
ARTICLES

LONG OVERDUE: FIFTH AMENDMENT PROTECTION FOR CORPORATE OFFICERS

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ABSTRACT

The Supreme Court has extended to corporations many of the same constitutional rights that were originally intended to protect people. One notable exception, however, is the Fifth Amendment's prohibition on compulsory self-incrimination.

"Corporations may not take the Fifth." There is a long line of cases dating back to the start of the twentieth century stating—but never directly holding—that corporations are not protected by the Self-Incrimination Clause.

But the fact that a corporation cannot invoke the Fifth Amendment does not explain why a person who works for a corporation cannot. As a matter of text, the Fifth Amendment draws no distinction among the "person[s]" it protects; everyone is protected—citizens and noncitizens. And the amendment certainly does not distinguish among "person[s]" depending on where they work or whether they are employed. Indeed, because the Justices agree, as Justice Scalia once noted, that "[a]ll the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears," an individual who works for a corporation—for example, the president or treasurer—is protected by the Fifth Amendment when forced to produce corporate records that will personally incriminate him.

Yet despite the plain text of the Fifth Amendment, the Court has concluded otherwise. According to the Justices, a person may be compelled simply because he is a corporate custodian to perform a testimonial act that will personally incriminate him. This is because the Court has fused the person with the corporation. Even the sole shareholder who runs a small business as his alter ego can be compelled to provide incriminating testimonial evidence due to his status as a corporate officer.

This Article examines and challenges the Court's long-standing view that an individual who works for or joins an organization is not protected by the Fifth Amendment when compelled to produce incriminating records that ostensibly

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belong to the organization. Known as the “collective entity” or “artificial entity” rule, the Court has described this rule as having “a lengthy and distinguished pedigree.” To be sure, the collective entity rule dates back to the start of the twentieth century. But there is nothing “distinguished,” and little to celebrate, about the rule. That is, unless one believes that certain persons, based on employment status or membership in an organization, should be compelled to give the government incriminating testimony.

The collective entity rule defies the text of the Fifth Amendment, the common law history of the privilege, and the Court’s Fifth Amendment precedents, which unmistakably establish that one’s employment status does not diminish the protection provided by the Fifth Amendment or the ability to invoke it.

CONTENTS

INTRODUCTION	1526
I. THE PROBLEMS WITH THE COLLECTIVE ENTITY RULE	1531
II. THE BEGINNINGS.....	1538
A. <i>The End of Boyd v. United States (1886) and the Emergence of Hale v. Henkel (1906)</i>	1550
B. <i>Wilson v. United States (1911): No Fifth Amendment Rights for Corporate Officers</i>	1555
C. <i>Wheeler v. United States (1913)</i>	1559
D. <i>United States v. White (1944)</i>	1562
E. <i>Curcio v. United States (1957): Two Types of Fifth Amendment Testimony?</i>	1565
F. <i>Bellis v. United States (1974)</i>	1571
G. <i>Fisher v. United States (1976)</i>	1575
H. <i>United States v. Doe (1984)</i>	1578
I. <i>Braswell v. United States (1988)</i>	1580
III. THE COLLECTIVE ENTITY RULE CANNOT BE RECONCILED WITH ESTABLISHED FIFTH AMENDMENT DOCTRINE	1588
A. <i>The Text of the Fifth Amendment Is Unambiguous: It Protects All Persons</i>	1588
B. <i>History: The Collective Entity Rule Is Inconsistent with the Common Law Privilege</i>	1590
C. <i>The Court's Waiver Theory Is Pure Legal Fiction</i>	1593
D. <i>Precedents: The Collective Entity Rule Contradicts a Long Line of Cases Holding That One's Occupation Does Not Undermine the Right to Take the Fifth</i>	1597
CONCLUSION.....	1603

INTRODUCTION

After a majority of the Court in *Citizens United v. Federal Election Commission*¹ ruled that “the Government may not suppress political speech on the basis of the speaker’s corporate identity,”² Justice Stevens’s dissent lectured his colleagues in the majority that “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”³ As a matter of text and original intent, Justice Stevens’s understanding of corporate personhood is probably correct. “There is nothing in the text of the Constitution that explicitly recognizes corporations or grants them individual rights. In fact, the word *corporation* appears nowhere in the Constitution.”⁴ And according to one excellent study of the Court’s cases in this area, “the people who wrote and ratified the Constitution simply never considered whether the Constitution applied to corporations.”⁵

Even so, despite the lack of attention paid to corporate personhood during the Framing era, the Court has extended to corporations many of the same constitutional rights that were originally intended to protect people.⁶ One notable exception, however, is the Fifth Amendment’s prohibition on compulsory self-incrimination.⁷ Even after a decision like *Citizens United*, “[c]orporations may

¹ 558 U.S. 310 (2010).

² *Id.* at 365.

³ *Id.* at 466 (Stevens, J., dissenting).

