

The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law

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Abstract

A convention is a practice not memorialized in a formal rule but regularly engaged in out of a sense of obligation, where the sense of obligation arises from the view that adhering to the practice serves valuable goals of institutional organization and the public good. Constitutional conventions are important in making it possible for the national government to achieve the goals set out in the Preamble. Over the past twenty years or so, however, such conventions have eroded. This article addresses the role and importance of constitutional conventions in the United States, arguing that conventions' erosion has been accompanied by a configuration of partisan politics that makes it difficult to present a discussion of that erosion in a way that will not itself seem partisan. I argue that contention over claims about departures from conventions takes forms familiar from ordinary common-law reasoning—perhaps not surprising because common-law reasoning rests on judicial decisions that cannot offer canonical textual formulations of the rules the courts apply. This article also discusses some of the ways in which political actors can depart from conventions, and some consequences of such departures. Finally, the Essay takes up some larger questions about constitutional transformation through abandonment or revision of constitutional conventions.

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*“[T]he [pirate’s] code is more what you’d call guidelines than actual rules.”*¹

I. INTRODUCTION

The U.S. Senate can act only when a majority of its members agree.² This follows from the Senate’s own rules and from the logic of decision-making in a multimember body: If the body can act when only a minority support the action,³ any such action can be revoked whenever a majority gets together.⁴ Yet, the work of legislating requires a great deal of “action” preliminary to enactment: Committees must hold hearings, documents must be admitted,

1. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures and Jerry Bruckheimer Film 2003).

2. See U.S. CONST. art. I, § 3, cl. 4; Jim Naureckas, *How Many Votes Does It Take to Pass a Senate Bill?*, FAIR (Mar. 10, 2009), <http://fair.org/uncategorized/how-many-votes-does-it-take-to-pass-a-senate-bill/>. I put aside for now the role of supermajority rules and the filibuster, which have been the focus of much of the discussion of legislative conventions, to bring the question of conventions into focus in a relatively uncontroversial context. See S. Res. 4, 113th Cong. (2013) (allowing the Senate to close debate concerning a motion—which otherwise could have continued indefinitely to prevent a vote on the motion—when three-fifths (or two-thirds when the motion is for amendment to the Senate Rules) of a quorum of the Senate votes to close debate).

3. See U.S. CONST. art. I, § 3, cl. 4. I put quorum requirements to one side: A majority of a quorum might be a minority in the body as a whole. See *id.* art. I, § 5, cl. 1 (stating that “a Majority of each [house of Congress] shall constitute a Quorum to do Business.”). Introducing quorum requirements into the argument would simply make exposition more complex without adding anything of analytic importance. I am open to arguments that I have overlooked some analytic implications of quorum requirements for the topics discussed in this essay. See *infra* Parts II–VI.

4. See ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 86 (Oxford Univ. Press 2007); see also *supra* note 2 and accompanying text. For a discussion of sub-majority requirements as a mechanism for forcing a majority to take action, see VERMEULE, *supra*, at 85–113.

statements made on the floor must be amended or supplemented.⁵ Requiring a roll call vote for each of these actions would paralyze the Senate. To forestall this possibility the Senate has adopted a norm according to which a great deal of action is taken pursuant to unanimous consent: The presiding officer asks for unanimous consent, and then, “hearing no objection” (in the jargon), declares the action taken.⁶

A minority—even a single member—could tie the Senate into knots by routinely refusing unanimous consent, or (in an alternative phrasing) by insisting on a roll call vote whenever the Senate rules require action by majority vote. Routinely agreeing to requests for unanimous consent is a convention (in the British constitutional sense).⁷ A convention is a practice not memorialized in a formal rule but regularly engaged in out of a sense of obligation, where the sense of obligation arises from the view that adhering to the practice serves valuable goals of institutional organization and the public good.⁸

Those who study the U.S. Constitution in law schools have come to realize something that political scientists understood long ago.⁹ As the example of unanimous consent shows, constitutional conventions are important in making it possible for the national government to achieve the goals set out in the Preamble.¹⁰ But, over the past twenty years or so, a significant number of conventions have eroded.¹¹ Perhaps, following the owl of Minerva into the

5. See Senate Rules VII, XV, XXVI, 113th Cong. (2013) [hereinafter Senate Rules], <https://www.gpo.gov/fdsys/pkg/CDOC-113sdoc18/pdf/CDOC-113sdoc18.pdf>.

6. See *Unanimous Consent*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/unanimous_consent.htm (last visited Feb. 22, 2018).

7. See Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1852 (2013). In the British sense, refers to standard, accepted practices that regulate the conduct of governmental actors but are not enforceable by courts and may be unwritten. See *id.* In contrast, in the United States sense, typically refers to the process of drafting constitutional provisions. See *id.* at 1850. The British literature on constitutional conventions (in their sense) is vast because nothing in the British constitution is memorialized in formal rules. See *id.* at 1851. The United States situation is different because of the presence of a written constitution, and much of the British literature is only tangentially relevant even to a discussion such as this one of the place of constitutional conventions in the United States political order. See *id.*

8. For a similar formulation, see Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 288 (2015). I note that much in this Essay develops or (occasionally) modifies points Vermeule’s paper makes. See Vermeule, *supra*.

9. See *id.* at 283–84 (referring to recurrent rediscoveries by legal academics of conventions’ importance).

10. See *supra* notes 5–7 and accompanying text.

11. For my initial discussion of the erosion of constitutional conventions, see Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004). Other scholars later developed related concepts, but (perhaps unsurprisingly) I still think my analysis is the best. See, e.g., Jack M. Balkin,

dusk, in this Essay I address some questions about the role of constitutional conventions in the U.S. constitutional system.¹² After this Introduction, Part II offers some preliminary observations about some difficulties of exposition associated with the discussion of constitutional conventions. I argue that conventions' erosion has been accompanied by a configuration of partisan politics that makes it difficult to present a discussion of that erosion in a way that will not itself seem partisan.¹³ The next Part asks why questions about the role of constitutional conventions in the U.S. constitutional order are important, given that we do have a written Constitution. Part IV turns to questions of interpreting conventions. I argue that contention over claims about departures from conventions takes forms familiar from ordinary common-law reasoning—perhaps not surprising because common-law reasoning rests on judicial decisions that cannot offer canonical textual formulations of the rules the courts apply.¹⁴ Part V discusses some of the ways in which political actors can depart from conventions, and some consequences of departures. The Conclusion briefly takes up some larger questions about constitutional transformation through abandonment or revision of constitutional conventions.

II. PRELIMINARY OBSERVATIONS—EXAMPLES AND ABSTRACTIONS

I began this Essay with an example of what I think is a real convention, but not one that has undergone any significant erosion.¹⁵ My reason for doing

Constitutional Hardball and Constitutional Crises, 26 QUINNIAC L. REV. 579 (2008); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

12. See *infra* Part III. Although constitutional conventions (in the British sense) have sometimes been assumed to play a negligible role in the United States, where a written constitution provides the fundamental law, such conventions commonly played an important role in the history of the United States. See Whittington, *supra* note 7, at 1847.

