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# Curbing Corporate Abuse From Jurisprudential Off-sites: Problematic Paradigms In *United States V. Textron Inc.*

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# Curbing Corporate Abuse from Jurisprudential Off-Sites: Problematic Paradigms in *United States v. Textron Inc.*

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## I. INTRODUCTION

In *United States v. Textron Inc.*,[1] the First Circuit Court of Appeals sought to reduce abusive tax shelters and thereby curb corporate social irresponsibility.[2] At the intersection of the work product doctrine and tax policy, the First Circuit located a jurisprudential site in which it could circumvent dominant views on the nature and purpose of firms[3] but also from which it may potentially intervene in future regulatory conflicts that involve corporate financial documents.[4] However, more significant than the First Circuit's endpoint is how it got there. The majority's rationale made its way erratically, hoping the ground would not shift, perhaps knowing that only its clumsy gait kept it on the move.

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1. 577 F.3d 21 (1st Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3320 (2010).

2. *Id.* at 31–32 (indicating that giving the IRS access to Textron's tax accrual workpapers "serves the legitimate, and important, function of detecting and disallowing abusive tax shelters").

3. *See infra* Part II.C.

4. Various critics of the First Circuit's decision have correctly noted that the majority's decision to create a stricter standard for the invocation of work product protection for dual purpose documents, *see Textron*, 577 F.3d at 31 (holding that Textron's tax accrual workpapers are not entitled to work product protection as a matter of law because they were not prepared *"for litigation"*) (emphasis added), may have far-reaching effects in the private and public sectors. *See id.* at 37–38 (Torruella, J., dissenting); Ronald L. Buch, *The Touch and Feel of Work Product*, TAX NOTES 915, 917 (Aug. 31, 2009) (noting that the First Circuit's "newly pronounced test for work product may likewise be applied to the IRS").

In *Textron*, various social, economic, and legal trajectories intersect, creating a unique example of judicial rehashing during a time of crisis—in the instant case, the financial crisis. During a four-year period,[5] spanning the overture and crescendo of the Great Recession of 2008,[6] Textron and the Internal Revenue Service (IRS) waged war over potential unpaid taxes that resulted from several sale-in, lease-out (SILO) transactions[7] Textron entered into from 1998 through 2001.[8] Textron's tax accrual workpapers[9] for its 2001 tax return became central to the IRS's ability to assess and collect taxes from Textron.[10] Consequently, Textron asserted that the IRS was not entitled to see its workpapers because they were protected by the attorney-client privilege, the tax-practitioner privilege, and, most importantly, by the work product doctrine.[11] It is important to note that what was at stake for the IRS—what the Service gains by the judiciary granting it access to a corporation's tax accrual workpapers—is a significant bargaining advantage in negotiations with the taxpayer.[12] Ultimately, the district court granted Textron's workpapers protection under the attorney-client privilege[13] and the work product doctrine.[14] The First Circuit en banc vacated the district court's decision, denying Textron's tax accrual workpapers protection under the work product doctrine as a matter of law.[15] Marshalling forth a rationale that stumbles along, the First Circuit

5. The IRS first issued a summons to Textron on June 2, 2005, for its tax accrual workpapers. *See* United States v. Textron Inc., 507 F. Supp. 2d 138, 147 (D.R.I. 2007), *vacated*, 577 F.3d 21 (1st Cir. 2009). The First Circuit rendered its en banc decision on August 13, 2009. *See Textron*, 577 F.3d at 21.

6. *See* Catherine Rampell, *'Great Recession': A Brief Etymology*, ECONOMIX (Mar. 11, 2009, 5:39 PM), http://economix.blogs.nytimes.com (providing a brief etymology of the phrase "Great Recession").

7. *See infra* notes 119–20 and accompanying text.

8. *Textron*, 577 F.3d at 23.

9. *See infra* Part II.B.

10. The First Circuit noted in *Textron* that:

> [T]he Supreme Court explained in *Arthur Young*, tax accrual workpapers provide a resource for the IRS, if the IRS can get access to them, by 'pinpoint[ing] the soft spots on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require payment of additional taxes' and providing 'an item-by-item analysis of the corporation's potential exposure to additional liability.

*Textron*, 577 F.3d at 23 (quoting United States v. Arthur Young & Co., 465 U.S. 805, 813 (1984)).

11. *Id.* at 24.

12. "Once the IRS [knows] which questionable positions a corporation took on its tax returns and how willing the corporation was to litigate those positions, there would be no real room for negotiation." Note, *Work Product*—United States v. Arthur Young & Co.—*A Work Product Privilege for Tax Accrual Workpapers*, 9 J. CORP. L. 126, 138 (1983).

13. *See* United States v. Textron Inc., 507 F. Supp. 2d 138, 147 (D.R.I. 2007).

14. *Id.* at 150–51.

15. *See Textron*, 577 F.3d at 30–31.

turned not only to the mystical, noting that tax accrual workpapers do not have the "touch and feel"[16] of work product, but also to notions of fairness, noting the inequity[17] of abusive tax shelters. From the First Circuit's summoning of tax policy[18] and its substantial deviation[19] from the prevailing view of the scope of work product protection afforded dual-purpose documents—specifically, tax accrual workpapers—emerges a potential jurisprudential space within which the judiciary can bypass dominant assumptions[20] regarding corporate law and corporate social responsibility. Moreover, it is a space from which the judiciary can emerge as a significant player in curbing corporate abuse. However, the First Circuit's opinion, perhaps, more effectively serves as a cautionary tale. If courts seek to take a more active role, then they must be sure to refine their analytical methods in the hopes of minimizing the collateral damage done to doctrines—like the work product privilege—that have a significant impact beyond the narrow context of any single dispute. If a court's determinations in times of crisis are to retain legitimacy and not be mere responses to the historical moment, then, at the very least, a court's proof must appear sound.

This note argues that the majority's opinion represents an intriguing but flawed judicial positioning within the current legal framework—a framework that must increasingly reckon with a social subtext that hums with questions about the ability of government to rein in corporate power and abuse.[21] Part II of this note presents an assessment of the underlying legal frameworks informing the First Circuit's opinion. This includes an examination of tax policy and tax shelter reform, a presentation of the nature and role of tax accrual workpapers, a look at the prevailing views regarding corporate law and corporate social responsibility, and a historical overview of the work product doctrine, including an assessment of the doctrine's development vis-à-vis tax accrual workpapers. Part III of this note examines the First Circuit's opinion, focusing on the majority's policy-driven rationale and its short-

16. *Id.*

17. *Id.* at 31.

18. *See infra* Part II.A.

19. *See Textron*, 577 F.3d at 32 (Torruella, J., dissenting).

20. *See infra* Part II.C.

