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ARTICLES

Outsourcing, Data Insourcing, and the Irrelevant Constitution *Kimberly N. Brown* 607

Long before revelations of the National Security Agency's data collection programs grabbed headlines, scholars and the press decried the burgeoning harms to privacy that metadata mining and new surveillance technologies present. Through publicly accessible social media sites, web-tracking technologies, private data mining consolidators, and its own databases, the government is just a mouse click away from a wealth of intimate personal information that was virtually inaccessible only a decade ago. At the heart of the conundrum is the government's ability to source an unprecedented amount of personal data from private third parties. This trail of digital information is being insourced into government coffers with no constitutional accountability—much like governmental powers are being outsourced to private contractors without constitutional restraint.

These phenomena reveal a troubling trend: the diminishment of the Constitution's relevance when the government works in tandem with third parties. Outmoded Fourth Amendment doctrine offers no pathway around this problem. Nor has legislation kept apace with technological advancements to forestall abuses before they occur. Moreover, the primary theories for challenging the private exercise of public power—the private delegation and state action doctrines—rarely persuade modern courts.

Rather than focusing on the privacy aspects of big data, this Article proceeds from the standpoint of the structural Constitution, and reframes existing doctrines for rendering the government constitutionally accountable for actions taken through a third party, on the theory that exclusive reliance on the political branches for the protection of individual privacy rights in the age of big data is insufficient.

The Sixth Commissioner *Nadelle Grossman* 693

The federal securities laws grant broad rulemaking authority to the Securities and Exchange Commission (SEC). In promulgating rules, the SEC must not only ensure that its rules protect investors and the public interest, but also consider the effects of its rules on efficiency, competition, and capital formation (the ECCF mandate).

However, the SEC's rulemaking authority has been frustrated. In two decisions striking down SEC rules, the D.C. Circuit has required the SEC to conduct a quantitative cost-benefit analysis under the ECCF mandate. This contrasts with the SEC's historic practice of qualitatively assessing the effects of its rules.

While these D.C. Circuit decisions have been criticized for applying an inappropriately high standard of review to SEC rulemaking, this Article identifies a more fundamental problem with these decisions: they interfere with the SEC's power to administer the securities laws. This interference frustrates administrative law principles that lie at the heart of the division of power among the three branches of government.

Requiring the SEC to engage in a quantitative analysis in rulemaking is especially troubling in a context where the SEC must pass numerous rules under the Dodd-Frank and JOBS Acts. These analyses will surely fail to capture the unquantifiable effects of SEC rules, such as their effect on firm wealth-creating strategic management processes. For these reasons, this Article urges the SEC to exert its authority under securities laws and issue an explicit interpretation of the ECCF mandate in a way that best captures the full impact of its rules.

Visualizing Change in Administrative Law *Aaron L. Nielson* 757

Although few realize it, the structure of administrative law has not changed much in two decades. Unlike past eras of upheaval, the key statutes, institutions, and judicial doctrines that defined administrative law in the early 1990s remain remarkably intact today. Administrative law's complexity, however, makes it difficult to see the big picture. This Article addresses that complexity by introducing a new visual framework. This framework has two principal benefits. First, it illustrates how administrative law's many parts fit together and

shows that the field has been in a holding pattern for a long time. Second, it also allows scholars to better predict future regulatory evolution. Indeed, by applying this new framework, it appears that at least three dynamics may change today's administrative law: Partisan Escalation, Regulatory Competence, and New Protectionism.

NOTES

- (Don't) Give It Up or Turnit A Loose: State Law Copyright Protection of Pre-1972 Sound Recordings in Blank-Slate Jurisdictions Like Georgia *Payton McCurry Bradford* 819

The issue of pre-1972 sound recordings—devoid of federal copyright protection—has emerged as an important legal issue with changes in how musicians are collecting royalties for music. Sound recordings have a complicated and fragmented history under United States copyright law. While recognized as a separate form of creative work from musical compositions since the early twentieth century, they nonetheless remained unprotected as separate works under federal law until 1972. Any sound recordings fixed prior to February 15, 1972, however, remain unprotected under federal law and are subject to common law copyright or state statutes. A majority of states, including Georgia, lack statutes and a body of common law that could adequately guide courts on what rights exist in these pre-1972 sound recordings, if any. This Note will evaluate the historical distinction between musical compositions and sound recordings under copyright law before turning to a survey of three state law approaches to sound recordings: New York common law, North Carolina statutory law, and California statutory law. This Note will ultimately conclude that the most legally sound approach for states like Georgia is to adopt a statute comparable to the California statute on pre-1972 sound recordings.

- Proper Pleading or Premature Proof? Rule 9(b)'s Particularity Requirement and the False Claims Act *Fisher K. Law* 855

Many taxpayer dollars are paid to private contractors supplying goods and services necessary to carry out federal programs in areas like healthcare, defense, and education.

These private contractors profit heavily from their dealings with the federal government, but unfortunately not all of these contractors are so patriotic. Indeed, some steal from the treasury by invoicing goods or services they did not actually provide.

Congress attempted to reel in this dishonest practice with its enactment of the False Claims Act during the Civil War. To supplement the enforcement effort of the Department of Justice, Congress included a qui tam provision allowing private citizens to sue fraudsters on behalf of the United States. As an anti-fraud statute, the issue regarding the necessary form of pleadings under Federal Rules of Civil Procedure 8 and 9 naturally arose as dispositive motions were argued on the grounds of insufficient “particularity.”

This Note examines the background of the False Claims Act, the purpose of notice pleading under the Federal Rules of Civil Procedure, and the current circuit split regarding the interpretation of “particularity.” Then, it will argue that a strict interpretation is inconsistent with notice pleading and fails to supplement the Act by requiring hard to access documentation too early in the litigation. Finally, it will propose that a more lenient interpretation sufficiently serves the purposes of notice pleadings while more effectively supplementing the DOJ’s effort.

**Intentional Pass: Analyzing Baseball’s
Antitrust Exemption as Applied to
Broadcasting Agreements in**

Laumann v. National Hockey League.....Jacob M. Ware 895

For more than a half-century, Major League Baseball’s exemption from antitrust laws has intrigued sports fans and legal scholars alike. It seems only fitting that America’s pastime would have an exemption with origins as mysterious and debated as the sport itself. Created by the Supreme Court and reinforced by Congress, the “baseball exemption” in the modern era continues to generate litigation. Like an umpire determining whether a baseball is fair or foul, courts today must judge the boundaries of baseball’s exemption.

Major League Baseball’s owners may benefit from the exemption, but its fans often pay the price. The League has divided the United States into different geographic

television markets, which makes it more difficult for fans to watch out-of-market broadcasts. Upset over this policy, fans sued Major League Baseball in 2012 and alleged its broadcast policy unreasonably restrains trade, in violation of antitrust laws. In August of 2014, Judge Shira Scheindlin, in the Southern District of New York, denied Major League Baseball's motion for summary judgment.

To the detriment of baseball fans, this Note argues that baseball broadcasting falls within the broad "business of baseball" exemption to antitrust laws. This Note provides an overview of the baseball exemption, including its origins and developments in the judicial system. It also analyzes and challenges Judge Scheindlin's view of the exemption. As technology develops, litigation over the exemption will involve baseball activities, like broadcasting, that could have never been imagined when the exemption was first enacted, so understanding its boundaries is critical.

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