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TRIBUTE

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Faculty of the Law School ix

ARTICLES

ZOMBIE LAWS

Howard M. Wasserman 1047

A judicial declaration of constitutional invalidity does not erase a challenged law. Such a law is "dead" in that enforcement efforts will not succeed in court, where judicial precedent binds and dictates the outcome in future litigation. But such a law is "alive" in that it remains on the books and may be enforced by a departmentalist executive acting on an independent constitutional judgment. Judge Gregg Costa has labeled these statutory remainders "zombie laws."

This Article describes several principles that define constitutional litigation, how those principles produce zombie laws, and the scope and nature of zombie laws. It then describes how Congress or state legislatures can eliminate or enable future enforcement of zombie laws by repealing or retaining them, depending on their views of judicial precedent and what they want to see happen with their laws in the future.

THE ALCHEMY OF EFFECTIVE AUDITOR REGULATION

Sarah J. Williams 1089

The audit profession has repeatedly failed in its obligation to accurately opine on financial statements prepared by companies that trade in U.S. markets. The list of entities that have contributed to the quest for effective regulation of these auditors is long; it includes the American Institute of Certified Public Accountants (AICPA), the U.S. Securities and Exchange Commission (SEC), Congress, outside directors of public companies, and the Public Company Accounting Oversight Board (PCAOB), a recent congressional creation. Yet, despite 50 years of effort, the formula for efficacious oversight of the audit profession remains elusive.

In 2020, then-president Donald Trump proposed to subsume the PCAOB into the SEC, citing regulatory duplication and budget savings. This proposal could have been summarily dismissed as fodder for a deregulatory political agenda, but reactions to the proposal from those outside the discrete enclave of securities regulators revealed deeper concerns about the state of auditor regulation that beg our attention.

This Article is the first in a series of planned articles exploring regulation theory as a path to answering the clamant question: What is the alchemy of effective auditor oversight? This Article begins the discussion by examining the methods by which regulators have determined which auditors would be subject to regulatory oversight, and the extent to which that process furthers the purported goals of more reliable audit reports. This Article establishes that regulatory processes to define the audience of regulated entities have been disinterested at best, and self-interested at worst. This Article articulates the need for a complete departure from the stale, recycled approaches that have been implemented under the guise of improved regulation. A fresh approach with a clear nexus to the objective of promoting fair and accurate audits of public company financial statements is imperative to advancing in the discovery of an efficacious formula for auditor oversight.

RECONCILING AGRICULTURAL PRODUCTION AND PROPERTY RIGHTS WITH THE USE OF DICAMBA HERBICIDES

Terence J. Centner 1129

The production of food and fiber by our nation's farmers is often dependent on using herbicides to control weed growth that can reduce crop yields. After several decades of herbicide usage, some weed species developed resistance to glyphosate and were decreasing yields. Seed and pesticide manufacturers responded to weed resistance by developing genetically engineered soybean and cotton seeds and specially formulated over-the-top (OTT) dicamba products. Commencing in 2017, OTT dicamba products were used to successfully kill glyphosate-resistant weeds. However, dicamba is a volatile herbicide, and applications of the new OTT products were accompanied by spray drift and volatilization that injured offsite vegetation, including non-dicamba-resistant soybeans. In the *National Family Farm Coalition v. Environmental Protection Agency* lawsuit, the Ninth Circuit found that the Environmental Protection Agency (EPA) had understated some of the products' risks and failed to acknowledge other risks. An analysis of 2020 OTT dicamba registrations supports a conclusion that the EPA again failed to adequately account for the costs associated with the use of the OTT products.

This Article proposes a government-sponsored dicamba compensation program to insure neighboring property owners who suffer injuries from dicamba spray applications. The program would collect occupational fees from persons purchasing dicamba products and place the monies in a fund that would be used to compensate proven offsite dicamba damages. By compensating property owners for the destruction of property rights, the program places injury costs on applicators. Such a program would acknowledge property owners' right to exclude harmful pesticides from their properties and provide an alternative to litigation, thereby reducing tensions between applicators and community members.

