thesis. Finally, in Part III, I consider constitutional revision and interpretation in the shadow of democratic revolution theory and ask whether Albert's account could currently justify democratic revolution in the United States.

I. DEMOCRACY IS NOT AN UNMITIGATED GOOD

Professor Albert proposes a new political taxonomy to differentiate a good revolution from a bad one, or as he conceptualizes it, a "democratic" from a non-democratic revolution. By "democratic" revolution, he does not mean a revolution initiated by the masses rather than political elites. His article clarifies that *elites* may initiate and execute a revolution; mass mobilization is *not* a necessary condition for democratic revolution.⁷ Instead, by "democratic," he means those revolutions that "increase the range of liberty of citizens, expand opportunities to exercise liberal democratic rights and freedoms, and to multiply popular choice."⁸ Such a revolution is located—and ranked—along "the scale of righteousness" depending on how much it "advances the cause of freedom and weakens the forces of oppression."⁹

The "democratic" in "democratic revolution," however, has its downsides, and there are good reasons not to be as sanguine as Albert about unbridled majoritarianism. Democratic revolution theory places emphasis on "the People" being the constituting power; yet "the People" do not all hold the same collective view. Indeed, the theory calls for counter-revolutionaries to contest the revolution.¹⁰ The possibility of dissent among the People—and unless we are to dehumanize the counter-revolutionaries, they too form a portion of the People—means that the theory of democratic revolution may overemphasize democracy at the expense of other desirable structural features of Western liberal governments, such as constitutional pre-commitment, the protection of minority interests, and political structures like separation of powers and federalism designed to promote deliberation and disperse power. Democracy, by definition, is at some level majoritarian: when controversies arise in a pluralistic democracy, factions resolve their political disputes with resort to some version of "majority rules" for election, legislation, confirmation of appointees, and decision-making on collegial courts.

Unruly majoritarianism not tempered with due regard to deliberation and republican civic virtue, however, may lead to outcomes for political minorities that prove insensitive, unfair, discriminatory, and oppressive. Consider the familiar case of a revolutionary war for independence from colonial hegemonic rule, only to be followed by the rule of an

7. *Id.* at 12.

8. *Id.* at 39–40.

9. *Id.*

10. *Id.* at 32–33.

ethnic majority that neglects or oppresses a minority's interests.¹¹ In such a case, it may be said that, although there may be "constituting" legitimacy *ab initio* in throwing off a colonial ruler, there is no continuing legitimacy—at least with regard to the minority of individuals who would revolt, for example, to form a separate state. Of course, this further fracturing and lack of continuing legitimacy can continue as an (almost) *ad infinitum* loop, particularly when one considers changes in majoritarian preferences over time. Thus, democratic revolution theory justifies a relentless and vicious cycle: democratic revolution against oppressive government, new democratic government constituted, majoritarian oppression of minority, rinse and repeat. Given the reality of majoritarianism and the inevitability of a dissenting minority, it is unclear where the end to justified democratic revolution really lies.

Consider the example of voter initiatives and referenda, often authorized among the Western states of the United States, to legislate majoritarian political preferences more than occasionally at the expense of a political minority.¹² The citizen initiative permits voters to bypass a legislature's usual role and its procedures in lawmaking or constitution amending.¹³ Presumably, initiatives occur because elected representatives, in their exercise of republican deliberation, reject the popular-supported measure as full of personal political hazard, imprudent, unconstitutional, etc. Often courts play a politically moderating countermajoritarian role as vindicator of entrenched rights even as against popular initiatives. During a revolution, however, judges acquiesce to majoritarian demands, as Albert would probably acknowledge.¹⁴ In such a case, democracy is more likely to take the form of raw majoritarianism rather than consensus-seeking facilitated by structures like federalism or the separation of powers. Accordingly, the stated objects of democratic revolution, i.e., to "increase the range of liberty of citizens" and "to multiply popular choice,"¹⁵ may potentially conflict with one another, at least with regard to the liberty of citizens with minority interests adverse to the popular choice of "King Numbers."¹⁶

11. See, e.g., S. J. TAMBIAH, *SRI LANKA: ETHNIC FRATRICIDE AND THE DISMANTLING OF DEMOCRACY* 13, 17, 70–72 (1986) (describing post-independence implementation of democratic majoritarian policies that discriminated against ethnic and linguistic minority).

12. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (discussing Colorado's 1992 statewide referendum "Amendment 2").

13. See, e.g., COLO. CONST. art. V, § 1 (reserving to the People "[t]he power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly").

14. Cf. Albert, *supra* note 1, at 21

15. *Id.* at 39.

16. RUSSELL KIRK, *JOHN RANDOLPH OF ROANOKE* 73–74, 553–54 () (characterizing legislative majority as monarch "King Numbers," who seeks to confiscate and tax property of political minorities).

Beyond the problem of unruly majoritarianism lies the related difficulty of an ill-informed majoritarianism. When “the People” are ill-informed in the context of either a functioning government or a revolutionary period, their consent may not be properly given. The “consent” may be intentional and voluntary, but not knowing. We know that political ignorance is widespread, and perhaps rationally so.¹⁷ Public choice suggests that when interest groups are large and transaction costs to communicate and organize are high relative to the benefits, the free rider problem makes it unlikely they will mobilize to petition government officials or otherwise register their preferences.¹⁸ In such a case, those elected representatives may prove inattentive to the People’s real concerns, appealing to them only through symbolic gestures, perhaps nationalistic or jingoistic, and the representatives may focus on their own self-interest or those of well-organized interest groups whose costs to organize are low relative to the benefits for doing so. This knowledge and attention gap makes mental consent unlikely on the part of the People and therefore requires the fallback substitute of performative consent, i.e., acquiescence. But acquiescence as consent may mean that the practice of democratic government differs significantly from its theory. The passive consent of acquiescence “does not distinguish among grudging, reluctant, or enthusiastic acceptance.”¹⁹ The gap along that spectrum suggests the institutions created to act on behalf of the People may be ill policed due to public apathy resulting in the public choice problems of governance.

More seriously, acquiescence as consent also suggests that a democratic government may have difficulty living up to the “continuing legitimacy” expectations of democratic revolution theory, which is no small problem given that the key distinguishing feature of a democratic revolution is whether it “exhibit[s] constituting and *continuing legitimacy*.”²⁰ After all, under democratic revolution theory, the People as the constituting power “can, as it pleases, revoke its consent from those constituted institutions, and once again constitute new powers for new institutions staffed by new individuals.”²¹ Contrary to Albert, such a result, if his justifying theory were embraced, could invite further revolution,²² or attempts at it, if nothing but acquiescence or consent by a majority were required. Revolution tends to be contagious—consider Europe in 1848, Eastern Europe in 1989, or the so-called Arab Spring in 2010 and continuing into 2011—and it may be that the phlegmatic People acquiesce

17. Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–13 (2004).

18. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2, 29, 33–35, 48 (1965).

19. Albert, *supra* note 1, at 38.

20. *Id.* at 39.

21. *Id.* at 35.

22. *Id.* at 38.

until some external force awakens them from their slumber. When they awaken, the consequences may be tumultuous.

II. REVOLUTION DOES OFTEN INVOLVE VIOLENCE OR ITS THREAT

Albert wishes to emphasize the substance of a revolution's end—i.e., whether it is democratic or non-democratic—rather than the procedural means by which it may come to pass.²³ In particular, he disputes the necessity of the relationship between revolution and violence (or its threat).²⁴ His burden is heavy, however. Political revolution is intimately tied with violence and tumult. Eugène Delacroix's painting *Liberty Leading the People*, which portrays the French July Revolution of 1830, epitomizes that connection.²⁵ Delacroix personifies Liberty as a determined French peasant woman striding across the dead bodies of the fallen forces of reaction.²⁶ She draws after her a ragtag-but-noble band of armed revolutionary irregulars as she leads, musket with bayonet in one hand, tricolor in the other.²⁷ Delacroix has accurately captured the violent spirit of most revolutions. Rebuttal of that fixed association requires good historical exemplars of nonviolent revolution.