21. *See generally* Matt Taibbi, *Obama's Big Sellout*, ROLLING STONE, Dec. 10, 2009, at 43; Margaret E. Tahyar, *The Dodd Bill's Effect on Corporate Governance and Executive Compensation Processes*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Nov. 24, 2009, 12:13 PM), http://blogs.law.harvard.edu/corpgov/2009/11/24/the-dodd-bills-effect-on-corporate-governance-and-executive-compensation-processses/; Elizabeth Warren, *Taking Stock: What Has the Troubled Asset Relief Program Achieved?*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Jan. 2, 2010, 11:20 AM), http://blogs.law.harvard.edu/corpgov/2010/01/02/taking-stock-what-has-the-troubled-asset-relief-program-achieved/.

comings, while examining counterpoints offered by the dissent and other critics. Part IV of this note analyzes the majority's reworking of the work product doctrine. This analysis includes an evaluation of the potential of using the work product doctrine, coupled with tax policy considerations, to dodge prevailing views regarding the propriety of laying upon corporations an ethical charge to be socially responsible. Part V offers a brief conclusion.

## II. THE LEGAL AND REGULATORY BACKGROUND

### A. *Tax Policy and Tax Shelters*

Taxation is a social tool, whose primary policy considerations reveal that it is an instrument whose function originates with the community that is subject to its vice-grip. First, "taxes are needed to raise revenue for necessary governmental functions, such as the provision of public goods."[22] Second, "[t]axation can have a redistributive function,[23] aimed at reducing the unequal[24] distribution of income and wealth that results from the normal operation of a market-based economy."[25] Along with raising revenue and redistributing wealth, "[t]axation also has a regulatory component: It can be used to steer private sector activity in the directions desired by governments."[26]

Corporations, however, often seek to cast aside the social imperatives of tax collection and engage in strategic tax behavior, hoping to

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22. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 4 (2006).

23. Reuven Avi-Yonah notes that:

> The income tax was substituted for the tariffs because of its redistributive impact. The post-Civil War industrialization and urbanization had led to a shift from a mostly agrarian society to one dominated by large industrial corporations and a sharp rise in inequality, as measured by the distribution of income or wealth.

*Id.* at 11 (citing RICHARD J. JOSEPH, THE ORIGINS OF THE AMERICAN INCOME TAX: THE REVENUE ACT OF 1894 AND ITS AFTERMATH 30–33 (2004)).

24. Avi-Yonah explains that there are three central arguments that "contend for the desirability of redistribution from a societal perspective." *Id.* at 15. First, "[i]n a democracy, all power ultimately should be accountable to the people. Private accumulations of power are by definition unaccountable, since the holders of power are neither elected by the people nor have their power delegated from the people's representatives." *Id.* Second, taxation's redistributive function fosters a "liberal conception of equality," *id.* at 16, whereby "every social 'sphere' should have its own appropriate distributive principles and that possession of goods relevant to one sphere should not automatically translate into dominance in other spheres as well." *Id.* at 16. Finally, taxation's redistributive function curbs the "negative effects of extreme inequalities." *Id.* at 17. Specifically, "revolutions are most likely to occur in societies that have experienced a period of economic growth that lifts the standard of living and expectations of all members of a given society, followed by . . . [a] shock that reduces the standard of living of the majority while leaving the rich unaffected." *Id.*(citing TED ROBERT GURR, WHY MEN REBEL 46–58 (1970)).

25. *Id.* at 3.

26. *Id.*

evade full payment of tax liability.[27] Commentators explain that:

> [T]he modern literature on tax enforcement assumes that there exists an "enforcement pyramid." At the bottom are the majority of citizens whose inclination is to try to comply with the tax law. As you go up the pyramid, the appetite for avoidance increases and the number of citizens decreases, and the type of enforcement changes from cooperation and the provision of information to increasingly harsher enforcement measures. Where the pyramid is reversed and most citizens do not cooperate, enforcement fails. In that way tax law is no different than other laws: A modern state cannot exist unless most citizens could be expected to comply with the law most of the time.[28]

Significantly, the largest corporations often represent a vast majority of the underreporting of income.[29] Moreover, firms with large deficiencies have a tendency to fight the IRS's collection efforts the hardest, dragging out the legal process to its extreme, in order to secure the most favorable settlement possible.[30] Especially relevant to the First Circuit's decision is the fact that "[t]ax considerations contributed to the corporate governance crisis in various ways."[31] First, "tax sheltering opportunities offered a rationale for reduced transparency that managers could then exploit to siphon resources from their firms without being observed by regulatory authorities, shareholders, or investors."[32] Second, "tax considerations encouraged the use of incentive compensation, both to avoid an ill-conceived $1 million ceiling on deductible annual salary payments to top executives at publicly traded companies and to permit executives to defer tax on much of what they were being paid."[33]

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27. *See generally* Michelle Hanlon et al., *An Empirical Examination of Corporate Tax Noncompliance*, *in* TAXING CORPORATE INCOME IN THE 21ST CENTURY 171 (Alan J. Auerbach et al. eds., 2007); Reuven S. Avi-Yonah, *Corporate Social Responsibility and Strategic Tax Behavior* (John M. Olin Ctr. for Law & Econ., Working Paper No. 06-008, 2006), *available at* http://ssrn.com/abstract=944793; Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and Firm Value* (Nat'l Bureau of Econ. Research, Working Paper No. 11241, 2005), *available at* http://ssrn.com/abstract=689562; Daniel Shaviro, *The 2008–09 Financial Crisis: Implications for Income Tax Reform* (N.Y.U. Law & Econ. Research Paper Series, Working Paper No. 09-35, 2009), *available at* http://ssrn.com/abstract=1442089.

28. Avi-Yonah, *supra* note 27, at 18.

29. For example, "[c]orporate underreporting in 2001 [was] estimated at $29.9 billion, of which corporations with over $10 million in assets make up $25 billion." Hanlon et al., *supra* note 27, at 175.

30. *See id.* at 183.

31. Shaviro, *supra* note 27, at 19.

32. *Id.*

33. *Id.* (citation omitted); *see also* Hanlon et al., *supra* note 27, at 172 ("[B]oth the percentage of annual compensation that is bonus and the level of equity incentives from exercising stock options are positively related to the proposed deficiency, indicating that executive compensation may be associated with tax aggressiveness.").

All of this, of course, is an old story,[34] as evident from the fact that the IRS has taken significant strides to curb[35] abusive tax positions since the tax shelter wave[36] of the late 1990s. Nevertheless, strategic tax behavior remains an ongoing problem—one that contributed to the corporate governance abuses and failings of the late 2000s.[37] Indeed, the complications and difficulties that the IRS experiences in settling with large corporations provided a central (tax) context for the First Circuit's decision in *Textron*.[38]

### B. *The Nature and Purpose of Tax Accrual Workpapers*

The function of tax accrual workpapers are at the very heart of the First Circuit's decision in *Textron*. Tax accrual workpapers,[39] which are also known as the "noncurrent tax workpapers, tax pool analysis, or tax contingency workpapers,"[40] contain analysis that "determines what amount the company should keep in its tax contingency reserve."[41] "Taxpayers generate these documents not because they want to but because they have to."[42] Specifically, "[u]nder federal securities laws, public corporations are required to file annual financial statements with the Securities and Exchange Commission."[43] A corporation's statements

34. *See generally Frontline: Tax Me If You Can* (PBS television broadcast Feb. 19, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/tax/.