13. See *infra* Part II.

14. See *infra* Part IV.

15. See *supra* Part I. I have occasionally run across references to one facet of the unanimous consent requirement. See *infra* Parts III–IV. Most committees may not meet on any day after the Senate has been in session for two hours, or after 2:00 PM when the Senate is in session, unless the majority and minority leaders agree to allow them, or if unanimous consent is granted. See Senate Rules, *supra* note 5, V ¶ 1, XXVI ¶ 5(a). Presumably the minority leader would object to unanimous consent when he or she had been unable to reach an agreement with the majority leader to allow such meetings. See *id.*, XXVI ¶ 5(a). On rare occasions, a minority insists on adherence to the Rule. See, e.g., Elise Viebeck, Ed O'Keefe, Sean Sullivan, & Paul Kane, *Furor Over Comey Firing Grows with News that He Sought Resources for Russia Investigation Before His Dismissal*, WASH. POST (May 10, 2017), https://www.washingtonpost.com/politics/after-comeys-ouster-democrats-press-for-independence-probe-of-russias-meddling-in-election/2017/05/10/88c45624-3529-11e7-b373-418f6849a004_stor

so is to present the issue of constitutional conventions divorced from any recent controversies.¹⁶ Those controversies—such as that over the Senate's actions with respect to President Obama's nomination of Merrick Garland to the Supreme Court—are highly partisan.¹⁷ There Democrats identified a convention of giving a hearing to those nominated by a president within a reasonable period prior to an election; Republicans responded by identifying another convention in which (from some time a reasonably long time ago to the present) those nominated to the Supreme Court during an election year were not confirmed.¹⁸

A similar partisan dynamic occurs in connection with claims about “new” departures from conventions.¹⁹ Republicans trace unfair partisanship in Supreme Court nominations to 1987 and the Bork nomination; Democrats respond by pointing to the filibuster against Abe Fortas's nomination or by saying that Bork was given a hearing after which the Senate voted on the merits, after considering and rejecting his views; Republicans respond by saying that Fortas was not really filibustered, and that Senator Ted Kennedy's speech immediately after Bork's nomination, and so prior to the hearings, poisoned the well—and so on and on.²⁰

y.html?utm_term=.ba353d123d5a.

16. See *supra* Part I.

17. See, e.g., Sarah Lyall, *Liberals are Still Angry, but Merrick Garland Has Reached Acceptance*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/merrick-garland-supreme-court-obama-nominee.html>; Dan McLaughlin, *It Doesn't Matter that Garland Didn't Get a Hearing*, NAT'L REV. (Mar. 23, 2017, 4:01 AM) [hereinafter *It Doesn't Matter*], <http://www.nationalreview.com/corner/446021/it-doesnt-matter-garland-didnt-get-hearing>; Dan McLaughlin, *The Garland Precedent Should Not Stop Gorsuch*, NAT'L REV. (Mar. 20, 2017, 4:20 PM), <http://www.nationalreview.com/article/445904/supreme-court-nominee-rejections-politics-has-lot-do-it>; The Times Editorial Board, *When the GOP Stole Merrick Garland's Supreme Court Seat, They Set the Stage for a Miserable Battle*, L.A. TIMES (Jan. 31, 2017, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-supreme-court-nomination-20170131-story.html>; Lana Ulrich, *Tracking the Controversy over Judge Garland's Nomination*, CONST. DAILY (May 27, 2016), <https://constitutioncenter.org/blog/tracking-the-controversy-over-judge-garlands-nomination>; John Yoo, *The Republican Senate Should Hold Firm on Supreme Court Nomination*, NAT'L REV. (Mar. 16, 2016, 3:48 PM), <https://www.nationalreview.com/blog/corner/supreme-court-merrick-garland-nomination-shouldnt-change-republican-senate-calculus/>.

18. See *supra* note 17.

19. See *infra* notes 20–25 and accompanying text.

20. See Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html>; Andrew Glass, *Abe Fortas Resigns from Supreme Court May 15, 1969*, POLITICO (May 15, 2008, 4:12 AM), <http://www.politico.com/story/2008/05/abe-fortas-resigns-from-supreme-court-may-15-1969-010346>; Elizabeth King, *A Filibuster on a Supreme Court Nomination Is So Rare It's Only Worked Once*, TIME (Feb. 08, 2017), <http://time.com/4659403/neil-gorsuch-filibuster-abe-fortas/>;

I take no sides in these competing characterizations, but note their deep partisanship.²¹ Depending on the issue, Republicans (or Democrats) assert that Democrats (or Republicans) “violated” a long-standing and valuable convention; Democrats (or Republicans) reply that they have not, because there was no such convention as the other side describes, or because the convention has become outdated, or simply because the “violators” have the votes to get away with the violation.²² Or, Democrats (or Republicans) assert that Republicans (or Democrats) are engaging in an “unprecedented” departure from convention, and Republicans (or Democrats) respond by pointing to prior similar though not quite identical departures by the other side.²³

Were I to rely on real-world examples of (claimed) departures from conventions, I would inevitably trigger partisan responses.²⁴ Presenting the argument in relatively abstract terms runs obvious risks, but I invite readers to fill in their own examples to see whether my arguments resonate with how they think about those examples.²⁵

III. THE IMPORTANCE OF CONSTITUTIONAL CONVENTIONS

Unlike the United Kingdom, the United States has a written Constitution.²⁶ Constitutional law in the United Kingdom consists in its constitutional

Nina Totenberg, *Robert Bork's Supreme Court Nomination "Changed Everything, Maybe Forever."* NPR (Dec. 19, 2012, 4:33 PM), <https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever>.

21. See *infra* text accompanying notes 22–25.

22. See, e.g., King, *supra* note 20; Lyall, *supra* note 17; The Times Editorial Board, *supra* note 17; Totenberg, *supra* note 20; Ulrich *supra* note 17; Yoo, *supra* note 17.

23. See, e.g., King, *supra* note 20; Totenberg, *supra* note 20; Ulrich, *supra* note 17. The dynamic is captured by the phrase, “It all started when he hit me first.” See *supra* notes 20–22 and accompanying text.

24. See *supra* text accompanying notes 16–18. I am reasonably sure that I cannot avoid the imputation to me of some left-leaning partisan content to my arguments, given my well-known identification with the left in U.S. politics. Louis Michael Seidman, *Can Constitutionalism Be Leftist?*, 26 QUINNIPIAC L. REV. 557, 557 (2008). Mostly, I think, the imputation would be a mistake, but of course I cannot be sure that I have not overlooked some hidden-from-me partisan motivations. See *infra* Parts III–VI. But, as the Conclusion suggests, I do not hold views that are conventional among Democrats, even though I vote for and contribute to Democratic candidates. See *infra* Part VI. I think I am reasonably neutral as between standard Democrats and standard Republicans—but, again, I may be deluding myself. See *infra* Parts III–VI.

25. See, e.g., *supra* Part I (providing a concrete example of a convention).

26. See Mario Patrono & Justin O. Frosini, *Two Grand Old Ladies Face to Face: The United Kingdom and the United States of America Constitutions Compared*, 46 VICTORIA U. WELLINGTON L. REV. 989, 989, 991 (2015).

conventions.²⁷ Why shouldn't constitutional law in the United States consist in the Constitution, full stop?²⁸ That is, why should students of the U.S. constitutional order pay attention to constitutional conventions?²⁹

The Constitution of course does a lot of things, and we can (creatively?) interpolate more into the written document.³⁰ Contemporary constitutional theory includes what have come to be called constitutional "constructions" within constitutional law.³¹ Constitutional constructions are interpretations of underspecified textual provisions developed over time by consistent practice among legislators and executives.³² Constitutional conventions might be an even-less-"textualizable" supplement to the written Constitution.³³ Or, they might be probes in the direction of the development of a constitutional construction.³⁴ We might then be interested in examining existing conventions to see which if any might be candidates for "elevation" into the constructed Constitution.³⁵

Perhaps, though, all this analytical work is unnecessary.³⁶ The Constitution licenses constitutional actors such as the Senate to make their own rules: If the Senate's unanimous-consent practice turns out to be unsuitable, the Senate could amend its rules to allow the presiding officer to act unless objected to by a minority—twenty percent for example—who could force a roll call vote.³⁷ On this view constitutional conventions are no more than convenient rules that can be displaced whenever they do not work well.³⁸ Departures

27. *See id.* at 991–92.