To meet this burden, Albert proposes several counterexamples of revolutions that were ostensibly non-violent events. Contrary to his assertion, those events that count as revolutions, at least under his approach,²⁸ all presented actual violence, or at least involved its very substantial threat. To begin, Albert offers the example of the Glorious Revolution of 1688 as a pre-twentieth century revolution that he claims de-links revolution and violence and for which violence-oriented traditional revolutionary theory “would find trouble accounting.”²⁹ Although the Glorious Revolution in England is styled “Bloodless,” historians acknowledge that label is misleading.³⁰ In fact, it involved a Dutch inva-

23. *Id.* at 7, 66.

24. *Id.* at 14–17.

25. BARTHÉLÉMY JOBERT, DELACROIX 128–33 (Terry Grabar & Alexandra Bonfante-Warren eds., Princeton Univ. Press 1998) (1997).

26. *Id.* at 132.

27. *Id.*

28. It is unclear whether the Georgian, Hungarian, Polish, or Ukrainian revolutions count as revolutions under Albert's own definition. For example, the Rose Revolution in Georgia, which challenged disputed parliamentary elections, see JONATHAN WHEATLEY, *GEORGIA FROM NATIONAL AWAKENING TO ROSE REVOLUTION, DELAYED TRANSITION IN THE FORMER SOVIET UNION* 183 (2005), would not constitute a revolution for Albert because it does not meet the requirement of “nonconstitutionality.” The Supreme Court of Georgia nullified the prior election results for 150 proportional seats and a new parliamentary election was held to elect new representatives under the same constitution (albeit amended through the formally ordained amendment process), see *id.* at 194–95. As the revolutionaries sought to vindicate and amend the constitution rather than overturn it, it is unclear the revolution met Albert's requirement of “nonconstitutionality.” See Albert, *supra* note 1, at 23, 24. Accordingly, the fact that these “revolutions” were non-violent does not establish Albert's point.

29. Albert, *supra* note 1, at 16.

30. TIM HARRIS, *REVOLUTION: THE GREAT CRISIS OF THE BRITISH MONARCHY, 1685–1720*, at 275 (2006).

sion with an assembled army of over 14,000,³¹ attendant bloodshed during battles outside Dorchester, in Reading, and at Wincanton,³² and rioting anti-Catholic mobs³³—in short, both actual and threatened violence characterized the revolution. If the Glorious Revolution supports any proposition about revolutionary violence, it is only the modest claim that occasionally revolutions end mercifully quickly with less violence and loss of life than might have occurred if the established order had not miscalculated the likelihood of revolution and quickly capitulated on the battlefield.³⁴

In some of the counterexamples, Albert defines what counts as violence too narrowly because he apparently excludes violence and threats of violence on the part of the establishment. But counterrevolutionaries, not just the revolutionaries, may perpetrate violence.³⁵ Consider the supposed “nonviolent” struggle for Indian independence.³⁶ The British colonial forces responded to revolutionaries with extreme prejudice on several occasions. For example, in 1930 the British massacred some 200-250 nonviolent Indian protestors at the Kabuli Gate in Peshawar when they opened fire on the crowd with machine guns.³⁷ Their violent deaths refute the notion that the Indian revolution was nonviolent, at least when the colonial power’s violence is considered.

Moreover, it is a mistake to focus only on Gandhi’s nonviolent campaign for India’s independence. The lengthy fight for India’s independence was multifaceted and included violence employed against the British by Indian revolutionaries, such as the efforts of Subhash Chandra Bose and the Indian National Army, revolutionaries *not* affiliated with Gandhi’s non-violent resistance movement.³⁸ Further, consider the Indians’ considerable numerical advantage as against the British. When large numbers of discontent protesters greatly outnumber a foreign occupying force, can it truly be said that the threat of violence is ever far away? The *in terrorem* effect on the British would have been potent.

31. W.A. SPECK, *RELUCTANT REVOLUTIONARIES, ENGLISHMEN AND THE REVOLUTION OF 1688*, at 79 (1988).

32. HARRIS, *supra* note 30, at 275, 295 (reporting thirty dead at Wincanton, fifty-three at Dorchester, and thirty to fifty at Reading).

33. SPECK, *supra* note 31, at 89; HARRIS *supra* note 30, at 296, 372-76 (describing anti-Catholic mobs in England and Scotland).