35. *See generally* I.R.S. Notice 2009-59, 2009-31 I.R.B., *available at* http://www.irs.gov/irb/2009-31_IRB/ar07.html.

36. *See Frontline: Tax Me If You Can*, *supra* note 34.

37. *See supra* note 27 and accompanying text.

38. *See* United States v. Textron Inc., 577 F.3d 21, 31 (1st Cir. 2009) (en banc) ("It is because the collection of revenue is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS.").

39. For example, Textron's tax accrual workpapers included the following:

> 1. A spreadsheet that contains (a) lists of items on Textron's tax returns, which, in the opinion of Textron's counsel, involve issues on which the tax laws are unclear, and, therefore, may be challenged by the IRS; (b) estimates by Textron's counsel expressing, in percentage terms, judgments regarding Textron's chances of prevailing in any litigation over those issues (the "hazards of litigation of percentages"); and (c) the dollar amounts reserved to reflect the possibility that Textron might not prevail in such litigation (the "tax reserve amounts").
>
> 2. Backup workpapers consisting of the previous year's spreadsheet and earlier drafts of the spreadsheet together with notes and memoranda written by Textron's in-house tax attorneys reflecting their opinions as to which items should be included on the spreadsheet and the hazard of litigation percentage that should apply to each item.

United States v. Textron Inc., 507 F. Supp. 2d 138, 142–43 (D.R.I. 2007).

40. Note, *supra* note 12, at 128.

41. *Id.*

42. Dennis J. Ventry, Jr., *Protecting Abusive Tax Avoidance*, 120 TAX NOTES 857, 872 (Sept. 1, 2008).

43. *Id.*

"must be certified by an independent auditor to verify that they provide a fair representation of the entity's financial condition in compliance with generally accepted accounting principle standards."[44] A corporation's workpapers are "integral to this reporting process in that they provide an amount to be included in the tax reserve account that reflects potential future liability for additional taxes in the event the government identifies, challenges, and litigates certain positions taken on returns and a court disallows them."[45]

Significantly, corporations produce workpapers "even if they do not anticipate having to set aside a tax reserve (because they have to justify to auditors the absence of a contingent-tax reserve), and they create tax reserves even if they do not anticipate litigation (including deferred-tax reserves for noncontingent taxes)."[46] If a public corporation fails to create tax accrual workpapers and a contingency reserve, then it may face severe consequences—mainly, it "would likely be delisted by its exchange, and it would no longer be permitted to conduct business as a public company."[47] Of course, corporations, their attorneys, and accountants have "vigorously resisted the efforts of the IRS to reach these workpapers, viewing them as beyond the summons power provided in section 7602 of the [Internal Revenue] Code . . . ."[48]

### C. *Corporate Law and the Corporate Social Responsibility Debate*

Prevailing views regarding corporate law and corporate social responsibility provide another contextual layer to the First Circuit's decision in *Textron*. Notions about the proper role of corporate social responsibility have developed alongside the disparate views that have emerged regarding the nature and purpose of corporate law.[49] The dominant[50] framework views corporations as consisting of a "nexus of con-

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (citing United States v. Arthur Young & Co., 465 U.S. 805, 818–19 & nn.13–14 (1984)).

48. Note, *IRS Access to Tax Accrual Workpapers: Legal Considerations and Policy Concerns*, 51 FORDHAM L. REV. 468, 471 (1982) (citing I.R.C. § 7602 (1976)).

49. *See generally* Reuven S. Avi-Yonah & Dganit Sivan, *A Historical Perspective on Corporate Form and Real Entity: Implications for Corporate Social Responsibility*, *in* THE FIRM AS AN ENTITY 153–85 (Yuri Biondi et al. eds., 2007); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Perspective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002); Avi-Yonah, *supra* note 27, at 6–12.

50. *See* Avi-Yonah, *supra* note 27, at 3 (noting that the "nexus of contracts view of the corporation . . . is the dominant view among contemporary corporate scholars").

tracts."[51] Based on a notion of strong property rights,[52] the contractual approach to corporate law sees shareholders as residual claimants.[53] Essentially, shareholders enter into (incomplete) contracts with a manager, who subsequently enters into transactions and manages the firm in the interests of the shareholders.[54] Firm managers are the agents of shareholders. Under the contractual view, also commonly known as agency theory, "the central 'problem' of corporate governance is the question of how to minimize the (harmful) consequences of the separation of ownership and control within public companies . . . by reference to competitive market pressures coupled with market-based incentive and disciplinary mechanisms."[55]

A critical premise of the contractual view of corporate law is that the firm is purely a legal fiction.[56] This premise has critical implications for notions about the social responsibilities of firms. Under the contractual view of corporate law, "there is . . . only one social responsibility of business—to use its resources and engage in activities designed to increase its profits . . . ."[57] There are three primary rationales—aside from concerns about the emergence of socialism[58]—for the contractual view's distaste for imposing social responsibilities on firms.[59] First, "since management are deploying the shareholders' money, they should concentrate only on one overriding objective, maximizing the shareholders' profits . . . ."[60] Second, "corporate social responsibility places too much trust in corporate management, and permitting more than one

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51. *See generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 1–39 (1991).

52. *See* Olivier Weinstein, *The Current State of the Economic Theory of the Firm: Contractual, Competence-Based, and Beyond*, *in* THE FIRM AS AN ENTITY 26–27 (Yuri Biondi et al. eds., 2007).

53. *See* EASTERBROOK & FISCHEL, *supra* note 51, at 67–70.

54. *See id.* at 24.

55. Marc T. Moore & Antoine Rebèrioux, *From Minimization to Exploitation: Re-Conceptualizing the Corporate Governance Problem* 3 (Reflexive Governance in the Pub. Interest Working Paper No. REFGOV-CG-32, 2009), *available at* hhtp://ssrn.com/abstract=1324127.

56. *See* EASTERBROOK & FISCHEL, *supra* note 51, at 12 ("The 'personhood' of a corporation is a matter of convenience rather than reality. . . ."); Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM 17 ("A corporation is an artificial person . . . .").

57. Friedman, *supra* note 56, at 32 (quoting MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962)).

58. *See* EASTERBROOK & FISCHEL, *supra* note 51, at 39 ("All competition produces dislocation—all progress produces dislocations . . . and to try to stop the wrenching shifts of a capitalist economy is to try to stop economic growth."); Friedman, *supra* note 56, at SM17 ("The businessmen [who] believe they are defending free enterprise when they declaim that business is not concerned 'merely' with profit but also with promoting desirable social ends . . . are preaching pure and unadulterated socialism.").

59. *See* Avi-Yonah & Sivan, *supra* note 49, at 154.

