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I respond to Steve Bainbridge's critique of my 2005 Yale Law Journal essay, Minorities, Shareholder and Otherwise. My essay made two novel claims: that corporate law places protection of minority shareholders at the heart of its endeavor; and that this minority-mindfulness should have even greater purchase in constitutional contexts. In his new paper, Bainbridge challenges my account of corporate law's solicitude for minority shareholders, suggesting that corporate law does not practice affirmative action for minority shareholders.

I rebut Bainbridge's case analysis, demonstrating that the cases show clear judicial succor for minority (by which I mean non-controlling) shareholders. The overarching explanation for judicial action in corporate law matters can generally be found in the simple goal of protecting minority shareholders. Unlike current constitutional jurisprudence, then, corporate law does not embrace minority-blindness. Because of, or despite, a legal framework

attentive to the most vulnerable among those contributing capital, corporations have proven to be remarkably successful forms of enterprise. Ultimately, I hope to spur the thought that human organizational forms stand to learn much from each other.

"How Racial Profiling in America Became the 'Law of the Land': United States v. Brignoni-Ponce and Whren v. United States and the Need for Rebellious Lawyering"

Georgetown Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 174

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It may seem surprising to most readers but racial profiling in law enforcement has long been permitted, if not expressly authorized, by U.S. constitutional law. This is true despite the civil rights revolution of the 1950s and 1960s and the generally positive trajectory of racial progress in the United States over the last century. Indeed, in two major post-civil rights movement decisions that are the subject of this Essay, the U.S. Supreme Court has affirmatively contributed to the predominance of racial profiling in law enforcement in modern America.

Persistent accusations of race-based ordinary criminal law enforcement, and specifically in traffic stops, have long plagued the United States. The Supreme Court declined to address the problem head on when given the opportunity in the 1996 case of Whren v. United States, which effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on race. Indeed, as we shall see, the Court's decision in that case made legal challenges to profiling more, not less, difficult, thereby implicitly encouraging police officers to rely on racial profiles in law enforcement.

Although racial profiling in ordinary criminal law enforcement receives the bulk of public scrutiny and scholarly commentary, the practice has had a much broader and deeper reach into modern law enforcement. Border enforcement officers have long employed crude racial profiles, which almost invariably include undefined "Mexican appearance," in making immigration (as well as drug) stops. Such profiles are used not just at the U.S./Mexico border but miles away from any port of entry. As is the case for traffic stops, the Supreme Court has sanctioned racial profiling in immigration enforcement. Indeed, more than two decades before Whren, the Court in 1975 in United States v. Brignoni-Ponce expressly sanctioned precisely this sort of profiling, so long as "Mexican appearance" was only one of many factors relied upon by authorities in making an immigration stop. Evidence unfortunately suggests that the Border Patrol today persistently relies unduly on race in targeting particular groups for stops.

Although decided over two decades apart, United States v. Brignoni-Ponce (1975) and Whren v. United States (1996) are cut from the same cloth. With little apparent concern for the consequences on minority communities, both decisions in effect allow racial profiling by law enforcement officers to go largely unchecked. As a result, both in effect tacitly encouraged - and encourage to this day - racial profiling in law enforcement.

To shed light on the emergence of the dominance of role in modern law enforcement, this Essay carefully situates Brignoni-Ponce and Whren in their proper historical contexts and dissects the litigation in those cases to show how and why the defense strategy failed to root out race-conscious law enforcement. It further analyzes how both Supreme Court decisions together operate in practice to effectively contribute to the problem of racial profiling in modern American social life.

When carefully considered, we see that Brignoni-Ponce and Whren aptly illustrate the difficult challenges facing lawyers seeking to bring about social change and racial justice. Gerald López popularized the concept of "rebellious lawyering," as a way of empowering poor clients through grassroots advocacy facilitated by lawyers. Others have sought to import those teachings to immigration and related fields. The idea is for lawyers to bring about social change while at the same time empowering the subordinated who can be their own advocates in future struggles. The important scholarship of Anthony Alfieri has offered much to this analysis, especially in considering the role of client identity in the strategies of poverty lawyers seeking to promote social change.

