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NEW CONSTITUTIONAL QUESTIONS

ESSAYS

Emoluments, Zones of Interests, and Political Questions: A Cautionary Tale
by Jed Handelsman Shugerman and Gautham Rao..... 651
<https://bit.ly/2qRaMfy>

As the Supreme Court addresses partisan gerrymanders in 2018, the “political question” doctrine is facing intense scrutiny. Will the Court tackle the problem or punt once again? It turns out that other high-profile cases in the lower courts offer a perspective on the political question doctrine. The Emoluments cases offer a cautionary tale about the use of the political question doctrine, and how the political question doctrine is too often an unconsciously tempting escape for judges facing challenging legal questions.

The dismissal by the Southern District of New York in *CREW v. Trump* avoided reaching the merits of the emoluments claims by finding that the plaintiffs do not have standing to bring the suit. The decision contains serious errors in its zone of interests analysis and its political question analysis. In this Essay, we argue that the plaintiffs are clearly in the zone of interests of the Emoluments clauses and that the political question analysis is out of step with a half dozen justiciable clauses of the Constitution. These errors are a sign of trying too hard to avoid the merits. There are certainly times when it is appropriate for courts to invoke the political question doctrine, but this episode is a reminder for judges to slow down and reflect when it may be an intuitively appealing resolution, but in fact, it is a dodge of a tough constitutional issue.

The President’s Constitutional Responsibility to Confront Climate Change and Invest in Renewable Energy for National Security
by Bishop Garrison..... 671
<https://bit.ly/2qRvyM8>

Climate change is having a direct effect on the United States as well as the rest of the world. The national security community has long identified climate change as an ongoing security threat. For decades, plans of action have been established to

address it, but the issue is still treated from a more partisan space than with the heft of a danger with lasting consequences. If national security leaders have deemed it a hazard, it follows that the leader of the Free World—the president of the United States—has a duty under the U.S. Constitution to protect against such a threat. Through constitutional jurisprudence, as well as domestic and international trends in countering climate change through regulation and investment in renewable energy, this Essay identifies the responsibilities of the President, as well as Congress, concerning national security in addressing climate change. As climate change is a threat to national security, the president has a clear responsibility to reduce and eliminate this threat. In the absence of executive action, it is the responsibility of Congress to hold the executive accountable and force action.

ARTICLE

Constitutionally Compromised Democracy: The United States District Clause, Its Historical Significance, and Modern Repercussions

by Bradley Raboin 685

<https://bit.ly/2vxHOqI>

The United States is widely considered the most prominent example of the modern democratic state. Yet, America’s most prolific historical document remains imbued with a seemingly impossible contradiction. The District of Columbia, the Constitutionally mandated territory housing the federal government and serving as the literal epicenter of American democracy, does not actually provide representation to citizens living in that district. Incredibly, the very place created to house a government “for the people, of the people, and by the people,” does not even allow the people residing therein to partake in that government.

This Article examines this Constitutional conflict within American democracy by first looking at the historical creation of the Federal district. By investigating the competing political ideologies responsible for the creation of the Constitution, this Article uncovers a delicate subtext of compromise and opportunity at the true heart of America’s District Clause. Then, this Article considers the resulting disenfranchisement in the Federal territory and questions how, and why, such an overt inconsistency in American democratic ideology could have been permitted to manifest in the nation’s capital. Finally, this Article concludes that America’s founding principles require a reevaluation of the District of Columbia representation issue and posits that existing Constitutional mechanisms already exist for resolving this most infamous of modern democratic contradictions.

NOTES

Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution

by *Ryan W. Porte* 715
<https://bit.ly/2vGtNGW>

The U.S. Supreme Court last decided the issue of whether post-incarceration sex offender regulations constituted punishment or nonpunitive regulations over twenty years ago. In coming to its conclusion, the Supreme Court assessed the regulations as they were written in the 1990s and the early 2000s and maintained the assumption that offenders constituted a greater danger to the public than other classes of criminals. In 2018, post-incarceration sex offender regulations are far more restrictive than they were two decades ago and scientific studies tend to refute the public belief that sex offenders are more recidivistic than other criminals. Recognizing this, some state courts and the Sixth Circuit Court of Appeals have held that these regulations are actually punitive in nature—and thus should require the requisite accompanying criminal constitutional protections. This Note is intended to survey the sex offender regulation statutes enacted over the past two decades and argues that the effect of these laws is punitive, and thus constitutional protections, as afforded to other classes of felons, should apply as well.

How the Lone Star State’s Refusal to Expand Medicaid Is Leaving Pregnant Women More Alone Than Ever

by *Naomi Strauss* 739
<https://bit.ly/2vJcBB1>

Texas’s maternal mortality rates are alarmingly high, reflecting a larger trend across the United States. By analyzing structural and social factors, this Note suggests that increasingly restrictive access to family planning and women’s health clinics across Texas has contributed to this public health crisis. Further complicating matters, the limited availability of quality maternal health data makes it hard to disentangle causes and effects. In order to correct this disturbing trend—which stands in stark contrast to the rest of the developed world—states should expand Medicaid coverage and access to services for all. California, for example, has implemented programs, which have successfully reduced maternal mortality. In light of this public health crisis, federal leadership is essential.

RLUIPA and Method-of-Execution Claims After *Glossip*: The Free Exercise Exception to *Glossip*'s Known-and-Available Alternative Requirement

by Griffin Estes 785

<https://bit.ly/2qQaIgX>

Since the Court's decision in *Glossip v. Gross*, a capital inmate has the burden of proposing an alternative method-of-execution to be administered in lieu of the statutorily proscribed method if the inmate believes that the method-of-execution to be used in their execution would violate the Eighth Amendment's prohibition on "cruel and unusual punishments." Many inmates have specific religious beliefs and it is possible that a condemned inmate might have a religious objection to capital punishment. The Religious Land Use and Institutionalized Persons Act ("RLUIPA") represents Congress's sensitivity toward the religious liberties of inmates. This Note applies the RLUIPA framework to a claim by a hypothetical death row inmate who has a religious belief against capital punishment. Because the capital inmate's religious beliefs are substantially burdened and because there are less burdensome ways to achieve the government objective sought, this Note argues that *Glossip*'s method-of-execution pleading requirement violates the free exercise rights of the hypothesized inmate.