60. *Id.*

measure of managerial success would enhance the agency cost problem and make it impossible to evaluate managers with any reasonable degree of objectivity . . . ."[61] Third, "by applying the nexus of contracts theory . . . opponents to corporate social responsibility see the corporation as a legal fiction of intertwined sets contracts [sic] and as a nonexistent entity . . . incapable of having ethical duties or corporate social responsibilities."[62]

Although the contractual view of corporate law is the dominant framework, it is not the only view.[63] Specifically, alongside the contractual view have emerged the artificial entity view and the real entity view.[64] A central premise of the artificial entity view is that "the corporation is primarily a creature of the state . . . ."[65] The real entity view sees "the corporation as an entity separate from both the state and from its shareholders . . . ."[66] Each of these views has varying implications for the debate about the propriety and scope of corporate social responsibility.[67] Both the artificial entity view and the real entity view allow corporations to engage in socially responsible activities that fall outside the scope of the profit-maximization principle.[68] More importantly, whatever view dominates will have important consequences regarding the propriety of abusive tax positions.[69] The First Circuit's decision in *Textron*, however, is an example of how to bypass the controversial debate surrounding corporate social responsibility and corporate law, while still affirming the proposition that corporations have certain responsibilities owed to society—for example, the payment of taxes. This is a critical aspect of the First Circuit's decision because it shows an alternative to making an outright choice between sides of the corporate social responsibility debate. Indeed, the First Circuit's jurisprudence in *Textron* shows how the judiciary can side with society—represented by the IRS—to the detriment of socially irresponsible firms.

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61. *Id. see also* EASTERBROOK & FISCHEL, *supra* note 51, at 38 ("A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither.").

62. Avi-Yonah & Sivan, *supra* note 49, at 154.

63. *See generally* Adolf A. Berle Jr., *The Corporation and Classical Economic Theory, in* THE FIRM AS AN ENTITY 95–104 (Yuri Biondi et al. eds., 2007); Avi-Yonah, *supra* note 27, at 6–8.

64. *See* Avi-Yonah & Sivan, *supra* note 49, at 155.

65. Avi-Yonah, *supra* note 27, at 2.

66. *Id.*

67. *See id.* at 7–10.

68. *Id.*

69. *See id.* at 2 ("From the perspective of the corporation, if engaging in [corporate social responsibility] is a legitimate corporate function, then corporations can also be expected to pay taxes to bolster society as part of their assumption of [corporate social responsibility].").

### D. *The Work Product Doctrine and Tax Accrual Workpapers*

The Federal Rules of Civil Procedure broadened the scope of discovery.[70] "Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings."[71] With the formulation of new open discovery rules, "civil trials in federal court no longer need be carried on in the dark."[72] Indeed, "[t]he way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[73] However, "the [e]xpansion of the scope of discovery . . . created tension between an attorney's obligation to his [or her] client and his [or her] duty to respond to discovery requests."[74] Consequently, "[c]ourts developed the work product[75] doctrine[76] to ease this tension."[77] "In origin, the work product privilege derives from the Supreme Court's decision in *Hickman v. Taylor* . . . ."[78] In *Hickman*, the Supreme Court first elaborated and refined the scope of the work product doctrine, while setting forth the policy rationales that have informed later work product decisions. First, the Court noted that "[t]he work product privilege . . . is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries."[79] Second, the Court indicated that if attorneys were required to disclose their work product, then sharp practices would develop because "much of what is now put down in writing would remain unwritten."[80] Finally, the work product doctrine preserves the adversarial system by preventing parties from free-riding on the efforts of their adversaries.[81]

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70. *See* Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 765 (1983).

71. Hickman v. Taylor, 329 U.S. 495, 500 (1947).

72. *Id.* at 501.

73. *Id.*

74. Special Project, *supra* note 70, at 765.

75. Generally, there are two kinds of work product—ordinary work product and opinion work product. Ordinary work product includes the following: "witness statements, investigative reports, interviews and intraoffice memoranda . . . [and] recordings prepared in anticipation of litigation." *Id.* at 796. Opinion work product includes the following: a lawyer's legal strategy, inferences, and mental impressions. *See id.* at 818–19. The central difference between these two types of work product is the level of protection they receive. Typically, opinion work product receives much greater protection that ordinary work product. *See id.* at 791.

76. Rule 26(b)(3) of the Federal Rules of Civil procedure "codifies the principles articulated in *Hickman*." United States v. Adlman, 134 F.3d 1194, 1197 (2d Cir. 1998).

77. *Id.*

78. United States v. Textron Inc., 577 F.3d 21, 26 (1st Cir. 2009) (en banc).

79. *Adlman*, 134 F.3d at 1196 (quoting Hickman v. Taylor, 329 U.S. 495, 510–11 (1947)).

80. *See Hickman*, 329 U.S. at 511.

81. *See id.* at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

At this point, it is important to note one of the major exceptions to work product protection. Specifically, "work product protection does not extend to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation."[82] Because an ordinary course of business exception is not found anywhere in the language of Rule 26(b)(3),[83] courts adopting this exception rely on the Advisory Committee notes to Rule 26(b)(3).[84] However, "some courts and commentators have criticized use of the ordinary course of business characterization as more than a rule of thumb."[85] Critics argue that the exception "upsets the effective operation of rule 26(b)(3)."[86] The ordinary course of business exception plays a critical role in analyzing whether tax accrual workpapers are entitled to work product protection.

The leading case discussing work product protection for tax accrual workpapers is *United States v. Arthur Young & Co.*[87] In *Arthur Young*, the IRS brought an enforcement action against the independent auditor of a corporation it was investigating.[88] The IRS sought from the accounting firm—Arthur Young & Co.—the tax accrual workpapers it created in preparation to verify the corporation's financial statements.[89] Arthur Young & Co. refused to turn over the workpapers—as per instructions from the corporation they audited—and asserted that the workpapers were not relevant to any IRS investigation and that the the work product doctrine immunized the documents.[90] The Supreme Court held that the workpapers are relevant to an IRS investigation and that workpapers prepared by an independent auditor are not entitled to work product protection.[91]

However, the Court never decided the question of whether workpapers prepared by a corporation's *attorneys* are entitled to work product protection.[92] Consequently, the circuits have split on the proper inquiry to conduct in answering the question of whether tax accrual

82. *Textron*, 577 F.3d at 30 (quoting Maine v. U.S. Dep't of Interior, 298 F.3d 60, 68 (1st Cir. 2002)) (internal quotation marks omitted).

83. *See* FED. R. CIV. P. 26(b)(3).

84. *See* FED. R. CIV. P. 26(b)(3) advisory committee's note ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by this subdivision."); *see also* Special Project, *supra* note 70, at 848.

85. Special Project, *supra* note 70, at 849.

86. *Id.* at 852.

87. 465 U.S. 805, 815–21 (1984).

88. *Id.* at 808.

89. *Id.*

90. *Id.* at 809–11.

91. *Id.* at 818.

92. *See id.* at 807.

workpapers prepared by a corporation's attorneys are entitled to work product protection.[93] In effect, the circuits have developed varying views on what it means to create a document "in anticipation of litigation."[94] The issue is particularly cloudy "as to documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of litigation."[95] Essentially, tax accrual workpapers are such documents.