28. *See infra* notes 40–52 and accompanying text.

29. *See infra* notes 40–52 and accompanying text.

30. *See infra* Part IV (discussing how constitutional conventions might be interpolated into the Constitution by interpretation). For a study that engages in quite extensive interpolation, see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

31. *See* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 *CONST. COMMENT.* 39, 41–42 (2010); *cf.* AMAR, *supra* note 30, at x–xv (discussing America's unwritten Constitution).

32. *See* Berman, *supra* note 31, at 42.

33. *See id.* at 43–45.

34. *See id.* To give a controversial example: Perhaps the elimination of the filibuster for presidential nominees is, or will come to be understood as, an interpretation of the words "by and with the Advice and Consent of the Senate, shall appoint." U.S. CONST. art. II, § 2, cl. 2.

35. Whittington, *supra* note 7, at 1854–55.

36. *See infra* notes 37–39 and accompanying text.

37. *See* U.S. CONST. art I, § 5; Senate Rules, *supra* note 5, V, XV; Whittington, *supra* note 7, at 1855.

38. *See* Whittington, *supra* note 7, at 1867.

from conventions simply shift the default.³⁹

Even on this view, though, constitutional conventions might be of independent interest.⁴⁰ The defaults they set might be inappropriately “sticky,” for example.⁴¹ That is, political actors can depart from conventions, but doing so is costly enough to allow some conventions to endure longer than they should.⁴² Progressive theorists of the administrative state had an account along such lines, and, suitably adjusted, it might be valid today.⁴³ For Progressives, the written Constitution was not well adapted to modern circumstances.⁴⁴ As they saw it, the nation was experiencing relatively rapid change in its social and economic environment, and existing institutions—the executive, the legislature, and the courts—were unable to respond quickly enough to the problems presented by that change.⁴⁵

39. *See id.*

40. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013) (discussing issues arising from interpreting the Constitution through conventions and construction).

41. *See* Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 *DUBLIN U. L.J.* 387, 393 (2015) (analyzing “how constitutional conventions may also change *written* constitutions, though only informally, by creating, retarding[,] or accelerating constitutional change, all without altering the text”); Whittington, *supra* note 7, at 1861–62 (“A larger web of social and political relations depends on sustaining the rule, even in circumstances in which a given political actor would be made better off in the short term by deviating from it. Constitutional commitments endure because they provide long-term benefits that override short-term costs. They collapse when the cost-benefit calculation changes and political actors are willing to pay the short-term costs associated with uncertainty and instability in order to try to shift the system to a new equilibrium. The higher the transaction costs of defection, the stickier the constitutional rule is likely to be.”).

42. *See* Albert, *supra* note 41, at 394. The costs might be in time, political energy, or reputation—which might themselves be pretty much the same thing from a politician’s point of view. *See id.*; Whittington, *supra* note 7, at 1861–62.

43. *See* Whittington, *supra* note 7, at 1850 (“So great was the gap between the written and unwritten constitutions, that the former could not even provide a ‘silhouette of the American political system.’ The ‘living organism’ of the political system regularly adapted itself to the changing environment, and the formal terms and processes of the written Constitution were soon left behind.”) (quoting WILLIAM BENNETT MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION 1* (1930)); Herbert Hovenkamp, *Appraising the Progressive State*, 102 *IOWA L. REV.* 1063 (2017) (appraising the progressive theory of the administrative state and its effects).

44. *See* FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (Yale Univ. Press 1930); Whittington, *supra* note 7, at 1850.

45. *See* Hovenkamp, *supra* note 43, at 1066–67; Whittington, *supra* note 7, at 1850; *see also* M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 *WASH. J. L. TECH. & ARTS* 135, 138 (2014) (“In talking with lawyers and scholars, the first reaction is the story of a system overwhelmed: by the rapid pace of technological changes; by whole areas of doctrine, like the First Amendment, that are an uncomfortable fit with the Internet; by legal regimes, like jurisdiction, that haven’t yet adapted to technologies that don’t play by old rules or respect physical boundaries.”).

The Progressives offered the modern administrative state as a suitably nimble set of institutions.⁴⁶ Perhaps constitutional conventions serve the same purpose, either as part of that state or independent of it.⁴⁷ Like administrative agencies' implementations of the power delegated to them by legislatures, constitutional conventions fill in the details, not of substantive policy but of institutional design, in ways that allow the national government to accomplish its tasks under modern circumstances.⁴⁸

Just as the Progressives' administrative agencies fell prey to even more modern developments, constitutional conventions understood as changeable defaults might now get in the way of governance.⁴⁹ Under modern circumstances, well-designed conventions might be necessary if the national government is to do anything at all.⁵⁰ We might be interested in conventions as part of an inquiry into whether the conventions are well-designed.⁵¹ Here too the language of "departure" or "breach" is important, because the simple fact that political actors are departing from existing conventions might be a hint—though hardly a conclusive one—that the conventions are not well-designed.⁵²

46. See Hovenkamp, *supra* note 43, at 1107 (analyzing the progressive state's accomplishments and concluding that "[t]he progressive state has proven to be reasonably adept at using economics and social science in service of the public interest"); McKeown, *supra* note 45, at 172 ("Beyond these legislative fixes, state and federal administrative regulations provide yet another, perhaps nimbler, tool to address new challenges . . .").

47. See *infra* notes 49–52 and accompanying text.

48. See Emily S. Bremer, *The Unwritten Administrative Constitution*, 66 FLA. L. REV. 1215, 1215 (2014) (arguing "that administrative law provides an unwritten constitution governing federal administrative agencies"); see also, e.g., *supra* notes 3–7 and accompanying text.

49. See Whittington, *supra* note 7, at 1858.

50. See Andrew Heard, *Constitutional Conventions and Written Constitutions: The Rule of Law Implications in Canada*, 38 DUBLIN U. L.J. 331, 356 (2015) ("To accept the importance and need to interpret the Constitution in light of unwritten principles may open the door to extend a welcome in the 'grand entrance hall' to convention as well. Convention provides a vast web of informal rules that transform the positive law of the Constitution into a working system of government.").

51. See Whittington, *supra* note 7, at 1855–57, 1861 (analyzing the design of the classic constitutional convention—the "two-term presidency").

52. See Albert, *supra* note 41, at 390. For completeness, I should note that one might not be bothered by the fact that the Constitution did not have a place for conventions, even if some conventions were necessary for the government to do anything. See *supra* note 50 and accompanying text. That could be true if one thought that nothing needed to be done at the national level, and that legislation at the state level coupled with common law development was all we needed to fulfill the Constitution's commitments. See, e.g., A. Everette MacIntyre & Joachim J. Volhard, *Predatory Pricing Legislation—Is It Necessary?*, 14 B.C. INDUS. & COM. L. REV. 1, 20 (1972). I think that relatively few people actually hold that belief. See *id.* Even the most libertarian are inclined to think that there ought to be a national security policy of some sort, and "moderate" libertarians typically leave room for nontrivial actions at the national level. See *Libertarians Seek a United States at Peace with the World*,

IV. INTERPRETING CONVENTIONS

Return to the example of the Senate's unanimous consent practice.⁵³ Suppose that a minority begins to insist on roll call votes far more frequently than had been common under the prevailing convention.⁵⁴ What questions would arise?⁵⁵ Perhaps the minority would assert that it had not breached the convention when the convention was properly understood.⁵⁶ So, for example, the minority might claim that the convention was to refrain from insisting on roll call votes except when matters of exceptional importance were at stake, and that such matters were indeed at stake when the minority started to insist on roll call votes.⁵⁷ Or, perhaps the minority would assert that the reasons for the convention had disappeared, for example, because the majority had already departed from conventions requiring consultation with the minority before moving forward.⁵⁸ Or, it might claim that the convention was unconstitutional.⁵⁹ This Part addresses these questions, deferring questions about departures from conventions resting on the ground that the conventions themselves

LIBERTARIAN: THE PARTY OF PRINCIPLE, <https://www.lp.org/issues/foreign-policy/> (last visited Feb. 25, 2018).