34. SPECK, *supra* note 31, at 80, 87.

35. Even Czechoslovakia’s “Velvet Revolution” featured riot police who violently suppressed peaceful student demonstrations by attacking them with truncheons. MICHAEL LONG, *MAKING HISTORY, CZECH VOICES OF DISSENT AND THE REVOLUTION OF 1989*, at 19-20 (2005). There was very much the threat of violence by the old guard, including (apparently) a student death at the hands of the police, though this report of a death later proved false, *id.* at 20, 124.

36. Albert, *supra* note 1, at 16-17.

37. Irfan Habib, *Civil Disobedience 1930-31*, 25 *SOCIAL SCIENTIST* 55-56 (1997), available at www.jstor.org/stable/3517680.

38. PETER WARD FAY, *THE FORGOTTEN ARMY: INDIA’S ARMED STRUGGLE FOR INDEPENDENCE, 1942-1945*, at 1-2, 5-6 (1993).

Other proffered counterexamples of “nonviolence” fare no better under a definition of “violence” that encompasses the old regime’s resistance. The Tulip revolution in Kyrgyzstan featured violence initially in the city of Jalalabad as the government “deployed internal troops to suppress civilian protesters” in clashes that left dozens wounded.³⁹ Interior Ministry troops also attacked protestors in the capital of Bishkek with more than twenty hospitalized and two hundred arrested.⁴⁰ Crowds then captured the principal government building while widespread looting and arson occurred, allegedly by counterrevolutionaries.⁴¹ The weeks that followed would also be marred by political assassination.⁴²

Of course, it is impossible to know *ab initio* whether a democratic revolutionary undertaking will turn violent because revolutions are complex and inherently chaotic events. The possibility of a true revolution unfolding without violence or its threat cannot be ruled out. One need not, however, establish that *all* revolutions are violent. It is enough that they frequently are violent. This concurrence of violence and revolution suggests the relationship is not accidental. Accordingly, too readily justifying revolution should give one pause. Consider the project of the social contract theorists and their discussion of the theoretical “state of nature” as a type of justification, or alternatively rejection, of revolution. How readily a Locke or a Hobbes justified or rejected revolution turned on their alternative conceptions of the state of nature, which would obtain during the disorder accompanying revolution. If an absence of civil authority is more akin to Locke’s great “Inconveniences of the State of Nature . . . where Men may be Judges in their own Case,”⁴³ revolution might more readily be justified. Conversely, if Hobbes is correct that “the life of man” in a revolutionary state of nature is “solitary, poor[,], nasty, brutish, and short,”⁴⁴ that alternative looks less appealing than simply tolerating a monarch, even if one’s liberty is constrained.

To be sure, revolution is occasionally justified—even acknowledging the probability of attendant violence. Those occasions, however, must be carefully weighed in light of the likelihood that violence will accompany them. The traditional theorist’s focus on the violent procedure of revolution suggests prudence about those weighty substantive reasons adequate to justify it.⁴⁵ If Albert were to defend a more modest

39. ERICA MARAT, *THE TULIP REVOLUTION: KYRGYZSTAN ONE YEAR AFTER*, MARCH 15, 2005–MARCH 24, 2006, at 5 (2006).

40. *Id.* at 129.

41. *Id.*

42. *Id.* at 130.

43. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 293–94 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

44. THOMAS HOBBS, *LEVIATHAN* 65 (Ernest Rhys ed., E. P. Dutton & Co. Inc. 1940) (1651).

45. *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (reflecting a similar sentiment, “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to

proposition about revolution and violence—i.e., revolutions may often be violent, but less bloody than supposed—we would need to ask the further question what quantum of violence would be acceptable in order for a democratic revolution to be justified? Given the imperfect state of the art of political forecasting, it may be that no satisfactory answer to the revolutionary question could be offered.

