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From the Selected Works of Seth Barrett Tillman

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ground rules of the common law," unless they actively decide to change the rules.¹⁷⁶

All this said, Amar might be right or wrong on the Vice President's impeachment role. The answer depends on the best reading of the Constitution and on the actual scope of *nemo judex* at the Founding.¹⁷⁷ But either way, the argument is at least as strong from the perspective of defeasibility as it would be from the unwritten constitution. To have its full effect, *nemo judex* doesn't need any status more exalted than that of an ordinary rule of common law.

Understanding the actual nature of the rule also helps us answer other questions more fully. If *nemo judex* is just a rule of common law, then it can be abrogated—unless there's something in the Constitution that prevents it. So suppose the Senate, using its rulemaking power, adopts a rule specifically inviting the Vice President to preside over his impeachment if he wants. Now the analysis is less clear. If *nemo judex* is just a common-law maxim, then the Senate rule should trump. Written law normally beats unwritten law—and unlike the anti-entrenchment rule, *nemo judex* doesn't limit the very power that might be used to abrogate it. But if *nemo judex* were truly a constitutional rule, then it should operate regardless of the Senate's wishes. That seems unlikely, and it would require some special justification above and beyond a well-established common-law pedigree.

2. Defeasibility and Higher Law

Defeasibility can also help us to understand Amar's claims regarding higher law and natural principles of justice. For example, Amar argues that the Ex Post Facto Clauses were unnecessary: the common law at the Founding was allegedly so hostile to ex post facto laws that a generally worded grant of legislative authority would exclude them.¹⁷⁸ This, again, sounds in defeasibility: a recognized and specific prohibition defeats a general grant. The historical issues here may be contested; during and after the Convention, some portrayed ex post facto laws as a real threat (or even a positive benefit), though it's hard to know whether the speakers were talking about criminal cases or just civil ones.¹⁷⁹ Either

176. *Staples v. United States*, 511 U.S. 600, 605 (1994).

177. See, e.g., Michael Ramsey, *Michael Stern and Seth Barrett Tillman on the Vice President's Impeachment Trial*, THE ORIGINALISM BLOG (Nov. 4, 2012, 7:00 A.M.), <http://originalismblog.typepad.com/the-originalism-blog/2012/11/michael-stern-and-seth-barrett-tillman-on-the-vice-presidents-impeachment-trial-michael-ramsey.html>.

178. See AMAR, *supra* note 3, at 9–10; see also 1 BLACKSTONE, COMMENTARIES *46 (describing such laws as cruel and unjust).

179. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1911) ("Mr Carrol remarked that experience overruled all other calculations. It had proved that in whatever light they might be viewed by civilians or others, the State Legislatures had passed them, and they had taken effect."); *id.* (statement of Mr. Williamson) ("Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it."); *id.* at 640 (statement of Mr. Mason) ("Both the general legisla-