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Digital Medicine, the FDA, and the First Amendment.....*Adam Candeub* 933

Digital medicine might transform healthcare more fundamentally than the introduction of anesthesia or germ basis theory of disease. Already, tens of thousands of "medical apps" are available for smartphones. These computer applications can measure blood pressure, pulse, lung function, oxygenation level, sugar level, breathing rate and body temperature—and can even diagnose skin cancer, analyze urine, and take an echocardiogram.

In fall 2013, the Federal Drug Administration (FDA) asserted regulatory authority over mobile medical applications and other digital medical services, threatening to chill, if not, destroy this innovation. This Article argues that the FDA stands on firm legal ground regulating medical devices that invasively measure bodily functions or take physical specimens.

On the other hand, the FDA's exercise of jurisdiction over applications that simply process information, or use approved medical devices to provide medical information, like 23andMe, a genome analysis firm against which the FDA brought enforcement proceedings, raise legal concerns. In particular, because these medical applications simply process information, the First Amendment places them beyond the FDA's regulatory reach.

This Article adds to the debate on the First Amendment, information and computer code. Building on recent Supreme Court decisions, this Article shows how code and applications that create healthcare information are protected speech. Given digital applications' capacity to produce pools of data that researchers can mine for clinical and epidemiological insights and given government funding of medical services, healthcare data

and production are scientific and political speech, deserving of full First Amendment protection.

Our Constitutional Commons ..... *Brigham Daniels* 995
Blake Hudson

While much has been written about the U.S. Constitution, very little if anything at all, has been said about the ways in which the Constitution shares attributes with the commons. This Article examines the Constitution and the efforts to influence the shape and scope of its application through the lenses developed by scholars for assessing both common good and public good resources. Focusing on these interrelated lenses provides a unique perspective on both the U.S. Constitution and those attempting to influence its text and its interpretation. The synergy and interaction between the common good and public good dimensions of the Constitution not only provide a more holistic understanding of its institutional design and mode of operation, but also provide new insights into the potential damage future constitutional conflicts may cause to the stability and strength of the U.S. Constitution and how that damage may be avoided.

Structural Tax Exceptionalism ..... *James M. Puckett* 1067

Following the Supreme Court's landmark decision in Mayo Foundation for Medical Education and Research v. United States, *many scholars of tax law have declared that* Mayo *marks the death of tax exceptionalism. The tax exceptionalist view holds that because tax is different or special, generally applicable administrative law procedural rules and doctrines do not apply in the tax context. In* Mayo, *however, the Supreme Court held that generally applicable administrative law rules and doctrines do apply to the Treasury Department and the IRS. Contrary to the prevailing narrative that proclaims the death of tax exceptionalism, this Article posits that the reports of the death of tax exceptionalism are significantly exaggerated.*

Although it is certainly true that the Mayo *Court rejected a tax-specific approach to administrative review, important aspects of tax procedure depart significantly from the standard template that Congress usually deploys to govern administrative action. For example, the Internal Revenue Code provides special rules for tax rulemaking as*

well as adjudication of tax controversies. The existing literature generally has examined these departures from the Administrative Procedure Act's template largely in isolation from one another. This Article, in contrast, explores such tax-exceptional features as an interlocking whole and posits that the unique structural features of tax administration revive tax exceptionalism as a practical matter.

Moreover, these departures arguably serve important policy goals. The Code's relatively flexible approach to rulemaking, including a grant of retroactive rulemaking authority, helps the Treasury Department and the IRS provide taxpayers with the guidance that they need, prevent abuse, and treat similarly situated taxpayers equally; while the Code's relatively ungenerous approach toward IRS fact finding affords taxpayers greater opportunity for individualized justice in court that reinforces taxpayer morale. In sum, though tax exceptionalism may technically be dead, the reality is much more complicated, and the tradeoffs of structural tax exceptionalism should not lightly be rejected.

