

National University of Ireland, Maynooth

From the Selected Works of Seth Barrett Tillman

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Extract from Richard Albert's Syllabus for "Law of Democracy" (Boston College Law School, Fall 2009), assigning Levinson-Tillman exchange, and Calabresi-Tillman exchange

Seth Barrett Tillman



**THE LAW OF DEMOCRACY
LL 974.01**

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CONTACT INFORMATION

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Invitation: I hope to get to know each student enrolled in this course. I invite students to join me for a casual lunch in small groups of two or three. Please contact my Faculty Support Assistant, Heather Coe-Smith, to schedule our lunch. Heather may be reached by telephone at (617) 552-4143 or by email at coesmith@bc.edu.

COURSE INFORMATION

Description: This course explores the intersection of the United States Constitution and the political process—specifically in selecting and regulating the nation’s democratic leadership, amending the constitution, and defining the respective functions of the three branches of government—and analyzes in these settings how constitutional politics inform and constrain the laws of democracy in the United States.

The Constitution governs the political process even as its contours are themselves shaped by the political process. This enduring and always evolving relationship stands at base of the American project of democracy—and it is the font from which spring the values and principles that underpin the political process.

This course examines the foundational values and principles of democracy in America through the lens of historical and contemporary constitutional politics. Topics will include the Electoral College, presidential succession, vice presidential selection, gubernatorial appointments to federal office, constitutional transformation and social change, the popular initiative, continuity of government, the administration and judicial review of elections, judicial confirmation and tenure, the Incompatibility Clause and the fusion of powers.

COURSE INFORMATION (cont'd)

Meetings: T 3:00-4:50pm

Credits: 2

Evaluation: Take-home final examination. Class participation and performance may also be considered to adjust final grades either up or down one grade increment.

Attendance: Students are expected to abide by the ABA requirement of “regular and punctual class attendance,” in ABA Standard 304(e). Please inform me or the Dean for Students of any anticipated absence(s) prior to the class you expect to miss.

Media: Laptops are permitted but discouraged. Class discussions will be more enjoyable and useful for all of us if we pledge to commit our undivided attention to each other. No recording devices may be used without permission.

READING MATERIALS

Readings will average 90 pages per week. At the first class meeting, students will be instructed as to which readings on the syllabus must be “read carefully” or which may be “skimmed.”

The following *required* materials are available for purchase at the law school bookstore:

1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006)
2. HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009)

Other required materials will be made available electronically.

Students wishing to explore subjects related to this course may find the following *non-required* and *entirely optional* text both interesting and illuminating:

1. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007)

TOPICAL OUTLINE

I. ELECTION & APPOINTMENT**A. Continuity of Government** (Pages: 40)

1. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 69-75 (2006)
2. Seth Barrett Tillman, *Model Continuity of Congress Statute*, 4 PIERCE L. REV. 191, 191-200 (2006)
3. Sanford Levinson, Comment, *Assuring Continuity of Government*, 4 PIERCE L. REV. 201, 201-06 (2006)
4. Seth Barrett Tillman, *Overruling INS v. Chadha: Advice on Choreography: A Reply to Professor Sanford Levinson*, 4 PIERCE L. REV. 207, 207-18 (2006)

B. The Twelfth Amendment (Pages: 50)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 79-97 (2006)
2. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 145-93 (1996)

C. Presidential Succession (Pages: 64)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 98-101 (2006)
2. Akhil Reed Amar, Symposium, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 ARK. L. REV. 215, 215-38 (1994)
3. Akhil Reed Amar & Vik Amar, Essay, *President Quayle?*, 78 VA. L. REV. 913, 913-47 (1992)

D. Vice Presidential Selection (Pages: 88)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 121-22 (2006)
2. Richard Albert, *The Evolving Vice Presidency*, 78 TEMPLE L. REV. 811, 811-96 (2005)

E. Judicial Confirmation (Pages: 103)

1. David S. Law, Symposium, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 479-500 (2005)
2. Gary L. McDowell, Symposium, *Bork was the Beginning: Constitutional Moralism and the Politics of Federal Judicial Selection*, 39 U. RICH. L. REV. 809, 809-18 (2005)
3. John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J. L. & PUB. POL'Y 181, 181-227 (2003)
4. Catherine Fisk & Erwin Chemerinsky, Symposium, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 331-53 (2005)
5. Stephen L. Carter, Op-Ed, *Let the Nominee Stay Home*, N.Y. TIMES, May 10, 2009, at A9, available at <http://www.nytimes.com/2009/05/10/opinion/10carter.html>

F. The Seventeenth Amendment (Pages: 80)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 49-62 (2006)
2. S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies: *Hearing Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 111th Cong. (Mar. 11, 2009), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3705>. [Please read all six statements by sitting Senators (the Honorable Sheila Jackson Lee, the Honorable John Conyers, the Honorable F. James Sensenbrenner Jr., the Honourable Russ Feingold, the Honorable Richard J. Durbin, and the Honorable Tom Coburn) and the testimony of all ten witnesses (Pamela Karlan, Vikram Amar, Bob Edgar, Kevin Kennedy, Thomas H. Neale, David Segal, Matthew Spalding, the Honorable David Dreier, the Honorable Aaron Schock and the Honorable Mark Begich).]

G. The Administration of Elections (Pages: 142)

1. HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009)

II. REGENERATION & RENEWAL

A. Amending the Constitution (Pages: 56)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 159-66 (2006)
2. Stephen M. Griffin, *The Nominee is ... Article V*, 12 CONST. COMMENT. 171, 171-73 (1995)
3. Sanford Levinson, *How Many Times has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 13-36 (SANFORD LEVINSON ed., 1995)
4. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164-84 (1988)

B. The Popular Initiative (Pages: 228)

1. *Strauss v. Horton*, S168047, *Tyler v. State of California*, s168066, and *City and County of San Francisco v. Horton*, S168078 (Cal.), available at <http://www.courtinfo.ca.gov/opinions/documents/S168047.PDF>
2. Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURISPRUDENCE 5, 5-47(2009)

C. Judicial Tenure (Pages: 129)

1. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 123-39 (2006)
2. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769, 769-877 (2006)
3. Akhil Amar & Ian Ayres, *Why not nominate vice justices for the Supreme Court?*, L.A. TIMES, May 7, 2009, at A31, available at <http://articles.latimes.com/2009/may/07/opinion/oe-ayres7>

III. BOUNDARIES & PREROGATIVES

A. The Fusion of Powers (Pages: 128)

1. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 633-88 (2000)
2. Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 51-104 (2001)
3. Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AMERICAN JOURNAL OF COMPARATIVE LAW 531, 531-48 (2009)

B. Judicial Review of Elections (Pages: 108)

1. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L. J. 1407, 1407-58 (2001)
2. John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 775-91 (2001)
3. Richard Albert, *The Constitutional Imbalance*, 37 NEW MEXICO L. REV. 1, 1-38 (2007)

C. The Incompatibility Clause (Pages: 26)

1. Seth Barrett Tillman & Steven G. Calabresi, Debate, *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, 134-59 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>