The work of the attorneys in the trenches in Brignoni-Ponce and Whren demonstrate the importance of litigation in seeking to confront racial subordination while also showing the importance of avoiding exclusive reliance on litigation but combining it with political strategies to bring about social change. Attorneys aggressively battled the state's reliance on race in both cases, only to be rebuffed in different - but both perfectly legal - ways. Stories of real lives of real people got lost in the shuffle of legalities. The potential solution, while possible through the courts, was more likely through the political process, by using political action to focus attention on the real life impacts of race-based law enforcement measures.

Part I of this Essay carefully studies Brignoni-Ponce v. United States, which perhaps inadvertently has encouraged the excessive and undue reliance on race in immigration enforcement by bestowing great discretion on the Border Patrol to make stops and specifically permitting them to consider a vague, and quite crude, identifier - "Mexican appearance" - in making an immigration stop. Part II considers Whren v. United States, which effectively immunized racial profiling by police on the streets and highways of America from sanction under the Fourth Amendment and offered a toothless Equal Protection remedy in return. The Essay concludes, by contending that,

to truly root out racial profiling from law enforcement, the law must impose limits on the consideration of race in law enforcement, restrict law enforcement discretion in making stops, and afford a meaningful remedy for impermissible stops. To maximize the potential of doing this, lawyers need to advocate for racial justice in the political arena as well as in the courts.

"A Primer on Tax Work Product for Federal Courts"

Tax Notes, Vol. 123, p. 875, May 18, 2009
UC Davis Legal Studies Research Paper No. 176

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This article discusses the application of the work product doctrine in the tax context. It provides an overview of the burdens that an applicant seeking immunity for its tax materials must meet as well as the procedures used by courts to verify an applicant's claim for a privilege traditionally reserved for documents prepared with an objectively reasonable anticipation of litigation in mind. Moreover, it roots the discussion in the primary question currently before the en banc First Circuit in the closely watched case, United States v. Textron: Are a company's tax accrual workpapers protected from discovery under the work product doctrine?

The article concludes that tax accrual workpapers never qualify as protected work product. Corporate taxpayers create these documents to comply with federal securities law, not because of future litigation. Workpapers may discuss the prospect of future litigation or contain analyses that later become the subject of litigation. But the appearance of those discussions and analyses in documents created exclusively for regulatory purposes does not transform the documents into materials created in anticipation of litigation. And it certainly does not transform them into materials created in objectively reasonable anticipation of litigation as required by the work product doctrine. Indeed, in the event an applicant or a court attempts to justify turning regulatory documents into litigation documents, it must face the attenuated temporal connection between preparation of workpapers and future litigation. In combination with the many dispute resolution procedures available to taxpayers and the government, anticipating litigation when preparing workpapers is distinctly unreasonable both as a matter of logic and mathematical probability.

"Toward a Distributive Commons in Patent Law"

Wisconsin Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 177

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Patents both promote the development of health technologies as well as constrain access to them. Access constraints on patented medicines, diagnostics, and agricultural innovations can severely compromise human health, particularly for low-income populations. To help address this challenge, this Article explores mechanisms for integrating distributive safeguards in the patent system in a manner consistent with strong property rights and private ordering. Finding existing patent doctrine inadequate, this Article examines solutions arising from the developmental histories of particular health technologies. In particular, this Article argues that public institutions, which contribute enormous amounts of "scientific capital" - money, labor, and bodily materials - to life sciences research and development, can effectively leverage these contributions to enhance access to downstream patented technologies.

By providing vital capital, government, academic, and nonprofit entities both weaken the economic need for exclusive rights as well as obtain limited co-ownership stakes in resulting inventions. By exercising this leverage, public institutions are helping to create a "distributive commons" that enhances access to patented health technologies for low-income populations. This Article surveys existing practices, providing prescriptions to address the chilling effects and technical competence concerns that undermine distributive efforts. It concludes by challenging prevailing theoretical preferences for individual rather than communal ownership of property, highlighting the advantages of public-private co-ownership of nonrival resources.

"Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond"

Ohio State Law Journal, Vol. 70, No. 563, 2009
UC Davis Legal Studies Research Paper No. 178

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In a number of recent cases, litigants have argued that states have the authority to disregard prior parentage adjudications when those determinations violate the forum's law and policy on lesbian and gay parenting. The Article offers two contributions to the analysis of these interstate parentage cases. The first contribution is doctrinal. Drawing upon recent legal scholarship about interstate recognition of adoption judgments, the Article demonstrates that other forms of parentage adjudications, including those made in the context of otherwise

modifiable orders such as child custody and support orders, are entitled to exacting respect under the Full Faith and Credit Clause.