In *United States v. El Paso Co.*, the Fifth Circuit laid down its view on the scope of work product protection afforded tax accrual workpapers.[96] In *El Paso*, the IRS issued a summons to El Paso's chief tax attorney, seeking the corporation's tax accrual workpapers.[97] The attorney refused to turn over the documents, citing a variety of privileges, including the work product doctrine.[98] The Fifth Circuit held that the tax accrual workpapers were not entitled to work product protection because "[t]he primary motivating force behind the tax pool analysis . . . is not to ready El Paso for litigation over its tax returns. Rather, the primary motivation is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability."[99]

In *United States v. Adlman*, the Second Circuit provided an alternative definition for the phrase "in anticipation of litigation."[100] In *Adlman*, the IRS issued a summons to a corporation's attorney, seeking a memorandum[101] he prepared, which evaluated the tax implications of a proposed merger.[102] The attorney refused to turn over the documents, asserting, among other things, the work product privilege.[103] The Second Circuit held that "[w]here a document is created because of[104] the prospect of litigation, analyzing the likely outcome of that litigation, it does

93. *See generally* United States v. Adlman, 134 F.3d 1194, 1198–1203 (2d Cir. 1998) (providing a discussion of the various inquiries adopted by the courts).

94. *See id.* at 1197 (noting that commentators and courts have a wide range of views on the meaning of the phrase "in anticipation of litigation").

95. *Id.* at 1197–98.

96. *See* United States v. El Paso Co., 682 F.2d 530, 543 (5th Cir. 1982) (focusing on the "primary motivating force behind the preparation of the documents").

97. *Id.* at 534.

98. *Id.*

99. *Id.* at 543.

100. *See Adlman*, 134 F.3d at 1202.

101. Although not exactly tax accrual workpapers, the memorandum "was a 58-page detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim . . . ." *Id.* at 1195.

102. *See id.*

103. *See id.* at 1196.

104. The Second Circuit adopted the work product inquiry developed by the Wright and Miller treatise, which states "that documents should be deemed prepared 'in anticipation of litigation' . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of

not lose protection under this formulation merely because it is created in order to assist with a business decision."[105] Importantly, the Second Circuit repudiated the "primary motivating purpose" test embraced by the Fifth Circuit. First, the Second Circuit noted that the "[t]he test of Rule 26(b)(3) does not limit its protection to materials prepared to assist at trial. To the contrary, the text of the Rule clearly sweeps more broadly."[106] Second, "the Rule takes pains to grant special protection to . . . documents setting forth legal analysis."[107] Indeed, "the Rule directs that 'the court *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of . . . [a party or its representative] concerning the litigation.'"[108] Third, "[f]raming the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine."[109]

Significantly, in *Maine v. U.S. Department of Interior*, the First Circuit adopted the test set forth by the Second Circuit in *Adlman*.[110] The central dispute of the case centered on Maine's Freedom of Information Act requests from several government agencies "for documents relating to the efforts of the Services to list Atlantic Salmon in eight rivers within Maine under the protection of the Endangered Species Act."[111] The United States Department of Interior (DOI) claimed work product protection for several hundred documents.[112] On appeal, the DOI argued that the district court used the wrong standard when it held "that the documents are protected by the attorney work-product privilege only if the 'primary motivating factor' for their creation was to assist in litigation."[113] The DOI asserted that the Second Circuit, in *Adlman*, used the correct standard for work product protection—specifically, that a document is protected if it can be "'fairly said to have been prepared or obtained *because of* the prospect of litigation.'"[114] The First Circuit agreed with the DOI and held that it "agree[d] with the formulation of

litigation.'" *Id.* at 1202 (quoting 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2024 (1994)).

105. *Id.*

106. *Id.* at 1198.

107. *Id.*

108. *Id.* (quoting FED. R. CIV. P. 26(b)(3) (1998)); *accord* FED. R. CIV. P. 26(b)(3) (noting that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation").

109. *Adlman*, 134 F.3d at 1199.

110. *See* Maine v. U.S. Dep't of Interior, 298 F.3d 60, 68 (1st Cir. 2002) (stating that the First Circuit "agree[s] with the formulation of the work-product rule adopted in *Adlman*").

111. *Id.* at 63.

112. *Id.*

113. *Id.* at 67.

114. *Id.* at 68 (quoting *Adlman*, 134 F.3d at 1202).

the work-product rule adopted in *Adlman*."[115] Moreover, "it was error to require the DOI to demonstrate that the withheld documents were created primarily for litigation purposes in order to claim the work-product privilege . . . ."[116] However, in *Textron*, the First Circuit appears to have changed course, though it does not acknowledge as much.[117]

## III. IN PLAIN SIGHT: *TEXTRON* AND THE FIGHT FOR CORPORATE DISCLOSURE

### A. *Sham Transactions and Regulatory Battles*

In 2003, the IRS decided to audit Textron's "corporate income tax liability for the years 1998-2001."[118] "In reviewing Textron's 2001 return, the IRS determined that a Textron subsidiary . . . had engaged in nine listed[119] transactions."[120] Specifically, Textron's subsidiary "had purchased equipment from a foreign utility or transit operator and leased it back to the seller on the same day."[121] Such a transaction is commonly referred to as a sale-in, lease out transaction (SILO),[122] which, in effect, allows "tax-exempt or tax-indifferent organizations—for example, a tax-exempt charity or city-owned transit authority—to transfer depreciation and interest deductions, from which they cannot benefit, to other taxpayers who use them to shelter income from tax."[123] Consequently, the IRS will not respect such transactions where they lack economic substance.[124]

After Textron refused to show spreadsheets documenting the SILOs, the IRS issued a summons pursuant to section 7602 of the Code,[125] seeking Textron's tax accrual workpapers.[126] Textron refused to hand over the workpapers and "[t]he IRS brought an enforcement action in federal district court in Rhode Island."[127] Textron contended that the IRS was not entitled to the workpapers on a variety of grounds,

115. *Id.*

116. *Id.*

117. *See* United States v. Textron Inc., 577 F.3d 21, 33 (1st Cir. 2009) (Torruella, J., dissenting) ("[T]he majority purports to follow *Maine* but really conducts a new analysis of the history of the work-product doctrine . . . .").

118. *Id.* at 23.

119. The IRS maintains an active and current list of transactions that it considers abusive. *See* Internal Revenue Service, Recognized Abusive and Listed Transactions—LMSB Tier I Issues, http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html.

120. *Textron*, 577 F.3d at 23.

121. *Id.* at 23–24.

122. *Id.* at 24.

123. *Id.*

124. *See* I.R.S. Notice 2005-13, 2005-9 I.R.B. 630 (Feb. 11, 2009).

125. *See* I.R.C. § 7602 (2006).

126. *See Textron*, 577 F.3d at 24; *see also* discussion *supra* Part II.B and note 40.