53. See *supra* notes 2–7 and accompanying text; see also Valerie Heitshusen, *The Legislative Process on the Senate Floor: An Introduction*, CONG. RES. SERV. 1, 1 (2017), https://www.senate.gov/CR_Spubs/5c970bdd-ed33-446c-a646-cda331d7b108.pdf (“Generally, the Senate can act more efficiently and expeditiously when its Members agree by unanimous consent to operate outside of its standing rules. Generally also, Senators insist that the rules be enforced strictly only when the questions before them are divisive and controversial. Compromise and accommodation normally prevail. Senators frequently exercise self-restraint by not taking full advantage of their rights and opportunities under the standing rules, and often by agreeing to unanimous consent requests for arrangements that may not promote their individual legislative interest. The standing rules remain available, however, for Senators to invoke when, in their judgment, the costs of compromise and accommodation become too great.”).

54. See Heitshusen, *supra* note 53, at 1, 12–13; *supra* note 7 and accompanying text.

55. See *infra* notes 56–60 and accompanying text.

56. See *infra* notes 57–60 and accompanying text. I use the term “breached” (and similar ones) rather than “violate” or “violation” to preserve some degree of neutrality in discussion of the propriety of departures from conventions: To call departures “violations” would suggest that they are presumptively wrong. See *infra* notes 116–18 and accompanying text.

57. See Heitshusen, *supra* note 53, at 1. *But see, e.g.*, Albert, *supra* note 41, at 398–99 (considering the filibuster convention as an additional example of departures from conventions within the Senate).

58. See Whittington, *supra* note 7, at 1861–62 (examining reasons why conventions thrive or collapse); Heitshusen, *supra* note 53, at 8 (addressing how negotiations take place in the Senate and the conventions in that process).

59. See Heitshusen, *supra* note 53, at 12–13 (discussing constitutional mandates imposed upon Senate proceedings that could potentially be violated); *cf.* Albert, *supra* note 41, at 398 (discussing how scholars are similarly divided on whether the filibuster is constitutional).

entirely lack legitimacy.⁶⁰

Assume for convenience a two-party system.⁶¹ At some point the majority party adopts a practice that serves its partisan interests and makes governing easier in general.⁶² If that party loses its majority and the old minority, now majority, party abandons the practice, the practice cannot be seen as a convention.⁶³ If the new majority continues the practice, it might become a convention.⁶⁴ Time never stands still, though.⁶⁵ The new majority might fracture, giving the minority an opportunity to recover power by departing from the convention, if (as with the unanimous consent convention) doing so is within its power.⁶⁶ Or the old majority might come back into power and discover that the convention, which helped them last time they were in charge, is now an impediment to achieving their present goals.⁶⁷ If those or many other contingencies occur, politicians have incentives to depart from the conventions that limit their power.⁶⁸

First, though, they might contend that they are *not* departing from the convention properly understood, but rather are complying with it—once we

60. See *infra* notes 61–104 and accompanying text.

61. See David A. Dulio & James A. Thurber, *America's Two-Party System: Friend or Foe?*, 52 ADMIN. L. REV. 769, 792 (2000) (analyzing America's two-party system). The analysis can be carried through in connection with multiparty systems, but exposition is easier for the two-party case. See, e.g., *infra* notes 62–104 and accompanying text.

62. See Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 37 (1999) (reviewing what may or may not be called a true “constitutional convention” based on a bi-partisan support system). I thank Richard Albert for directing me to this article.

63. See *id.* at 40.

64. See *id.* at 37. I note that the argument that a convention cannot be established until it gains bi- or multi-partisan support suggests that Vermeule is mistaken to treat the “Hastert Rule”—that the majority party in the House of Representatives will not allow a bill to receive a floor vote unless it has support from a majority of the majority party—as a convention, because, as far as I know, Democrats have not adopted that rule (if only because they have not had many opportunities to do so; they were a majority in the House only from 2007 to 2011). See Vermeule, *supra* note 8, at 286.

65. See SAMUEL K. K. BLANKSON, WHAT IS TIME: WHAT IS THE ORIGIN OF TIME AND THE SENSE OF DURATION 20 (2017).

66. See Vermeule, *supra* note 8, at 307–08; Jaconelli, *supra* note 62, at 40 (footnotes omitted) (“In the same way, we could argue that constitutional conventions which, apparently, derive their status from acts of agreement, statements made in the legislature, and resolutions of international conferences attain that status in truth only when they have set in motion a chain of actions and expectations based on observance of the statements, resolutions, etc.”).

67. See Scott Stephenson, *When Constitutional Conventions Fail*, 38 DUBLIN U. L.J. 447 (2015) (discussing reasons why departures from conventions occur and how they may incentivize reconstruction to better fit modern needs).

68. See Stephenson, *supra* note 67; Whittington, *supra* note 7, at 1863.

understand what the convention truly is.⁶⁹ Constitutional conventions do not have canonical verbal formulations.⁷⁰ Rather, they exist in practices, which are simply taken for granted most of the time.⁷¹ That characteristic means that there is ordinarily no need to try to describe any individual convention: People simply act in accordance with it.⁷² Only when a convention comes under pressure is there some need to describe what the convention “is.”⁷³ That pressure, in turn, comes from politics.⁷⁴ But, precisely because it does, the verbal formulation of the convention is likely to be contested.⁷⁵

Consider the supposed convention that “politics stops at the water’s edge.”⁷⁶ That formulation cannot sensibly be taken to mean that U.S. politicians cannot publicly express in any way their disagreement with what they regard as a President’s foreign adventurism.⁷⁷ Does the convention draw some sort of geographic line, such that a politician can express such disagreement while within the borders of the United States but not while outside it?⁷⁸ Does that interpretation “make sense” in the modern world, in which the geographic location where the politician speaks has only a loose connection to

69. See Stephenson, *supra* note 67, at 447 & n.6 (discussing the tests used to determine the “existence and content of conventions”).

70. See Whittington, *supra* note 7, at 1854 (“The presence of a written constitution might be taken to reduce the need for unwritten conventions, but the text may not be exhaustive. Although the formal constitution embodied in the written document drafted in Philadelphia in 1787 may lay down many of the rules and procedures that organize and limit government power in the United States, there are features of the constitutional terrain that are not adequately described in constitutional text.”). But see Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 408 (2007) (“Viewed from this perspective, ‘the Constitution’ would include not only the canonical document but also a variety of statutes, executive materials, and practices that structure our government.”).

71. See Jaconelli, *supra* note 62, at 25–26; Young, *supra* note 70.

72. See Jaconelli, *supra* note 62, at 30–31; James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 *BUFF. L. REV.* 645, 658 (1992).

73. See Jaconelli, *supra* note 62, at 32–34 (discussing that the need to define presidential terms arose only after the habit had been called into question).

74. See *id.*; Wilson, *supra* note 72, at 682–83.

75. See Jaconelli, *supra* note 62, at 32–34.

76. See Andrei Cherny, *Recounting: Water’s Edge*, *DEMOCRACY: J. IDEAS* (Fall 2008), <https://democracyjournal.org/magazine/10/waters-edge/>.

77. See William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars: Partisan Politics and Presidential Power*, *FOREIGN AFF.* Sept.–Oct. 2007, at 95, 95–96 (analyzing the application of the “politics stops at the water’s edge” convention in the context of President Bush’s tenure).