NOTES

Laissez *Fair*: The Case for Alternative Litigation Funding and Assignment of Lawsuit Proceeds in Georgia ..... *David Tyler Adams* 1121

This Note discusses the value of alternative litigation funding (ALF) and the legal challenges affecting the ALF industry in Georgia. More specifically, it identifies a way to maximize ALF's benefits for plaintiffs with personal tort and employment discrimination claims. Tort victims who are rendered incapable of working, and employees who have lost jobs because of workplace discrimination or retaliation, face immediate financial burdens—they may be unable to afford food, housing, health care, transportation, and other necessities. This economic pressure often forces plaintiffs to settle quickly for less than the value of the harm inflicted. But ALF companies offer a workable solution to this problem by providing financial backing to plaintiffs in exchange for a stake in any eventual recovery. This support gives plaintiffs the economic stability to adequately pursue their claims.

However, Georgia inhibits ALF through the doctrine of champerty and prohibitions on the assignability of legal claims. ALF companies are barred from contracting for a share of plaintiffs' potential recovery. Consequently, ALF contracts in Georgia are only enforceable when they are structured in ways that more closely resemble high interest loans. These fee arrangements are complex and inefficient; they involve unrestricted interest charges and, in short, provide more opportunities for abuse of consumer borrowers. To resolve these problems and facilitate socially useful development of ALF, the Note recommends that Georgia (1) ban interest bearing lawsuit loans, (2) repeal the law against champerty, and (3) legalize assignment of proceeds from lawsuits for personal torts and employment discrimination.

Without a Pilot: Navigating the Space
Between the First Amendment and
State and Federal Directives
Affecting Drone Journalism ..... *Leah Marie Davis* 1159

A new player in American airspace, the drone, creates greater opportunities for newsgathering. But with new opportunities, come new rules. Current legislatures, regulators and courts face the challenge of creating and enforcing a legal framework by which this new technology can be integrated into American airspace. The debate surrounding proper drone directives is influenced by competing policies of privacy, security, and First Amendment concerns.

This Note surveys past and present state and federal directives on drone use, and argues for the creation of a separate set of guidelines for Press drones. Separate directives would ensure that news outlets are able to utilize innovative drone technology to promote their societal goals: informing the public and acting as a check on government. Beyond these public goods, the implications of the inclusion of the Press Clause in the First Amendment, suggests that severe restriction on Press newsgathering could beg a First Amendment violation.

In the wake of First Amendment challenges over state drone laws and FAA directives, this Note suggests several practical ways in which legislators and regulators can walk the fine line between American privacy, and

violating the First Amendment right of the Press to gather news. These proposals include narrowing the definition of the Press, implementing a credential system to determine who will be considered part of the Press and finally, encouraging press pooling over dangerous or public areas. Distinct drone laws for the Press and the public could avoid First Amendment violations, and stand the test of time.

Dangers in Justifying A Means for an End:
U.S. Supreme Court Faces Risky Interpretation
Question with PPACA, Exchanges, and
Premium Tax Credits ..... *Erin Michelle Peterson* 1193

This Note examines the text of the Patent Protection and Affordable Care Act to determine whether Congress intended for premium tax credits to be available on only *state Exchanges, or on* both *state and federal Exchanges. This Note argues that strict textualism reveals that Congress clearly intended to limit premium tax credits to what the text defines as "an Exchange established by the State under section 1311 of the Patent Protection and Affordable Care Act," which does not include federal Exchanges.*

However, this interpretation of the text nearly eliminates an essential function of the Patent Protection and Affordable Care Act because all qualified individuals governed under the authority of federal Exchanges would lose access to premium tax credits. This drastic consequence of millions of Americans losing access to affordable healthcare has made this strict interpretation highly unpopular and a major political question within the federal courts. This Note argues why these courts should emphasize the use of strict textualism when faced with highly political interpretation questions, as the interpretation device prevents biased judges from unlawfully rewriting otherwise unambiguous legislation.

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