127. *Textron*, 577 F.3d at 24 (citing I.R.C. § 7604(a) (2006)).

including a claim of work product protection for the documents.[128] Ultimately, the district court "denied the petition for enforcement."[129] The district court held that Textron's workpapers were protected by the work product privilege because, though the workpapers "were useful in getting a 'clean' opinion from their accountants regarding the the adequacy of the [contingency] reserve amount, there would have been no need to create a reserve . . . if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding."[130] "On appeal, a divided panel upheld the district court's decision. The en banc court then granted the [IRS's] petition for rehearing . . . ."[131]

### B. *Work Product Recast: The Majority Opinion's New Standard*

The majority's analysis begins by maneuvering its way out of the deferential clear error standard of review to the much more lax de novo standard.[132] The majority simultaneously changes the legal standard required for work product protection, while asserting that the district court made an error of law when it followed the prior standard.[133] First, the majority explains that the district court never found that "the workpapers were prepared *for use* in possible litigation . . . ."[134] After sorting through some of the evidence and witness statements, the majority concludes that "[a]ny experienced litigator would describe the tax accrual workpapers as tax documents and not as case preparation materials."[135] Of course, then the *legal* question becomes whether such documents are entitled to work product protection.[136]

First, the majority examines *Hickman* and Rule 26(b)(3), finding that "[f]rom the outset, the focus of work product protection has been on materials prepared *for use* in litigation, whether the litigation was underway or merely anticipated."[137] Indeed, the majority goes on to refine its statement, narrowing the scope of the work product inquiry, noting that the "phrase used in the codified rule—'prepared in anticipation of litiga-

128. *Id.*

129. *Id.* at 25 (citing United States v. Textron Inc., 507 F. Supp. 2d 138, 150, 155 (D.R.I. 2007)).

130. *Id.* at 25–26 (quoting *Textron*, 507 F. Supp. 2d at 150).

131. *Id.*

132. *See id.* at 26 (noting that one of the difficulties presented by the case "stems from the mutability of language used in the governing rules and a confusion between issues of fact and issues of [law]").

133. *See id.* at 26–27.

134. *Id.* at 27.

135. *Id.* at 28.

136. *Id.*

137. *Id.* at 29 (emphasis added).

tion or for trial'—did not . . . mean prepared for some purpose other than litigation . . . ."[138] Ultimately, the majority relies on its tactile sensitivities, noting that tax accrual workpapers simply do not have the "touch and feel of materials prepared for a current or possible . . . lawsuit."[139] Channeling a schoolyard ethos, the majority concludes that "no one with experience of law suits" would place workpapers within the same category of documents prepared in anticipation of litigation.[140]

Second, the majority looks to prior First Circuit precedent. Indeed, in one fell swoop the majority reconciles its decision with *Maine* by locking in on the court's elaboration of the ordinary course of business[141] exception in that decision.[142] The majority notes that, "[i]n *Maine*, we said that work product protection does not extend to 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.'"[143] Consequently, "*Maine* applies straightforwardly to Textron's tax audit work papers . . . [because they] were prepared in the ordinary course of business . . . ."[144] Interestingly, the majority regards the Fifth Circuit's "primary purpose" test favorably,[145] noting that the sole purpose of Textron's workpapers was to "prepare financial statements."[146]

Finally, the majority reconciles its decision with the central policy rationales of the work product doctrine. First, the work product doctrine "is not . . . designed to help the lawyer prepare corporate documents or other materials prepared in the ordinary course of business,"[147] and, therefore, the doctrine's goal of protecting the litigation process remains unobstructed.[148] Second, any concern "about discouraging sound preparation for a law suit" is moot because tax accrual workpapers "have to be prepared by exchange-listed companies to comply with the securities laws and accounting principles for certified financial statements."[149] Third, any unfairness to Textron, resulting from the disclosure of its workpapers, pales in comparison to the IRS's need to collect revenue and the practical problems the Service faces because of the "underre-

138. *Id.*
139. *Id.*
140. *Id.*
141. *See* discussion *supra* Part II.D.
142. *Textron*, 577 F.3d at 24.
143. *Id.* (quoting Maine v. U.S. Dep't of Interior, 298 F.3d 60, 70 (1st Cir. 2002)).
144. *Id.*
145. *But see Maine*, 298 F.3d at 68.
146. *Textron*, 577 F.3d at 30.
147. *Id.* at 30–31.
148. *Id.*
149. *Id.* at 31.

porting of corporate taxes."[150] Ultimately, the majority denies Textron's workpapers work product protection, explaining that the "work product privilege is aimed at protecting work done for litigation, not in preparing financial statements."[151]

### C. *Patently Unrestrained: The Dissent's Attack*

Judge Torruella's dissent challenges the majority's opinion on several fronts, focusing on the doctrinal liberties taken by the majority and its imposition of the strictest work product inquiry in the land.[152] First, Judge Torruella accuses the majority of "quietly reject[ing] circuit precedent."[153] In *Maine*, the First Circuit "adopted the broader 'because of' test, which had been . . . explained . . . in the Second Circuit decision in *Adlman* . . . ."[154] However, the majority "really conducts a new analysis of the history of the work-product doctrine and concludes that documents must be "'*prepared for* any litigation or trial.'"[155] Simply, "[t]he majority's opinion is . . . stunning in its . . . suggestion that it is respecting rather than overruling *Maine*."[156]

Second, Judge Torruella denounces the majority's "prepared for" test as a bad rule.[157] Not only is the majority's rule inconsistent with the plain language of Rule 26(b)(3) but it is also inconsistent with policy concerns announced in *Hickman*.[158] Specifically, the majority reads the phrase "'anticipation of litigation' . . . out of the rule by requiring a showing that documents be prepared for trial."[159] Moreover, the majority's rule will allow the IRS to free ride on the work of corporate tax attorneys by denying the attorneys any privacy.[160] Ironically, "because of these very same concerns about privacy and fairness, the IRS itself [has] argued for the protection of its documents prepared for the dual purposes of helping the IRS understand the litigation risks that might result if the IRS made the administrative decision to adopt a new program."[161]

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150. *Id.*
151. *Id.*
152. *Id.* at 32 (Torruella, J., dissenting).
153. *Id.*
154. *Id.* at 32–33 (citing Maine v. U.S. Dep't of Interior, 298 F.3d 60, 68 (1st Cir. 2002) ("In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted in *Adlman* and by five other courts of appeals.")).
155. *Id.* at 33.
156. *Id.*
157. *Id.* at 35.
158. *See id.*
159. *Id.*
160. *Id.*
161. *Id.* at 36 n.13 (citing Delaney, Migdail, & Young, Chartered v. IRS, 826 F.2d 124 (D.C. Cir. 1987)).

Finally, Judge Torruella notes that the majority boldly casts aside the factual findings made by the district court and replaces them with its own.[162] Judge Torruella denounces the majority's sly tactic of exalting in the fact that the district court failed to make a "for use" finding, though such a test "is not and has never been the law of [the First Circuit]."[163] Indeed, Judge Torruella's dissent questions why the standard of review is not clear error.[164] Many of the dissent's criticisms reflect a real discomfort with the majority's jurisprudence, which consists of doctrinal failings and an unabashed proclivity for sleights of hand.