78. See *id.* at 96.

the number and location of people who learn in near real time what the politician said?⁷⁹ Even if the geographic line matters, does a U.S. politician express disagreement with a president's policy by meeting outside the United States with leading figures of the opposition to a leader with whom the U.S. President has close political and personal ties?⁸⁰ What of meeting such figures inside the United States?⁸¹ All these are, I think, more or less plausible interpretations of the convention that politics stops at the water's edge.⁸²

Again moving to a more abstract level, I use the example to show that conventions have implicit conditions of application and implicit limitations.⁸³ Specific political controversies elicit arguments seeking to establish that one thing or another is included in or excluded from the implicit conditions or limitations.⁸⁴ A characterization is said to be too broad or too narrow if a limitation is present or absent.⁸⁵

These arguments take exactly the forms we see in common law development: A precedent [specific practice] stands for a larger principle, or a precedent [specific practice] has to be limited to a subset of its facts, or a precedent [specific practice] has to be seen in conjunction with a group of other precedents [practices] more or less strongly related to this one.⁸⁶ There are several obvious differences between common law arguments and arguments about specifying or characterizing a convention once controversy over its meaning arises.⁸⁷ First, the former are conducted in political forums, including discussions among the public (in the traditional media or on modern social media),

79. See *id.* at 105 (illustrating the interplay of partisan politics and a President's foreign affairs policies).

80. See *id.*; Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 335–36 (2001) (stating that even when presidential candidates strongly disagree with a sitting president's "ability to conduct foreign affairs," the candidates will tend to ignore such issues during campaigns and before inauguration).

81. See Howell, *supra* note 77, at 105.

82. See *id.*

83. See *infra* Part V; see also Jaconelli, *supra* note 62, at 26–27 (outlining different ways constitutions may be enacted).

84. See Jaconelli, *supra* note 62, at 26–27.

85. See *id.* at 32–33 (demonstrating interpretation issues of constitutional conventions).

86. See Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 367–69 (2007) (describing how courts develop precedent); see also, e.g., *Butler v. McKellar*, 494 U.S. 407, 423 (1990).

87. See William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 7–10 (1994); *infra* notes 88–91 and accompanying text.

discussions within legislative chambers and executive branch offices, and discussions across the chambers and executive offices.⁸⁸ Second, some but not all of the participants in the discussions are lawyers with some specialized knowledge of constitutional law.⁸⁹ Third, in political forums politics competes with—some would say inevitably dominates—principle as the ground for finding one set of arguments more convincing than another, whereas in common law development, it is commonly thought that, with many qualifications, principle plays a more significant role.⁹⁰ And, finally (and related to the prior points), courts provide an institutionalized forum for the definitive resolution of interpretive disputes about a precedent's meaning, whereas, again with many qualifications, we have no such forum for resolving disputes over a practice's content.

In these respects disputes over characterizing conventions resemble “political questions.”⁹¹ I have argued that the best way to understand the political question doctrine relies on politics: Political questions are ones as to which we have good reason to believe that the political branches have incentives to come up with constitutionally acceptable answers (and that we have no good reason to believe that judges are likely to come up with answers that are systematically better than those the political branches come up with).⁹² We know that the political question doctrine has been subject to substantial pressure from a legal culture that treats all other constitutional questions as properly subject to determination by the courts.⁹³

Similar pressure may come to bear on controversies over characterizing conventions.⁹⁴ That is, once a controversy over a convention's interpretation arises, partisans on the side that finds itself at an immediate disadvantage in political forums will try to convert the controversy into one about the content

88. See Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004) (arguing that public influence is one of the main purposes lawyers pursue litigation); H. Jefferson Powell, *Constitutional Investigations*, 72 TEX. L. REV. 1731, 1736–37 (1984).

89. See *supra* Part I.

90. See, e.g., Susannah C. Vance, *The Permissibility of Incitement to Religious Hatred Offense Under European Convention Principles*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 201, 246–47 (2004); see *supra* Part I.

91. See *infra* notes 92–93; *supra* Part II.

92. See Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

93. For the most recent example, see *Zivotofsky v. Clinton*, 566 U.S. 189, 191 (2012), holding that a constitutional challenge to a statute purporting to limit the President's power to designate a citizen's birthplace on his or her passport did not present a political question.

94. See *supra* Part II; *infra* notes 95–98 and accompanying text.

of the judicially enforceable Constitution.⁹⁵ They may hope that they can achieve a quicker victory in the courts than they could in what they believe will be the more extended discussions that take place in the political forums.⁹⁶ Or, they may hope that they can achieve a victory in the courts that is out of reach in the political forums.⁹⁷ Or, they may hope that they can achieve a victory that will “stick,” unlike victories in the political forums that can be undone when the balance of political forces shifts.⁹⁸

When this occurs, interpretations are generated, not of the conventions, but of the judicially enforceable Constitution.⁹⁹ And, when these interpretations are generated, they might well seem somewhat implausible.¹⁰⁰ Again, examples will be controversial,¹⁰¹ but for me, the claim that the filibuster is unconstitutional is implausible in this way.¹⁰² Yet, under appropriate political conditions, arguments that seem implausible to many move from being off the wall to being on the table.¹⁰³ And, once the arguments are on the table, courts

95. *See supra* Part II.

96. *See supra* Part II. One reason for such a belief is that courts have to provide answers to the questions put to them, unless the questions are “political questions” in the doctrinal sense, coupled with an implicit or explicit claim that the question at issue is not within that shrinking doctrinal domain. *See supra* Part II.

97. *See supra* Part II. One reason for such a belief on the part of those who assert that the practice at issue is inconsistent with an established convention might be that the judges before whom they bring the challenge will almost certainly have been appointed at a time when no one was attempting to depart from the established convention; to such judges the claim that the departure is a violation of law may be somewhat more plausible than it would be to judges appointed after the convention’s content had become a matter of political controversy. *See supra* Part II.

98. *See supra* Part II.

99. *See* Jaconelli, *supra* note 62, at 30–31 (describing the process of interpreting constitutional conventions).

100. *See id.*

101. *See supra* note 34 and accompanying text; *see also* Tushnet, *supra* note 11, at 524–29 (discussing controversial examples of “constitutional hardball”).

102. *See* Josh Chafetz, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); *see also* Tushnet, *supra* note 11, at 525 (footnote omitted) (“I believe that [the argument that filibusters are unconstitutional is] strained, because it requires one to distinguish between filibusters of judicial nominations and filibusters of ordinary legislation recommended by the President to Congress pursuant to his duty to do so.”).

103. *See* Seth Barrett Tillman & Steven Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 146 (2008); Chafetz, *supra* note 102, at 267 (providing an example of a tax increase policy as an implausible legislative act that courts would find constitutional); Jaconelli, *supra* note 62, at 40.

might find them not merely plausible but correct.¹⁰⁴

V. HOW TO DEPART FROM CONVENTIONS, AND THE SIGNIFICANCE OF DOING SO

According to Adrian Vermeule, “serious good-faith disagreement over the existence of a convention implies that there is no convention.”¹⁰⁵ On this view conventions disappear the moment appropriate political actors depart from them.¹⁰⁶ When political actors deny that they have departed from the convention properly understood, we might say that they have, by their very actions, eliminated one possible convention from consideration but created another, or redefined the boundaries of the convention, or brought to light what the real convention always had been.¹⁰⁷ It seems to me, though, that this way of thinking misses important aspects of the role of conventions in U.S. constitutional discourse.¹⁰⁸

First, people argue about whether they should depart from a convention.¹⁰⁹ Disagreement over that question of course does not undermine but rather assumes the claim that there is a convention to be departed from.¹¹⁰ So, for example, during the debates over the Gorsuch nomination, Democrats disagreed about whether they should depart from what they took to be a convention of not filibustering Supreme Court nominations.¹¹¹ Debates about choosing between adhering to and departing from conventions bring into the open

104. See Tillman & Calabresi, *supra* note 103, at 146; GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 24 (Oxford Univ. Press, 2010). A cynical, but I think correct, observation is that the political conditions almost certainly involve some initial inclination on the part of enough judges to take sides in the partisan combat occurring in the political forums. LIU, KARLAN & SCHROEDER, *supra* at 40–41; see also, *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (“Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”).