III. CONSTITUTIONAL REVISION (AND INTERPRETATION) IN THE SHADOW OF DEMOCRATIC REVOLUTION THEORY

In the first portion of this response essay, I suggested that the “democratic” in democratic revolution might prove undesirable. Although majority rule is an essential component of democracy, majoritarianism is in tension with other aspects of liberal governance, including the constitutional protection of minority interests and structures designed to promote consensus. Accordingly, the emphasis on the “democratic” in democratic revolution implies a version of majority rules to constitute a legitimate governing institution without any necessary regard for these other features of Western-style governance. In the essay’s second part, I separately questioned whether a true Albertian revolution could be truly non-violent by illustrating that the historical record is less than reassuring on this count. In this portion of the essay, I argue that in light of revolution’s majoritarian and violent realities, it is desirable to avoid revolution by facilitating a measure of democratic but deliberative control. Thus, the essay considers constitutional revision and interpretation in the shadow of democratic revolution theory. To do so, it asks whether Albert’s account would currently justify democratic revolution in the United States or whether Article V and “interpretation” can adequately serve the ends that a democratic revolution might otherwise seek to attain.

As previously argued, revolution, even democratic revolution, could very likely prove violent and majoritarian in its most crassly undesirable sense. Assuming it is desirable to avoid unfiltered majoritarian outcomes, or at least the violent process, how could “continuing legitimacy” be secured through nonviolent, democratically legitimate change? Historically, one agent for facilitating constitutional change in the U.S. system has been the judiciary’s *sub rosa* amendment of the Constitution under guise of interpreting a constitutional text characterized as ambiguous, or at least as underdetermined. Albert anticipates interpretation-qua-revision as a nonviolent species of democratic revolution as his theory attempts to account for, and ratify, among other things, constitutional restructuring that occurs outside formally authorized procedures, such as

suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed.”).

that constitutional order that emerged outside of Article V during the New Deal settlement.⁴⁶

Perhaps the difficulty of the formal supermajoritarian process and the asserted exigency to respond to changed circumstances might be invoked as a justification for interpretation-qua-amendment. But this approach fails both a criterion of the democratic revolution and a critique of it. First, if one rejects the hyperrealist indeterminacy premise, then the use of constitutional interpretation to legitimate amendment-in-fact succeeds only because “We the People” are inattentive, ignorant, or deceived. Albert accepts that the acquiescence-as-consent essential to constituting and continuing legitimacy may encompass “grudging, reluctant or enthusiastic acceptance,”⁴⁷ but does that consent also embrace acquiescence predicated on inattention, ignorance, or deception? If so, continuing legitimacy may prove a rather empty concept. Second, in the particular case of the New Deal, interpretation-as-amendment occurred without violence, but it remained decidedly majoritarian. The Court’s expansion of the national government’s authority was not costless to private minority interests. Consider *Carolene Products* and its famous footnote four: the Court ratified the majoritarian exercise of legislative power through a presumption of constitutionality that restricted claims of individual right against the national government.⁴⁸

If judicial interpretation-as-amendment is an inadequate device for maintaining continuing legitimacy under the U.S. Constitution, does the formal mechanism of Article V adequately serve the ends that a democratic revolution might otherwise seek to attain? If not, does its supermajoritarian structure justify an appeal to democratic revolution theory and nonconstitutional action?

It is perhaps ironic that one generation’s revolutionaries may be the defenders of the next generation’s establishment, but it remains that the Philadelphia Convention drafted a document resistant to facile amendment. Article V accommodates demand for democratic change, but does so by allowing only clear supermajorities to have their way. Although the procedural rules facilitate the avoidance of revolution and its violent haz-

46. Albert, *supra* note 1, at 9, 18. In this sense, Albert’s project draws upon and parallels efforts, for example, by Bruce Ackerman and Mark Tushnet, to explain and justify constitutional change outside Article V’s formal rules for amendment. Democratic revolutions with constituting and continuing legitimacy are his answer to Ackerman’s constitutional moment resulting from constitutional politics. See BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 10–31 (1998). Those democratic revolutions are his answer to Tushnet’s constitutional hardball. See also Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (describing constitutional hardball as a strategy for altering constitutional orders).