The second contribution is normative. Thus far, the scholarship on these interstate parentage cases has been limited largely to consideration of their implications for other same-sex parent families. Lesbian and gay parenting is not, however, the only area of parentage law where the states have adopted widely divergent rules based on moral or policy concerns. To the contrary, parentage has become an increasingly contested area of law. This Article seeks to fill the gap in the literature by considering the potential ripple effects of these same-sex parent cases in two other areas of parentage law - surrogacy and paternity disestablishment.

"Eggs as Capital: Human Egg Procurement in the Fertility Industry and the Stem Cell Research Enterprise"

Signs: Journal of Women in Culture and Society, Vol. 34, p. 763, 2009
UC Davis Legal Studies Research Paper No. 179

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The fertility industry and the stem cell research enterprise are treated at law and in discourse as separate activities. Yet, eggs and embryos bind them. They are the raw materials of production for both activities. This article examines the medical and commercial practices that form the process of procuring human eggs for use in the fertility industry and research enterprise. It also provides discursive analysis of the regulatory debates and the accompanying narrative explanations. The examination reveals that it is not just the corporeal egg, but its transformation into biocapital as a result of its use in activity that combines biomedicine and capitalism. The article then turns to the more specific regulatory debate about egg procurement for research. It suggests that the regulatory critics, in particular, deploy an assumption that extrinsic and intrinsic values cannot coexist. While that captures the fears of regulatory supporters, as well, the regulatory proposals suggest a starting point for negotiating shared space for the commercial as well as human aspects of egg procurement.

"Recent Developments in Federal Income Taxation: The Year 2008"

Florida Tax Review, Vol. 9, No. 275, 2009
UC Davis Legal Studies Research Paper No. 180

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This article discusses, and provides context to understand the significance of, the most important judicial decisions and administrative rulings and regulations promulgated by the Internal Revenue Service and Treasury Department during 2008 - and sometimes a little farther back in time if the authors find the item particularly humorous or outrageous. Most Treasury Regulations, however, are so complex that they cannot be discussed in detail and, anyway, only a devout masochist would read them all the way through; just the basic topic and fundamental principles are highlighted. Amendments to the Internal Revenue Code generally are discussed to the extent that (1) they are of major significance, (2) they have led to administrative rulings and regulations, or (3) they have affected previously issued rulings and regulations otherwise covered by the outline. The outline focuses primarily on topics of broad general interest - income tax accounting rules, determination of gross income, allowable deductions, treatment of capital gains and losses, corporate and partnership taxation, exempt organizations, and procedure and penalties. It deals summarily with qualified pension and profit sharing plans, and generally does not deal with international taxation or specialized industries, such as banking, insurance, and financial services.

"Corporate Governance Convergence: Lessons from the Indian Experience"

Northwestern Journal of International Law & Business, Vol. 29, No. 2, 2009
UC Davis Legal Studies Research Paper No. 181

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Over the past two decades, corporate governance reforms have emerged as a central focus of corporate law in countries across the development spectrum. Various legal scholars studying these reform efforts have engaged in a vigorous debate about whether globalization will lead to convergence of corporate governance laws toward one model of governance: namely the Anglo-American, dispersed shareholder model, or whether existing national characteristics will thwart convergence. Despite rapid economic growth and reforms in developing countries such as India, the legal literature discussing this debate primarily focuses on developed economies.

This Article examines recent corporate governance reforms in India as a case study for evaluating the competing claims on global convergence of corporate governance standards currently polarizing the field of corporate law.

This Article seeks to make a fresh contribution to the convergence debate by examining the implications of India's corporate governance reform efforts. It contends that the Indian experience demonstrates that traditional theories predicting convergence, or a lack thereof, fail to fully capture the trajectory of actual corporate governance reforms. India's reform efforts demonstrate that while corporate governance rules may converge on a formal level with Anglo-American corporate governance norms, local characteristics tend to prevent reforms from being more than merely formal. India's inability to effectively implement and enforce its extensive new rules corroborates the argument that comprehensive convergence is limited, and that the transmission of ideas from one system to another is highly complex and difficult, requiring political, social and institutional changes that cannot be made easily.

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