105. Vermeule, *supra* note 8, at 302.

106. See *id.*; Chafetz, *supra* note 102, at 267.

107. See Stephenson, *supra* note 67, at 452.

108. See *infra* notes 109–14 and accompanying text.

109. See, e.g., Jayne S. Ressler, *Removing Removal’s Unanimity Rule*, 50 HOUS. L. REV. 1391, 1391–92 (2013) (arguing that, by codifying the unanimity rule of removal actions, “Congress has disregarded and entrenched opportunities for abuse by both parties to the litigation”).

110. See Fisk & Chemerinsky, *supra* note 102; Matt Flegenheimer, *Democrats’ Vow to Filibuster Ensures Bitter Fight over Gorsuch*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/politics/senate-democrats-appear-poised-to-filibuster-gorsuch-nomination.html>.

111. See Noah Feldman, *Why Democrats Shouldn’t Filibuster Gorsuch*, CHI. TRIB. (Mar. 30, 2017,

the specific considerations of good governance upon which particular conventions rest.¹¹²

Second, we can think about the consequences of departing from—and thereby eliminating—particular conventions.¹¹³ For example, if the “unanimous consent” convention allows the Senate to get on with its business, we can seek to identify the ways in which the Senate’s business would be affected (a) if that convention were eliminated entirely, making roll call votes mandatory for all Senate actions, or (b) if it were replaced by a rule making unanimous consent an override-able default, or (c) if it were replaced by a new convention to the effect that unanimous consent will be granted except when extraordinary conditions obtain, with some effort made to limn the contours of the term “extraordinary.”¹¹⁴

With these considerations in mind I return to the implication of Vermeule’s argument, that conventions disappear when they are not adhered to.¹¹⁵ The first consideration, that arguments take place about whether one should depart from a convention, suggests that a “mere” departure from a convention is not enough—perhaps, in Vermeule’s terms, because a mere departure might signal a lack of good faith.¹¹⁶ The actors departing from the convention can

11:37 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-why-democrats-shouldn-t-filibuster-gorsuch-20170330-story.html>.

112. See Stephenson, *supra* note 67, at 452–53.

113. See *id.* at 457–59 (discussing the opportunities both squandered and seized by the Australian Governor-General’s departure from constitutional conventions and the consequences arising therefrom).

114. See Chafetz, *supra* note 102 (discussing the unanimous-consent convention in the Senate and the possible consequences to our democracy if this convention were to end); Daniel B. Magleby & Molly E. Reynolds, *Putting the Brakes on Greased Wheels: The Politics of Weak Obstruction in the United States Senate*, 44 CONGRESS & PRESIDENCY 344, 346–49 (2017); *Part 11: Roll Call Votes, Voice Votes and Unanimous Consent*, AM. LEGION, <https://www.legion.org/legislative/thomas/17797/part-11-roll-call-votes-voice-votes-and-unanimous-consent> (last visited Feb. 27, 2018); see also Fisk & Chemerinsky, *supra* note 102, at 204 (discussing the general consequences of departing from unanimous consent: “The Senate, unlike the House, has neither standing rules to formally guide floor proceedings nor a procedure, like the House’s powerful Rules Committee, to adopt such rules on an ad hoc basis. As a consequence, the Senate relies on unanimous consent agreements to structure a surprisingly large amount of its floor deliberations. Without consent agreements, the Senate floor could become chaotic”).

115. See Vermeule, *supra* note 8; *supra* notes 105–06 and accompanying text.

116. See Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUDY 421, 421–22 (2012) (suggesting that the beneficiary of a power can prevent its erosion by desuetude simply by exercising the power more or less randomly). Query whether something like a requirement of good-faith exercise might be invoked against the power-holder’s claim that the power had not been eroded. See *id.*

demonstrate their good faith by offering a plausible reason for the departure.¹¹⁷ Such reasons could include that the convention has become outdated and therefore no longer serves the good-governance purposes it used to serve, or that the convention never was a good one in the first place (was “wrong the day it was decided,” so to speak) because it actually was and is inconsistent with good governance.¹¹⁸

The second consideration, regarding the consequences of a convention's disappearance, is important if a convention, or conventions generally, stabilize the constitutional system by making it possible for governing to occur at all.¹¹⁹ Eliminating a single convention might destabilize the system a little or a lot. But, because we are dealing with a system, it might well “restabilize”—reach a new equilibrium—after that elimination.¹²⁰ Other practices will adjust to deal with the disruptive effect.¹²¹ In the new equilibrium, accomplishing some things readily done under the prior system might be more difficult, other things difficult to achieve earlier might be more easily achieved.¹²² That is, eliminating a convention might have real effects on policy outcomes.¹²³ Eliminating a convention will likely have such effects immediately, because political actors depart from conventions precisely because the conventions are making it difficult for them to accomplish some specific goal.¹²⁴ But, eliminating a convention might have real effects in the long run as well, because the adjustments made to reach a new equilibrium might favor some policies over others (in the sense of making some policies easier to enact, others more difficult).¹²⁵ The bottom line, though, is that departing from a convention,

117. *See id.* at 421.

118. *See id.*

119. *See* Stephenson, *supra* note 67, at 449.

120. *See* VERMEULE, *supra* note 4, at 3 (footnote omitted) (“Where discontinuities in important variables occur, small changes can produce large effects, while large changes can produce small effects. Seemingly minor changes in voting rules, for example, can profoundly affect both processes and outcomes in multimember institutions.”).

121. *See id.*

122. *See* Tushnet, *supra* note 11, at 529–30.

123. *See* VERMEULE, *supra* note 4, at 2; *see also* Flegenheimer, *supra* note 110 (highlighting that the elimination of the filibuster will have long-standing consequences).

124. *See* Flegenheimer, *supra* note 110 (describing how Republicans were going to kill the filibuster process in an effort to reach their specific goal of confirming Gorsuch); Stephenson, *supra* note 67, at 452 (“As constitutional change is often a long and slow process that can take years if not decades, that crisis or controversy can help keep the deliberative process energised [sic] and infused with a sense of purpose.”).

125. *See supra* note 122 and accompanying text; Tushnet, *supra* note 11, at 529.

even a convention adhered to because it enables action, does not necessarily imply that the sky is falling and that the government will become paralyzed.¹²⁶

Sometimes arguments from consequences are made against departures from conventions.¹²⁷ A reasonably common form refers to the analysis of repeated Prisoners' Dilemmas games.¹²⁸ The standard analysis of such games is rather complicated.¹²⁹ If both sides believe that they will interact into the indefinite future, they both benefit from cooperating—in the present context, from adhering to the convention.¹³⁰ And, if one side departs from the convention in one round of play, the other side's best response is "tit-for-tat," departing from the convention in the next round but returning to cooperation in the third round if the other side cooperated in the second.¹³¹

Consider, for example, the convention that the Supreme Court's size is fixed at nine, said to be established with the failure of Franklin Roosevelt's Court-packing plan.¹³² Were Democrats to control the presidency and both houses of Congress after the 2020 elections, they might be tempted to respond to the presence of Justice Gorsuch by retaliating for the Republican tactics that placed him there: tit-for-tat (as the Democrats see the events of 2016).¹³³ The mechanism might be to expand the Court by two—one new justice to offset Justice Gorsuch, and a second to accomplish the Democratic-nominated majority that they were denied in 2016.¹³⁴ But, opponents of the departure from the convention might argue, once the genie is out of the bottle, Democrats run the risk that were Republicans to regain control of the presidency and Congress, they too would expand the Court, say to fifteen: again tit-for-

126. See Stephenson, *supra* note 67, at 453.

127. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1186–91 (2013).

