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"Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming"

Arizona Law Review, Forthcoming

UC Davis Legal Studies Research Paper No. 144

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Discussion of policy approaches to reducing greenhouse gas emissions currently centers on emission trading, virtually to the exclusion of all other options. While trading has a place in the policy portfolio needed to mitigate global warming, it alone will not be sufficient to solve the problem. Emission trading has lowered the costs of achieving certain other air pollution goals, such as reducing acid-rain - causing emissions from power plants, but those problems were much different than global warming. Reducing greenhouse gas emissions enough to prevent harmful climate change will require both changes in individual behavior and the development and diffusion of new technologies. Emission markets to date have not produced either behavioral changes or technological innovation. In the United States, although the Clean Air Act is not a perfect fit for the problem of climate change, its cooperative federalism framework can help fill the gaps left by an emission trading strategy. A mandate, modeled on the Clean Air Act's State Implementation Plan program, that states inventory emission sources and meet emission reduction targets is better suited than markets to motivate behavioral change. Technology-based regulation, with minimum standards set at the federal level but one or more states allowed to impose more stringent standards, can better drive innovation. In crafting federal climate change legislation, Congress should look to better tailor these elements of the Clean Air Act to the greenhouse gas problem, rather than tossing them

out in favor of a strictly market-based or preemptive federal regulatory approach.

"Minorities, Immigrants and Otherwise"

Yale Law Journal, Forthcoming
UC Davis Legal Studies Research Paper No. 148

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Anupam Chander's article *Minorities, Shareholders and Otherwise* 113 YALE L.J. 119 (2003), brilliantly offers a "conservative" justification for a U.S. constitutional law truly dedicated to fairness and justice for all. It does so through counter-intuitively looking to the bottom-line oriented world of corporate law. As Chander explains, modern constitutional law, which in effect ignores the racially discriminatory outcomes of facially neutral laws, has much to learn from corporate law, which strives to ensure fair outcomes - as well as procedures - for minority shareholders.

This commentary offers a most powerful example of the gulf between constitutional law and corporate law identified by Professor Chander. Modern constitutional law affords no meaningful substantive protection to immigrants to the United States. The Supreme Court has consistently held that the political branches of the U.S. government possess "plenary power" over immigration and the courts lacks the power to review the substantive constitutionality of the immigration laws. The "plenary power" doctrine in operation serves as a bulwark of inequality for immigrants to the United States.

"Evangelizing Climate Change"

UC Davis Legal Studies Research Paper No. 145

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Any effective response to climate change must address greenhouse gas (GHG) emissions from individuals, who are responsible for nearly one-third of total annual emissions. A leading proposal for doing so, developed by Michael Vandenberg and Anne Steinemann, advocates the disclosure of information about an individual's emissions, resulting harms, and steps that can be taken to reduce emissions. Providing information on individuals' contribution to climate change will be important in countering common misconceptions that individual activities do not matter to the environment. Such proposals, however, give insufficient attention to the role of personal values. Values matter to efforts to change individual behavior in at least two important ways. First, values underlie beliefs and norms, providing motivations for behavior. Because behavioral norms such as environmental protection are far from universal, efforts to change behavior will have to operate at a deeper level and tap into altruism and other values. Second, values influence how individuals process risk-related information. Efforts to provide individuals with information about GHG emissions and climate change must account for the effect of values on risk perception. This Article proposes a climate change strategy that accounts for the role of values in behavior and examines steps for motivating changes within a particular community, American evangelicals. The suggested steps are patterned after evangelical techniques, which in turn can inform efforts to achieve behavioral change in the broader public.

"Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach"

University of Illinois Law Review, Forthcoming
UC Davis Legal Studies Research Paper No. 146

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Few are unaware that the Tax Code and Regulations provide a detailed, complex (and lengthy) set of rules. It is hardly surprising (or new) that taxpayers attempt to avoid these rules to lower their taxes. Courts and lawmakers have long grappled to identify abusive transactions and strip taxpayers of the associated tax savings. The transactions have, however, changed dramatically over the last decade making the task much more challenging. The rapid proliferation of aggressive and diverse tax shelters has created what many refer to as a tax shelter war. In general, tax shelters refer to transactions carefully designed to fit within the letter of the law to derive benefits unintended by those sections. Courts, however, do not inquire directly into purpose when analyzing tax shelters but instead rely on traditional anti-abuse tests. These tests are outdated and insufficient to curb current tax shelters. Even those that defend these tests admit that they supply neither a necessary nor sufficient basis for denying tax benefits. Scholars defend the usage of these tests believing a viable alternative to be lacking. This Article attempts to fill this gap and develops an alternative test, which inquires directly into the purposes of the tax laws to address abuse directly. After developing this test along with an extensive set of guidelines for analyzing tax provisions, the test is applied to three recent tax shelters to illustrate its advantages. Such a test is an essential weapon to compete in current and future tax shelter wars.

"Built-In Gain and Built-In Loss Property on Formation of a Partnership: An Exploration of the Grand Elegance of Partnership Capital Accounts"

Florida Tax Review, Forthcoming

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This article is a primer on the issues faced by partners in dealing with the consequences of built-in gain or loss property contributed to a partnership. The article explores the tax consequences of almost every aspect of the partnership treatment of built-in gain and loss property.

The use of properly maintained capital accounts to answer tax allocation questions is a principal focus of the article. The first part of the article discusses basic principles of partnership taxation that provide for the formation of partnerships and allocation of partnership book and tax items. A thorough understanding of these fundamental principles is a prerequisite to discussing the problems of built-in gain and loss property. Part II considers the problems raised by contributions of built-in gain property. The analysis demonstrates that recent proposed Treasury regulations regarding contributed built-in gain or loss property and partnership mergers in some circumstances create mischief by failing to fully address deferred recognition. Part III looks at the complexity that is added by the existence of debt in the partnership. Part IV addresses special problems created by built-in loss property, including the issues raised by section 704(c)(1)(C) enacted in 2004. The analysis in this part demonstrates the need for analyzing partnership capital accounts in order to apply the basis limitation of section 704(c)(1)(C)(ii) in the context of its statutory purpose and suggests an interpretation of section 704(c)(1)(C)(ii) in conjunction with optional basis adjustments that produces proper allocations of loss. Part V considers partnership allocations that occur on the admission of a new partner to a partnership with built-in gain and built-in loss property.

"Protecting Abusive Tax Avoidance"

UC Davis Legal Studies Research Paper No. 143
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In August 2007, a federal court in Rhode Island quashed an IRS summons seeking tax accrual workpapers pertaining to a taxpayer's investment in abusive tax shelters. The court held in *United States v. Textron* that the documents at issue were protected under the work-product doctrine, which immunizes from discovery documents prepared "in anticipation of litigation" so long as the prospect of litigation was "objectively reasonable" and the documents would not have been prepared "in substantially the same manner" irrespective of the anticipated litigation. The government has appealed the decision.

This Article argues that tax accrual workpapers never deserve work-product protection, because they are prepared for regulatory rather than for litigation purposes. It also argues that in preparing tax accrual workpapers, it is not objectively reasonable for a taxpayer to anticipate litigation, because the nexus between the two events is so attenuated and fraught with contingencies that one leads to the other only a fraction of the time. Indeed, applying work product in the tax context presents unique challenges for taxpayers, tax advisors, tax authorities, and courts, so much so that this Article suggests reforms to the work-product doctrine for non-litigation, regulatory proceedings.

If affirmed, *Textron* threatens effective tax enforcement. It expands the work-product doctrine beyond its historical role of protecting the adversarial process, and it swallows the attorney-client privilege, effectively cloaking from discovery not just all legal advice but all advice pertaining to potential litigation, no matter how attenuated. In addition, the decision protects precisely the kind of abusive tax avoidance that Congress and the Treasury Department have fought to root out and punish. In the end, the decision destroys the IRS summons power, prevents the IRS from performing its regulatory function of verifying a taxpayer's self-assessed liability, undermines recent anti-shelter efforts, and protects abusive tax avoidance.

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