STEP-PARENT AS FIDUCIARY

Ruth Zafran 1183

Does a step-parent have any obligations toward the non-resident legal parent of the child? To date, the law has been silent on this point, and the scholarship has paid little, if any, attention to it. This Article argues that the conceptual framework of fiduciary enables us to recognize, both conceptually and legally,

the relationship between the step-parent and the non-resident legal parent (who, generally speaking, spends less time with the child on a day-to-day basis). The aim of this fiduciary duty is to protect the more vulnerable party (in this specific context, the non-resident legal parent) from the more powerful one (the step-parent) and to safeguard important social and familial interests, including cooperation between family members and mutual respect between them. Up until now, efforts have been made to give proper acknowledgment to the standing of the emotional and meaningful relations forged between children and their step-parents, but almost no attention has been given to the relations between the step-parent and the non-resident legal parent. This Article joins a strand of scholarship that brings fiduciary to the field of family law, adding, for the first time, a new dimension by dealing with the special relationship between the step-parent and the non-resident legal parent.

In Part I of the Article, I present the relationship between the step-parent and the non-resident legal parent, reveal the lack of its consistent regulation, and analyze the difficulties caused by this lacuna by highlighting the shortcomings of potential approaches currently found in case law. In Part II, I lay out the conceptual infrastructure that I am proposing as a fit-for-purpose response to the complexities of this relationship. I broadly explain the notion of fiduciary in private law and consider the role it has, or may have, in the family context, especially vis-à-vis the step-parent–non-resident parent relationship. In Part III, I present two case studies and discuss them in the context of the conceptual infrastructure offered by fiduciary law. Part IV demonstrates the application of the conceptual infrastructure offered by fiduciary law and provides the preliminary doctrinal output of my proposed framework.

ESSAY

SOCIAL MEDIA, SECURITIES MARKETS, AND THE PHENOMENON OF EXPRESSIVE TRADING

John P. Anderson, Jeremy Kidd, and George A. Mocsary.....1223

A new category of retail stock trader has emerged: the "expressive" trader. An expressive trader is not motivated by profit alone, but trades as a form of social protest, political speech, or aesthetic expression. GameStop's meteoric surge in price in January 2021 revealed the power expressive traders can exert on the market. This Essay explores the phenomenon of expressive trading and its implications for issuers, markets, and regulators. The Essay sets forth potential defensive measures available to issuers against the consequences of expressive trading, and cautions regulators against hasty action to address expressive trading.

NOTES & COMMENTS

SOUTH AFRICA'S REFORMED INVESTMENT REGIME AS A MODEL FOR DEVELOPING COUNTRIES

John Mayer.....1247

Beginning in 2012, South Africa decided to unilaterally terminate many Bilateral Investment Treaties (BITs) with European countries—this represented a departure from the 1990s, where South Africa, like many other developing countries, entered into BITs with wealthy, capital-exporting states in the hopes of attracting foreign direct investment. In 2015, South Africa enacted, in place

of the BITs, the Protection of Investment Act, designed to protect foreign investors while also providing the state more freedom to regulate in the public interest. This Comment analyzes the history of South Africa's BIT policy, and argues that South Africa has suffered minimally, if at all, in terms of foreign investment. South Africa's approach could be used as a model for other developing countries. This Comment proposes conditions that other countries should meet to effectively follow the South Africa model.

USING ADAPTIVE GOVERNANCE TO PROTECT OREGON'S WATER RESOURCES

Lauren Butz 1281

Over 30 years ago, Oregon adopted the innovative In-Stream Water Rights Act, which introduced new regulatory tools and incentives for encouraging efficient water consumption, and paved the way for the emergence of water trusts. However, Oregon's water resources are under increasing strain as the state faces the challenges of over-appropriation and climate change. New solutions are needed to augment the existing regulatory framework. This Comment draws on the principles of adaptive governance and ecological resilience to formulate possible legal solutions to help the state adapt to increasing demands for water, proposing that Oregon leverage corporate social responsibility to encourage investments in water trusts; implement mandatory corporate water consumption disclosures; and use taxes to generate revenue for acquiring instream water rights.

TITLE IX ABROAD: A PROPOSED FRAMEWORK FOR EXTRATERRITORIAL APPLICATION

Christina Vieira da Rosa 1317

Regulatory changes to Title IX made clear that the statute's sexual assault grievance procedures do not apply to incidents that take place outside the United States. This Comment explores the reasoning underlying these 2020 regulations, which signal a departure from prior interpretations of Title IX and limit recourse for U.S. students who are sexually assaulted while studying abroad. Ultimately, this Comment argues that Title IX should have an extraterritorial reach when both complainant and respondent are affiliated with U.S. institutions. Such a change would harmonize Title IX's underlying purpose with the practical difficulties of investigating and adjudicating conduct occurring outside of the United States.

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