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Displeased with judicial interpretations of constitutional provisions and enacted statutes, Congress—either politically unwilling or unable to propose constitutional amendments or amend substantive law—has resorted to questionable jurisdictional and procedural devices to compel change in judicial outcomes. This Article analyzes the use of such devices in three seemingly unrelated recently enacted statutes. The use of these devices raises profound separation of powers issues. In response, a divergence has developed in the Supreme Court's view of the core constitutional authority of Article III courts.

SOVEREIGN BARGAINS, INDIAN TAKINGS, AND
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The 1949 congressional taking of the Fort Berthold Indian Reservation occurred against the backdrop of distinctive property and compensatory doctrines that apply only to Native-American peoples and their lands. Over eighty percent of the members of the Three Affiliated Tribes, some 325 families, were removed to make way for the Garrison dam and reservoir, which were required for the massive water development project known as the Pick-Sloan Plan. Those Indian peoples were relocated from their historic villages along the Missouri River to the wind-swept bench lands of their treaty-established reservation. This taking of Indian lands disrupted the entire cultural and economic life of the Mandan, Hidatsa, and Arikara peoples.

The Fort Berthold taking, and its devastating aftermath for the Three Affiliated Tribes, illustrates the need for a modern Indian takings

doctrine that restrains congressional plenary power over Indian lands so as to help preserve the remaining Indian Country as a viable homeland for the Indian peoples. This Article criticizes the failure of those earlier "sovereign bargains," or Indian treaties, to effectively preserve Indian Country as a homeland for the Indian peoples. It concludes by sketching the doctrinal outline and principled application of a modern Indian takings doctrine within the context of the Three Affiliated Tribes' forty-three year long struggle for just compensation for the 1949 taking of the Fort Berthold Indian Reservation.

FRANCHISE SELECTION AND RETENTION: DISCRIMINATION CLAIMS AND AFFIRMATIVE ACTION PROGRAMS ..... *Robert W. Emerson* 511

Many franchising disputes concern franchise selection and retention, including franchisors' allegedly discriminatory behavior against minority franchisees and franchise applicants. The author examines case law and business practices. He collects and considers some statistics on minority representation in two heavily franchised industries (fast-food restaurants and auto dealerships), and he analyzes the effectiveness *vel non* of some franchisors' minority recruitment and retention programs.

The author offers proposals that account for the judicial trend against affirmative action. He recommends extraordinary disclosures to prospective, high risk franchisees and argues the need for private systems to counter the redlining of franchises and poor servicing of redlined communities. These franchisor-implemented systems would better assist high risk franchises: those owned by poorer franchisees or located in markets or communities where businesses face higher costs and lower rates of return.

TAX POLICY AND THE PASSIVE LOSS RULES: IS ANYBODY LISTENING? ..... *Mona L. Hymel* 615

Congress enacted the passive loss rules under section 469 of the Internal Revenue Code in an attempt to curb tax shelters. Many still question the appropriateness of the passive loss rules. In this Article, Professor Hymel reexamines the policy considerations behind passage of section 469, as well as measuring the passive loss rules against normative tax policy criteria. The analysis reveals that section 469 suffers from numerous defects under traditional tax policy criteria. Furthermore, anti-tax shelter legislation leading up to the enactment of section 469 was sufficient to curb the use of abusive tax shelters. Therefore, section 469 should be repealed and replaced with tax laws curbing unintended use of tax preferences.

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HEARSAY, DEAD OR ALIVE? ..... *Roger C. Park* 647

Professor Park examines the hearsay rule's health and its prognosis. In addition to analyzing hearsay doctrine, he reviews survey data, reversal counts, and other quantitative information. He concludes that the rule excluding hearsay retains significant influence. However, features of the institutional environment may weaken its influence. These features include fear of crime, the decline of jury trials, and the proliferation of expert witnesses.

Notes

THE ARIZONA WATER BANK AND THE LAW OF THE RIVER ..... *Margaret Bushman LaBianca* 659

In 1996, the Arizona Water Bank was created to store unused Colorado River water. This Note demonstrates that the Water Bank is Arizona's latest effort to protect its apportionment of the Colorado River from unfettered use by California. The Note maintains that the Water Bank is also significant because it provides for the interstate transfer of Colorado River water. The Note examines the Water Bank provisions within the context of the Law of the River.

TOXIC TORTS AND EMOTIONAL DISTRESS: THE CASE FOR AN INDEPENDENT CAUSE OF ACTION FOR FEAR OF FUTURE HARM ..... *Kenneth W. Miller* 681

Traditional tort law generally does not recognize a cause of action for the negligent infliction of emotional distress absent a physical injury, impact, or manifestation. However, toxic exposure cases present unique and compelling arguments in favor of the abolition of the physical injury rule. This Note questions the legitimacy of the arguments commonly offered in support of the physical injury rule and presents an independent cause of action for fear of future harm in toxic exposure cases.