128. See, e.g., Vermeule, *supra* note 8, at 298–99.

129. See *id.*

130. See Vermeule, *supra* note 127, at 1187–88; ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 10–11 (Basic Books, 1984).

131. AXELROD, *supra* note 130, at 10–11. Another formulation of the first-round strategy is "No First Use." *Id.*

132. John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 974–75 (1986); William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN, (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>.

133. See, e.g., David Faris, *How Democrats Can Make Republicans Pay for Justice Gorsuch*, WEEK (Mar. 20, 2017), <http://theweek.com/articles/681352/how-democrats-make-republicans-pay-justice-gorsuch>.

134. See *id.*

tat.¹³⁵

I think there are numerous difficulties with this informal game-theoretic argument.¹³⁶ When the “rounds” of play are infrequent, it may be quite difficult to distinguish the first and second rounds.¹³⁷ The argument against expanding the size of the Court assumes that the first round was the Garland/Gorsuch episode, with Court-expansion being the tit-for-tat response in the second round.¹³⁸ If that is so, the tit-for-tat strategy counsels Republicans not to expand the Court’s size when next they have the opportunity.¹³⁹ But, perhaps (probably so, from the Republican point of view), the Court-expansion is the first round in a different game; the Garland/Gorsuch episode was part of the game of “judicial nominations,” whereas the Court-expansion proposal is part of the game of “setting the size of the Supreme Court.”¹⁴⁰ On that view, the Democratic proposal is the initial departure from convention, for which Republicans should respond with tit-for-tat.¹⁴¹

135. See AXELROD, *supra* note 130, at 118.

136. See *infra* notes 137–47 and accompanying text.

137. See *infra* notes 138–41 and accompanying text. When the rounds of the game are infrequent it may be particularly difficult to distinguish between playing tit-for-tat in round two and reverting to cooperation in round three, and being played for a sucker in round three. See *infra* notes 138–41 and accompanying text. My intuition is that this is the same point as is made in the text, but I confess that I cannot spell out the grounds for that intuition. See, e.g., *infra* notes 138–41 and accompanying text.

138. See AXELROD, *supra* note 130, at 118.

139. See *id.*

140. See *supra* note 23 and accompanying text (discussing the “he hit me first” phenomenon); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 513–14 (2018). Professor Grove quotes Senator John Cornyn as asserting that “we are coming full circle” when the Senate abolished the filibuster for Supreme Court nominations, in response (tit-for-tat) for the abolition of the filibuster for nominees to fill existing vacancies on lower courts, which Republicans had characterized as “court-packing.” Grove, *supra*, at 516–17.

141. See AXELROD, *supra* note 130, at 118; see also, e.g., Julia Craven, *North Carolina Republicans May Want to Pack the State Supreme Court, but They Probably Won't Do It*, HUFFINGTON POST (Dec. 8, 2016, 6:46 PM), https://www.huffingtonpost.com/entry/republicans-state-supreme-court-north-carolina_us_5849ad73e4b08283d6b51145 (discussing how North Carolina Republicans might be tempted to pack their state’s Supreme Court because the North Carolina Democrats did so earlier). An evident departure from convention might be thought to enable future departures by bringing the possibility of departure to the attention of the other side. See Grove, *supra* note 140, at 516–17; AXELROD, *supra* note 130, at 118. I believe that in most situations of interest the other side is quite capable of coming up with the idea of departing from convention entirely on its own. See Craven, *supra*; AXELROD, *supra* note 130, at 118. Recent actions by Republicans in North Carolina involve a politically motivated manipulation of the state Supreme Court’s size, and there have been structurally similar efforts in Republican-controlled Nebraska. See Craven, *supra*; Joe Duggan, *Ricketts Gets Second Appointee to Supreme Court Early in 2016, with More Potential Retirees Ahead*, OMAHA WORLD-HERALD (Dec. 20, 2015), <http://www.omaha.com/news/nebraska/ricketts-gets-second-appointee-to-supreme-court-early-in-with/articlefaf660e6-d167-5ba7-969a-0240adb018b4.html>. I think there is no

In addition, the game-theoretic analysis proceeds on the assumption that the same players confront each other in the repeated games.¹⁴² Of course we do find “Republicans” and “Democrats” engaged in repeated interactions.¹⁴³ We must remember, though, that parties are a “they,” not an “it.”¹⁴⁴ When rounds of play are separated by long periods of time, the actual people who play against each other can be quite different, even to the point of there being a trivial amount of overlap between those who played in round one and those who played in round two.¹⁴⁵ Individual players, as they see it, are playing a single round of the Prisoners’ Dilemma game, in which the rational strategy is a single round is to “defect”—to depart from the convention.¹⁴⁶

reason to believe that Republicans at the national level would be (distinctively) informed about the possibility of changing the Supreme Court’s size by a Democratic proposal to add two justices to the Court. See Faris, *supra* note 133; Ethan Leib & Thomas Lee, *Trump Can Save the Filibuster: Avoid the Nuclear Option by Expanding the Bench and Nominating Merrick Garland, Too*, U.S. NEWS & WORLD REP. (Apr. 6, 2017, 11:42 AM), <https://www.usnews.com/opinion/debate-club/articles/2017-04-06/donald-trump-should-expand-the-supreme-court-to-save-the-filibuster> (discussing the possibility of Republicans increasing the size of the Supreme Court to appease Democrats).

142. See AXELROD, *supra* note 130, at 11; Avinash Dixit & Barry Nalebuff, *Prisoners’ Dilemma*, LIBR. ECON. & LIBERTY, <http://www.econlib.org/library/Enc1/PrisonersDilemma.html> (last visited Mar. 2, 2018).

143. See, e.g., Kimberly Leonard, *Trump: Republicans and Democrats “Working Together Very Hard” on Healthcare*, WASH. EXAMINER (Oct. 16, 2017, 2:02 PM), <http://www.washingtonexaminer.com/trump-republicans-and-democrats-working-together-very-hard-on-healthcare/article/2637651>.

144. See Mark Tushnet, *Politics as Rational Deliberation or Theater: A Response to “Institutional Flip-Flops,”* 94 TEX. L. REV. 82, 83–84 (2016) (my initial presentation of the implications of this point).

145. See *id.*; AXELROD, *supra* note 130, at 11.

146. See AXELROD, *supra* note 130, at 10; Russell Berman, *How Democrats Paved the Way for the Confirmation of Trump’s Cabinet*, ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/01/democrats-trump-cabinet-senate/513782/>. Another way of putting the point is that, from the individual players’ point of view, every round of play is the last round (because they do not expect to be present when the next round occurs much later in time). See AXELROD, *supra* note 130, at 10; Dixit & Nalebuff, *supra* note 142. In this connection I think it relevant to note that newspaper commentary on proposed departures from conventions seems to me typically to quote long-term members of Congress as supporting adherence to the conventions, because (I think) those members have been around long enough to see several rounds of play. See Paul Kane, *Reid, Democrats Trigger ‘Nuclear’ Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?utm_term=.29057a713cd1. Senator John McCain’s reaction to the elimination of the filibuster is also of interest. McCain referred to having “been through” numerous confirmation fights and called the filibuster’s elimination “a body blow to the institution,” but also voted in favor of eliminating the filibuster. See Paul Kane, *McConnell: ‘Nuclear’ Option Helps Senate. McCain: ‘Whoever Says That Is An Idiot,’* CHI. TRIB. (Apr. 5, 2017, 5:38 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-mcconnell-mccain-nuclear-option-senate-20170405-story.html>. When he made that statement, Senator McCain probably believed that he was serving his final term in the Senate. See *id.*

