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GEORGIA LAW REVIEW

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REMEMBRANCE .... *Rebecca H. White*

ARTICLES

Mutual Fund Performance Advertising:
Inherently and Materially Misleading? .... *Alan R. Palmiter* 289
Ahmed E. Taha

Mutual fund companies routinely advertise the past returns of their strong-performing, actively-managed equity funds. These performance advertisements imply that the advertised high past returns are likely to continue. Indeed, investors flock to these funds despite high past returns being a poor predictor of high future returns. Thus, fund performance advertising is inherently and materially misleading and violates federal securities antifraud standards. In addition, the SEC-mandated warning in these advertisements that "past performance does not guarantee future results" fails to temper investors' focus on past returns.

The SEC should do more to prevent investors from being misled by fund performance advertisements. It should at least require a stronger warning that makes clear that high returns by actively-managed mutual funds generally do not persist. The SEC should also seriously consider reinstating its prior prohibition of performance advertisements. Such a ban would help investors focus on more important fund characteristics, such a fund's costs, risk, and the extent to which the fund's investment objective matches that of the investor.

State Amici, Collective Action, and the
Development of Federalism Doctrine .... *Michael E. Solimine* 355

State attorneys general (SAGs) have been individually and collectively active on many legal and regulatory fronts in recent years. One of those activities has been the filing of amicus curiae briefs in the United States Supreme

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Court, especially in cases impacting the states and federalism doctrine. Frequently SAGs will join in one amicus brief, and briefs signed by forty or more states are not uncommon. This phenomenon has been the subject of attention by legal scholars and political scientists, but the normative jurisprudential significance of such briefs has not. In their opinions, the Justices vary in how much legal weight, if any, they give such briefs. The issue is particularly acute in cases where significant numbers of states take a position by amicus brief against *the apparent state interest and in favor of the federal or national interest. For example, in 2009 the Court held in* McDonald v. City of Chicago *that the Second Amendment's individual right to bear arms applied to the states. Thirty-eight states filed an amicus brief supporting that application, which was noted and appeared to be given significance by the majority opinion. A dissent, though, declined to give weight to that brief and expressed puzzlement that SAGs would ask the Court to limit the regulatory options available to states.*

This Article addresses the jurisprudential weight SAG amicus briefs should be given by the Court. It first considers formalism and functionalism as paradigms for federalism doctrine and discusses whether amicus briefs by SAGs are relevant at all under either viewpoint. It next focuses on those briefs that take a position against the apparent state interest and addresses whether and to what extent that expressed position should be relied upon by the Court. The Article concludes by arguing that such amici should play a role, albeit a limited one, in the development of federalism doctrine by the Court.

Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support .... *Michael J. Higdon* 407

Much of the law relating to child support is based on the fact that it is typically in a child's best interest to receive financial support from mothers as well as fathers. In fact, child support is essentially a form of strict liability with the justification being that the child is an innocent party, and thus, even those men who never consented to the sexual act that caused the pregnancy are nonetheless

liable for the support of the resulting child. These men include males who become fathers as a result of statutory rape and also adult males who became fathers either as a result of sexual assault or having their sperm stolen and used by a woman for purposes of self-insemination.

However, the courts' justification that all children are entitled to support from both biological parents has been seriously undermined by the laws regulating artificial insemination. In that context, a man only becomes the legal father of an artificially inseminated child if he affirmatively consents to fatherhood. This Article argues that it is incongruous to allow exceptions for formal sperm donors yet deny similar protections wholesale for those who, although not in the setting of a sperm bank, never consented to the use of their sperm. Accordingly, this Article proposes that courts adopt an approach similar (albeit narrower) to that used in artificial insemination cases to adjudicate child support claims against those men who were forced into fatherhood as a result of nonconsensual insemination.

NOTES

American Electric Power v. Connecticut:
Disaster Averted by Displacing the Federal
Common Law of Nuisance.................... *Damian Michael Brychcy* 459

Historically, the federal common law of nuisance has provided a means to regulate interstate pollution. With the passing of legislative acts such as the Clean Water Act and the Clean Air Act, however, traditional federal nuisance lawsuits were displaced. The continued viability of the federal common law of nuisance to regulate pollution, specifically greenhouse gases, was brought to the forefront of American jurisprudence in American Electric Power Co. v. Connecticut. *There, the Supreme Court held that the Clean Air Act and the EPA actions the Act authorizes displace any federal common law right to seek abatement of greenhouse gases—reversing the Second Circuit.*

This Note analyzes the divergent analysis used by the Second Circuit and the Supreme Court in the displacement of the federal common law and discusses the

potential disasters of the Second Circuit displacement standard. This Note then seeks to discuss the effects of the Supreme Court decision on pending greenhouse gas litigation under federal common law and calls for further legislative action in the area of greenhouse gas regulation.

Endorsement Clauses in a Post-*White* Legal System: Why These Restrictions Do Not Violate a Judicial Candidate's First Amendment Right to Free Speech.................................. *Shawna Marie Portner* 495

Elections have remained an integral method of state judicial appointments for over two centuries. However, because the Founding Fathers imposed upon judges the duty to neutrally uphold the U.S. and state constitutions, state legislatures, per the recommendation of the ABA, have imposed certain restrictions on the speech and actions of judicial candidates to maintain impartiality. In 2002, the Supreme Court struck down one category of these provisions in Republican Party of Minnesota v. White. *The Court declared Minnesota's announce clause, which prohibited judicial candidates from voicing their opinions on issues likely to come before the bench, to be an unconstitutional First Amendment violation. The after-effects of this decision have varied among the circuit courts, particularly regarding the constitutionality of endorsement clauses, which prohibit a judge or judicial candidate from endorsing a political candidate. Since* White, *lower courts have struggled in deciding whether to apply the decision as precedent in cases challenging endorsement clauses. By analyzing the history of judicial elections, recounting the purposes and obligations of the judiciary, and applying strict scrutiny, this Note concludes that endorsement clauses do not violate the First Amendment and should be upheld as constitutional, even in a post-*White *legal system.*

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