## IV. REGULATORS MOUNT UP: A JURISPRUDENTIAL SPACE AND ITS DANGERS

### A. *Harnessing Corporate Abuse*

The majority's decision to deny work product protection to Textron's tax accrual workpapers represents a significant step forward in tax enforcement and collection efforts. The decision also represents a refusal to expand work product protection to its breaking point. More importantly, *Textron* represents a substantial collaboration between the judiciary and the IRS in curbing corporate social irresponsibility. Indeed, the majority—via a jurisprudence born from the collision between tax policy and the work product doctrine—manages to bypass complex and controversial notions about the proper social role of corporations.

Arguably, the more practical and tangible result of the majority's decision is a potential reduction of abusive tax shelters. As a stated goal of the court,[165] curbing tax shelters will likely be one of *Textron*'s lasting effects. "Under our tax system, taxpayers self-assess their liability, and taxpayers engaged in aggressive tax planning enjoy greater flexibility in their self-assessment because of the legal ambiguity surrounding their transactions."[166] Consequently, corporations are often able to occult their more risky tax positions, hiding transactional histories within exceedingly complex and voluminous tax returns and accompanying disclosure statements.[167] The IRS, in effect, is at the mercy of

162. *See id.* at 39 (noting that "[t]he majority makes no effort to reject these factual findings, but simply recharacterizes the facts as suits its purposes").

163. *Id.*

164. *Id.* ("[T]he actual purpose of the documents' creators . . . is a factual issue, and the majority makes no effort to explain why such issue should be reviewed as a legal conclusion.").

165. *Id.* at 32 (majority opinion) ("IRS access [to workpapers] serves the legitimate, and important, function of detecting and disallowing abusive tax shelters.").

166. Ventry, *supra* note 42, at 871.

167. *See id.*; Dennis J. Ventry Jr., *A Primer on Tax Work Product for Federal Courts*, TAX NOTES 875, 881 (May 18, 2009) ("The audit documents at issue for the applicant in *Textron* filled nine four-drawer file cabinets, and its consolidated tax return exceeded 4,000 pages covering more

substantial informational asymmetries. "In the world of tax regulation, taxpayers and their advisers possess the information that tax regulators seek. The goal is to keep as much of the information from the IRS as possible, and taxpayers pay considerable sums of money to those advisers most skilled at concealment."[168] Therefore, "[d]enying immunity to tax accrual workpapers and protecting a vigorous IRS summons power appropriately mitigates the severe informational asymmetries separating the government from the private sector."[169] Moreover, the majority's denial of work product protection aligns the judiciary with "legislative and regulatory antishelter efforts . . . ."[170] Although government efforts to curb tax avoidance are nearly a century old, "government antishelter efforts have accelerated significantly over the last several years, with an emphasis on disclosure and transparency."[171]

The majority's decision avoids an overexpansion of the work product doctrine. First, the work product doctrine serves the purpose of protecting documents prepared in anticipation of litigation. However, tax accrual workpapers are never prepared with an objectively reasonable anticipation of litigation because of the "infinitesimal odds that items in tax accrual workpapers will be the subject of litigation . . . ."[172] For example, in Textron's "last eight audit cycles, dating back to 1959, the government proposed thousands of adjustments to the taxpayer's reporting positions. Yet the parties resorted to litigation over disputed issues just three times."[173] Therefore, the majority's decision avoids expanding "the work product doctrine significantly beyond its historical role of protecting the adversarial process."[174] Second, the majority's decision avoids the perverse result "whereby more aggressive, abusive behavior receives a greater degree of protection than less aggressive, compliant behavior."[175] Such a standard "would blow a hole in the fisc . . . [a]nd it would immunize nearly every document analyzing the potential tax benefits of a transaction because the analysis necessarily involves a discussion of the position's likelihood of success on the merits."[176] The majority's decision refuses to give tax advisers such blanket immunity.

Finally, the majority's decision provides an illustration of a poten-

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than 190 different entities . . . [and] [b]uried in the return was an opaque reference to the nine sale-in, lease-out prohibited tax shelters . . . .").

168. Ventry, *supra* note 42, at 879.

169. *Id.*

170. *Id.* at 871.

171. *See id.* at 880–81.

172. Ventry, *supra* note 167, at 882.

173. *Id.*

174. *Id.*

175. Ventry, *supra* note 42, at 878–79.

176. *Id.* at 879.

tial jurisprudential strategy, which other courts can use to overcome dominant views regarding the nature and purpose of corporations and their role in society. Agency theory, which remains the dominant view regarding corporate law in the United States, denounces corporate social responsibility as inconsistent with the nature and purpose of firms.[177] The sole purpose of firms is to maximize profits.[178] Under this view, tax avoidance is necessarily consistent with the structure and purpose of corporate law because managers that engage in tax avoidance are working under the wealth-maximization principle.[179] Consequently, a judiciary that adheres to a contractual view of corporate law will suffer from a certain degree of ambivalence when imposing social responsibilities on firms. Of course, this assumes a judiciary working within the confines of corporate law. But what if the judiciary could curb corporate social irresponsibility from outside the intellectual fences of corporate law and its assumptions?

In *Textron*, the majority found a space from which to harness a socially deviant corporation—Textron. Indeed, at the intersection of the rationales and notions of the work product doctrine and tax policy, the majority located a site from which it could circumvent prevailing notions of corporate law. Informed by the strong principles of fairness underlying taxation,[180] and by the driving rationales of the work product doctrine,[181] the majority managed to overcome and trump Textron's pleas for the judiciary to essentially stay out of the chess match corporations play with the IRS—and, inevitably, with the public. Indeed, the majority positioned itself alongside the IRS as a new player in the regulation of corporate social irresponsibility. What the decision in *Textron* shows is that the judiciary can locate jurisprudential spaces from which to brush aside the traditional views regarding corporate activity.[182] The majority in *Textron* showed how the doctrinal and policy rationales of ancillary areas of the law could converge to liberate courts from viewing the imposition of corporate social responsibilities as inconsistent with a capitalist marketplace. Perhaps, tax evasion is so clearly socially deleterious that the First Circuit's decision is unexceptional. However, what are exceptional are Textron's protracted efforts[183] to promote an expan-

177. *See* discussion *supra* Part II.C.

178. *See supra* note 57 and accompanying text.

179. *See* discussion Part II.A.

180. *See* United States v. Textron Inc., 577 F.3d 21, 31 (1st Cir. 2009) (en banc) (noting that "Textron apparently thinks it is 'unfair' for the government to have access to its spreadsheets, but tax collection is not a game . . . [and] [u]nderpaying taxes threatens the essential public interest in revenue collection").

181. *See id.* at 30–31.

182. *See generally* EASTERBROOK & FISCHEL, *supra* note 51, at 93–100.

183. *See supra* note 6 and accompanying text.

sive view of work product protection. Undoubtedly, Textron recognized that the battle against corporate social irresponsibility takes place on many fronts.