In sum, the game-theoretic analysis of departures from conventions relies on the consequences of doing so, but may be using an inappropriate analytic framework for assessing those consequences.¹⁴⁷

VI. CONCLUSION: DISRUPTIVE DEPARTURES FROM CONVENTIONS

Most of the preceding analysis deals with departures from a single convention, although I have recurrently referred to departures from several conventions at the same time.¹⁴⁸ I conclude with some thoughts about departures from a large number of conventions, pretty much all at once.¹⁴⁹ Were such departures to occur, the constitutional system might well be dramatically disrupted and fail to re-equilibrate for quite a while.¹⁵⁰ Unlike classical Burkean conservatives, I have no deep objections to disruption as such.¹⁵¹ One might think—as I sometimes do—that the status quo, supported by many conventions (among other things), has become congealed in patterns that are dysfunctional from a long-term point of view.¹⁵² The economist Joseph Schumpeter's phrase "creative destruction" has become popular in business circles, where it has become associated with "disruptive" technologies and business models.¹⁵³ Perhaps departing from many conventions all at once should be

147. See *supra* notes 127–46 and accompanying text.

148. See *supra* Parts IV–V.

149. See *infra* notes 150–68 and accompanying text.

150. See *supra* Parts IV–V. Searching for and discovering re-equilibrating conventions might take a long time. See *supra* Parts IV–V. Figuring out which new conventions could re-stabilize the system might be quite difficult: Something that might have worked to offset the disruptive effects of a single departure might not be achievable in the presence of other departures, or might not be effective because its potential efficacy depends on the persistence of some other conventions, themselves abandoned as part of the larger program. See *supra* Parts IV–V.

151. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).

152. See, e.g., Hugh Hewitt, *The Real World Doesn't Care Much for the 'News' Inside the Beltway*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/opinions/the-real-world-doesnt-care-much-for-the-news-inside-the-beltway/2017/06/16/ba392e52-52aa-11e7-be25-3a519335381c_story.html?utm_term=.e7d2b4858be8. I tend to have those thoughts when reading particularly egregious examples of "inside-the-Beltway" thinking, the "conventional wisdom" of the status quo. See *id.* My exemplars are the columnists Tom Friedman and Maureen Dowd of the *New York Times*. See, e.g., Thomas L. Friedman, *Who Are We?*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/17/opinion/who-are-we.html>; Maureen Dowd, *Girl Talk at Trump Tower*, N.Y. TIMES (Oct. 1, 2016), <https://www.nytimes.com/2016/10/02/opinion/sunday/girl-talk-at-trump-tower.html>.

153. See THOMAS K. MCCRAW, PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION 352 (Belknap Press, 2010); Sharon Reier & Int'l Herald Trib., *Half a Century Later, Economist's 'Creative Destruction' Theory is Apt for the Internet Age: Schumpeter: The Prophet of Bust and Boom*, N.Y. TIMES (Jun. 10, 2000), <https://www.nytimes.com/2000/06/10/your-money/half-a-century-later-economists-creative-destruction-theory-is.html>.

seen as an act of political creative destruction.¹⁵⁴

The political market differs from the economic one, though, in at least one important way.¹⁵⁵ Many economic innovators try to disrupt their markets, but they fail if their innovations do not meet with consumers' approval: There is a market test that tells us whether a disruption is good (at least in the short run).¹⁵⁶ The political market has a test, too: electoral success.¹⁵⁷ But, the pace of economic markets is often faster than that of political ones.¹⁵⁸ Elections occur less frequently than some consumer purchases do, for example.¹⁵⁹ Political disruptions might succeed in the sense that they displace those in power, but we might not know whether they succeed in replacing failed patterns of action with better ones until "too late"—when the next election occurs and the disrupters can be thrown out of office.¹⁶⁰ And, even if they are, there are no clear mechanisms for establishing a new, better equilibrium over the medium run.¹⁶¹

I draw my description of the circumstances under which large-scale departures from existing conventions might be desirable from Charles Sabel, the theorist of democratic experimentalism.¹⁶² Suppose nearly all of us agree, or should agree, that the overall political system is not working well.¹⁶³ The metrics can vary among people: Liberals might think that the system isn't

154. See MCCRAW, *supra* note 153; Reier & Int'l Herald Trib., *supra* note 153.

155. See *infra* notes 156–61 and accompanying text.

156. See, e.g., Daniel F. Spulber, *Innovation Economics: The Interplay Among Technology Standards, Competitive Conduct, and Economic Performance*, 9 J. COMPETITION L. & ECON. 777, 806 (2013) (describing the challenges a patent owner faces in attempting to dominate a market); Michael Horn, *Uber, Disruptive Innovation and Regulated Markets*, FORBES (Jun. 20, 2016, 8:30 AM), <https://www.forbes.com/sites/michaelhorn/2016/06/20/uber-disruptive-innovation-and-regulated-markets/#165a698937fb> (analyzing the success of Uber's initial black-car service and concluding that it disrupted the existing market).

157. See *supra* note 156 and accompanying text.

158. See Michelle Gibley, *Performing Reformers: How Political Change Can Affect Stocks*, CHARLES SCHWAB (May 18, 2016), <https://www.schwab.com/resource-center/insights/content/performing-reformers-how-political-change-can-affect-stocks>.

159. See *id.*

160. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1101–03 (2014); *Tell Me More: Tea Party Assessing Damage From Election 2012?*, NPR (Nov. 13, 2012, 12:00 PM), <http://www.npr.org/2012/11/13/165030609/tea-party-assessing-damage-from-election-2012>.

161. See Carl Hulse, *Republicans Stonewalled Obama. Now the Ball Is in Their Court*, N.Y. TIMES (Jan. 2, 2017), <https://nytimes.com/2017/01/02/us/politics/republicans-congress-trump-white-house.html>.

162. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 276–77 (1998) (addressing the circumstances that led to the New Deal and the resulting departures from existing conventions).

163. See *supra* note 152 and accompanying text.

working well because we're seeing increasing economic inequality, while conservatives might think that it isn't working well because it's stifling economic innovation and growth.¹⁶⁴ And suppose as well that nearly all of us agree, or should agree, that the things we've tried haven't worked, or perhaps that the overall political system isn't letting us try things that we think might work: Liberals can't get progressive taxes enacted, conservatives can't get serious programs of deregulation implemented.¹⁶⁵ Under those circumstances, we might do better by trying something entirely different.¹⁶⁶ Of course, we know there are downside risks to substantial political disruption—the abandonment of many conventions at the same time—but we might think that the upside potential is so great that it's worth trying.¹⁶⁷ Perhaps our current situation satisfies the conditions Sabel identifies.¹⁶⁸

164. See Donna Wiesner Keene, *Government Regulations Hinder Economic Growth*, USA TODAY (May 2, 2013, 9:00 AM), <https://www.usatoday.com/story/opinion/2013/05/02/economy-washington-congress-column/2124083/>.

165. See *id.*

166. See Levinson & Balkin, *supra* note 11, at 747.

167. See *supra* Part V.

168. See Dorf & Sabel, *supra* note 162. For example, the Trump administration might be a large-scale disrupter trying something entirely new—or, as I am inclined to think, an effort, likely (I hope) to fail, thereby establishing that neither liberal nor conservative approaches can “de-congeal” the bad behaviors characteristic of our political system. See Terence Szuplat, *Why Trump's “America First” Policy Is Doomed to Fail*, New Yorker (Feb. 3, 2017), <https://www.newyorker.com/news/news-desk/why-trumps-america-first-policy-is-doomed-to-fail>.