47. Albert, *supra* note 1, at 38.

48. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

ards by forcing consensus before allowing change, Article V denies a simple majority its right to govern as it pleases. Indeed, it promotes “the more general constitutional principle of republicanism, which attempts to promote the public good within a system of popular representation”⁴⁹ more than it attempts to promote democracy. A strongly deliberative process, however, is not costless if it produces veto gates from which proposed amendments may not emerge. Initiation of the amendment process requires bicameral two-third supermajorities with a requirement that three-fourths of state legislatures, or conventions in them, ratify any amendment.⁵⁰ The alternative of a constitutional convention, where two-thirds of the state legislatures initiate the process whereby constitutional amendments may be proposed with the same three-fourths rule for ratification, is no less demanding.⁵¹ Indeed, that there have been only twenty-seven successful amendments, ten secured as an early negotiated political compromise, demonstrate the formal Article V process is not very democratically responsive.

Moreover, Article V is likely to be even less effective when addressing matters where the institutional or individual interests of Article V gatekeepers—the prerogatives of Congress and its members or the interests of the several States—are directly at stake. Consider a hypothetical repeal of the Seventeenth Amendment, which itself repealed state legislative selection of senators and provided for direct election of U.S. senators.⁵² To the extent that it were thought such an amendment would subject senators to renewed state legislative accountability, such an amendment would never be proposed.⁵³ Thus, Congress and the States act as important gatekeepers for initiating the Article V process.

This conclusion suggests that Article V would inadequately address the demands of democratic revolution theory and, depending on the particular democratic demand (e.g., the redistributive demands of the “Occupy Wall Street” movement were it to win majoritarian support),⁵⁴

49. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002).

50. U.S. CONST. art. V.

51. To complicate matters further, Article V provides that a state may not be stripped of its equal representation in the Senate (i.e., two senators per state) without its consent. U.S. CONST. art. V. This provision gives a state an effective veto power over any such amendment.

52. U.S. CONST. art. XVII.

53. The ratification of the Twenty-seventh Amendment, which provides that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened,” is not to the contrary. James Madison proposed the original amendment as a part of the Bill of Rights. Jay M. Zitter, *Construction and Operation of Twenty-Seventh Amendment to United States Constitution Relating to Congressional Compensation*, 95 A.L.R.5th 459 (2002). Its ratification required over two hundred years and Article V required no further action by Congress. *Id.*

54. Douglas Schoen, *Polling the Occupy Wall Street Crowd*, WALL ST. J., (Oct. 18, 2011), available at <http://online.wsj.com/article/SB10001424052970204479504576637082965745362.html> (noting his firm’s polling of 200 protestors in New York’s Zuccotti Park and reporting that 65% favor guaranteed health care, education, and retirement and 77% favor increasing taxation on wealthiest, while 58% oppose increasing taxation on all).

could justify a new American Revolution. If constituting or continuing legitimacy is at its heart a claim about a democratic majority being able to rule, then likely Article V would not deliver. One might alternatively consider an Article V amendment to the way in which we amend under Article V. Authorizing additional tools to more easily amend the document, perhaps by disintermediating the gatekeepers, could possibly meet the demands of his theory.⁵⁵

Of course, such concessions to Albert's theory would prioritize democracy over republicanism, constitutionalism, and other desirable features of Western-style liberal governance. Moreover, if his premise that revolution has no necessary association with violence is untrue, as I have argued it is, Article V rightfully becomes more attractive as a deliberative mechanism for change that seeks broad consensus and change without the inevitable bloodshed that attends the People's irregular exercise of constituting power.

CONCLUSION

This response essay identified two objections to Albert's democratic revolution theory. First, democracy is but one desirable aspect of governance. Its overemphasis is in tension with the protection of minority interests and the consensus-seeking features of constitutionalism. Second, whether or not violence or its threat is a defining characteristic of revolution, violence and its threat often do attend revolution. In light of the undesirability of crass majoritarianism and revolutionary violence, this essay considered whether his theory could be accommodated either by interpretation-as-amendment or by the Article V method for amending the document. Neither would suffice to satisfy the demands of his democratic revolutionary theory. That conclusion stands, *reductio ad absurdum*, as a strong suggestion that the premises of democratic revolutionary theory are mistaken.

55. These tools might assume the form of a national citizen petition or a revision commission convened periodically to assess the document. *See, e.g.*, FLA. CONST. art. XI, § 2 (providing for revision commission that convenes every twenty years to consider amendments to Florida Constitution).