### B. *Doctrinal Missteps and the Merits of Restraint*

Although the majority in *Textron* takes positive strides in the direction of reducing tax evasion and promoting corporate social responsibility, it also places the legitimacy of its decision in question. "Basic to the popular perception of the judicial process is the notion of government of law, not people. Law is, in this conception, separate from—and 'above'—politics, economics, culture, and the values or preferences of judges or any person."[184] Indeed, "[i]n this separation resides the law's ability to be objective, principled, and fair."[185] Of course, scholars and practitioners generally consider such a view an idealistic and simplistic representation of the judicial process.[186] Realistically, a variety of factors and considerations, ranging from political propensities to interpretive style, affect a judge's decision and analysis.[187] All of this is an old story and generally accepted, evident by the legions of litigators who continue to view judge shopping as a worthwhile activity.[188] Ultimately, the legitimacy of the judicial process likely rests on how well any given court gives the appearance of the idealized form of jurisprudence, which includes "judicial subservience . . . to precedent."[189] The majority in *Textron* placed the legitimacy of its decision in question by doctrinal shortcomings, by unnecessarily revising the work product doctrine, and by failing to account for the policy implications of its holding. Judicial decisions perceived as illegitimate severely restrict the ability of other courts to design opportunities to rein in corporate irresponsibility.

First, as Judge Torruella's dissent correctly points out, the majority failed to explain how it was able to review de novo whether Textron's workpapers were prepared in anticipation of litigation, especially after the district court made factual findings on the matter.[190] Moreover, the majority slyly characterizes the issue as a legal question on the ground that the district court never made a finding that Textron's workpapers

184. David Kairys, *Introduction* to THE POLITICS OF LAW at 11 (David Kairys ed., 3d ed., 1998) (footnote omitted), *available at* http://ssrn.com/abstract=841469.

185. *Id.*

186. *See id.* at 1–3.

187. *See id.* at 1–4.

188. *See id.* at 3.

189. *Id.* at 2–3 (noting that "perceived deviations" from the idealized notion of the judicial process "undermines the legitimacy and power of the courts").

190. *See* United States v. Textron Inc., 577 F.3d 21, 39 (1st Cir. 2009) (Torruella, J., dissenting).

were *prepared for use* in litigation.[191] Of course, the district court could not make a "for use" finding because it did not even know that that was the proper inquiry since it was not the law of the First Circuit.[192] Rather, the majority castigates the district court for finding that the workpapers were prepared *because of* anticipated litigation. However, that is the specific standard adopted by the First Circuit in *Maine*[193] and affirmed in the majority opinion in *Textron*.[194] As the dissent notes, "Discarding a district court's factual findings on causation without any demonstration of clear error is not within [the] court's proper appellate function."[195]

The majority's new work product inquiry, which calls upon courts to ask if documents are prepared for use in litigation, overly narrows the scope of work product protection. Specifically, "[n]owhere does Rule 26(b)(3) state that a document must have been prepared to *aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation."[196] "There is no reason to believe that "anticipation of litigation" was meant as a synonym for 'for trial.'"[197] The majority's rule allows discovery of "'notes and memoranda written by Textron's in-house tax attorneys [that] reflect[ ] their opinions as to which items should be included on the spreadsheet . . . [and] explain the legal rationale underpinning Textron's views of its litigation chances."[198]

Even scholars favoring stricter work product standards for tax accrual workpapers acknowledge the risk of too strict a rule[199] and, therefore, suggest a sliding scale of protection.[200] Indeed, the majority's strict work product standard is overinclusive, as it does not distinguish between taxpayers for whom the likelihood of litigation is certain nor for those that engaged in prohibited transactions in order to wage a good-faith challenge to the IRS's position.[201] The majority's new rule is especially troubling because the court did not need to revise its work product standard to reach its goal of giving the IRS access to a firm's workpapers. The majority could have easily left the "because of" test in place, while merely finding that tax accrual workpapers fell outside the

191. *Id.* at 30.
192. *Id.* at 39.
193. *See supra* note 117 and accompanying text.
194. *See Textron*, 577 F.3d at 30.
195. *Id.* (Torruella, J., dissenting) (citation omitted).
196. *Id.* at 34 (quoting United States v. Adlman 134 F.3d 1194, 1197–98 (2d Cir. 1998)).
197. *Id.* at 35.
198. *Id.* at 37.
199. *See* Ventry, *supra* note 42, at 884 ("Strictly applying the work product doctrine in the tax context can arguably produce harsh results.").
200. *Id.*
201. *Id.*

scope of the doctrine because such documents are prepared in the ordinary course of business.[202] Such a result avoids reaching far outside the tax context, which is what the majority's decision will likely do. Importantly, since enactment of the "Sarbanes-Oxley Act . . . the need to preserve [a] zone of privacy is even more necessary for lawyers to serve their corporate clients in previously unforeseen ways, navigating compliance with growingly complex regulatory schemes that necessarily blend questions of potential liability with important business considerations and reporting obligations."[203]

## V. CONCLUSION

In assessing the First Circuit's approach in *Textron*, two questions emerge. First, should firms be socially responsible? Second, what happens when courts decide to make them responsible? The first question has a well-developed pedigree of debate, analyzing the issue ex ante.[204] The second question may be more interesting because it arises ex post in fact-specific and context-specific situations. The First Circuit's decision in *Textron* is exemplary in its problematic use of the work product doctrine and tax policy to rein in abusive tax shelters, thereby holding a massive corporate entity responsible where its management sought profit maximization to the detriment of society. Can courts impose social responsibilities on firms by removing advantages that doctrines outside corporate law provide? Essentially, the First Circuit shows how courts can manipulate and gut doctrines that firms rely on to avoid and fight social accountability. Of course, such a strategy risks a great deal. First, a poorly reasoned decision appears illegitimate. Second, it is uncertain how well any given ancillary doctrine can absorb a forceful remodeling. For example, the First Circuit, to reach its decision, fashioned a new inquiry for work product doctrine that may be inconsistent with the scope of the doctrine as envisioned in *Hickman* and the Federal Rules of Civil Procedure. Third, waging an indirect fight on corporate social irresponsibility via jurisprudential sites outside the corporate law context will create uncertainty, raising transactions costs for firms. Moreover, such an indirect fight walks and talks like judicial activism.

However, a court can mitigate an appearance of illegitimacy or

202. *See id.* at 872 ("[T]ax accrual workpapers are generated every year in a public corporation's ordinary course of business, and would be generated whether or not the company anticipates any specific or potential litigation.").

203. Supplemental Brief for Amici Curiae the Chamber of Commerce of the U.S. & Ass'n of Corporate Counsel Supporting Textron Inc. & in Favor of Affirmance at 8, *Textron* 577 F.3d 21 (No. 07-2631), *available at* http://www.acc.com/vl/public/AmicusBrief/loader.cfm?csModule=security/getfile&pageid=207212+.

204. *See* discussion *supra* Part II.C.

judicial activism if its reasoning appears sound and tempered by a light hand. Via a commitment to a minimalist approach and sound logic, a court faced with a corporation dodging any type of social responsibility can refashion ancillary doctrines—doctrines outside the corporate law context—to make life very difficult on firms. Moreover, ancillary doctrines are more likely to be able to absorb minimal structural changes than more aggressive plying. Putting aside the normative issues of whether or not courts are the right actors to curb corporate social irresponsibility, the reality is that judges can and will act. What matters is that the fallout from such action does not taint the touchstone doctrines of other areas of the law.