⁴ ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 3 (2018); see also Note, 30 COLUM. L. REV. 103, 106 (1930) (“Nowhere in the Constitution is the word ‘corporation’ to be found . . .”).

⁵ WINKLER, *supra* note 4, at 3.

⁶ See *id.* at 4. There is extensive legal scholarship on the Constitution and corporations. See generally Robert E. Wagner, *Miranda Inc.: Corporations and the Right to Remain Silent*, 11 VA. L. & BUS. REV. 499 (2017) (discussing impact *Citizens United* might have on Court’s denial of Fifth Amendment rights to corporations); Jonathan A. Marcantel, *A Unified Framework to Adjudicate Corporate Constitutional Rights*, 39 U. HAW. L. REV. 115 (2016) (navigating inconsistencies in existing corporate constitutional jurisprudence); Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605 (2016) (discussing question of corporate personhood based on recent jurisprudence extending rights of speech and religion to corporations); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015) (describing that corporate personhood argument originated from understanding corporations as associations of people); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014) (discussing practical questions for how corporation may bring case in federal court); Christopher Slobogin, *Citizens United and Corporate and Human Crime*, 41 STETSON L. REV. 127 (2011) (exploring criminal liability in light of *Citizens United*). For an insightful analysis of how the Court’s new and expansive Fourth Amendment doctrine on technological surveillance could converge with the Court’s expansive view of corporate personhood under the Constitution to restrict the investigative powers of regulators and prosecutors, see generally Miriam H. Baer, *Law Enforcement’s Lochner*, 105 MINN. L. REV. 1667 (2021).

⁷ The clause states, “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

not take the Fifth.”⁸ There is a long line of cases dating back to the start of the twentieth century stating—but never directly holding—that corporations are not protected by the Self-Incrimination Clause.

But the fact that a corporation cannot invoke the Fifth does not explain why a *person* who works for a corporation cannot. As a matter of text, the Fifth Amendment draws no distinction among the “person[s]” it protects; everyone is protected—citizens and noncitizens. And the amendment certainly does not distinguish among “person[s]” depending on where they work or whether they are employed. Indeed, because the Justices agree, as Justice Scalia once noted, that “[a]ll the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears[,]”⁹ an individual who works for a corporation—for example, the president or treasurer—is protected by the Fifth Amendment when forced to produce corporate records that will personally incriminate him.¹⁰

Yet despite the plain text of the Fifth Amendment, the Court has concluded otherwise. According to the Justices, a person may be compelled “simply by virtue of his status as a corporate custodian, to perform a testimonial act which will incriminate him personally.”¹¹ Why? Because the Court has fused the person with the corporation. The Court “has assimilated the position of company officials to that of the corporation they serve.”¹² Even the sole shareholder who runs a small business as his alter ego can be compelled to provide incriminating testimonial evidence due to his status as a corporate officer.¹³

And it is not just corporate officers to whom the Court denies Fifth Amendment protection. A person who joins a union, a political organization, a charity, a small business, or a family partnership or other organization cannot invoke the privilege against self-incrimination when subpoenaed to produce

⁸ Garrett, *supra* note 6, at 128-29.

⁹ Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 391-92 (2010) (Scalia, J., concurring).

¹⁰ Cf. United States v. Hubbell, 530 U.S. 27, 50 (2000) (Thomas, J., concurring) (noting when Fifth Amendment was adopted, “the term ‘witness’ meant a person who gives or furnishes evidence If this is so, a person who responds to a subpoena *duces tecum* would be just as much a ‘witness’ as a person who responds to a subpoena *ad testificandum*”).

¹¹ Braswell v. United States, 487 U.S. 99, 122 (1988) (Kennedy, J., dissenting).

¹² *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1278 (1979) [hereinafter *Corporate Crime*] (“Thus, a corporate functionary incriminated by company records he prepared may be compelled to produce them.”).

¹³ *Braswell*, 487 U.S. at 102; see also Maureen Coghlan, *Mistaking the Fifth: No Fifth Amendment Privilege for a One-Person Corporation*, FED. PRAC. & PROC. SECTION NEWSL. (N.J. State Bar Assoc., New Brunswick, N.J.), Sept. 2015, at 3 (discussing *In re Grand Jury Empanelled on May 9, 2014*, 786 F.3d 255 (3d Cir. 2015)); Note, *Privilege Against Self-Incrimination Held Inapplicable to Owner of One-Man Corporation*, 39 N.Y.U. L. REV. 1118, 1120 (1964) (noting Supreme Court’s disinterest in fact that person claiming corporate privilege was sole stockholder).

documents that the government claims belong or relate to the functions of the collective entity.¹⁴ As the Court has explained,

when acting as representatives of a collective group, [individuals] cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination.¹⁵

So, it's not just that corporations cannot take the Fifth; it's that anyone involved in a collective enterprise cannot. Indeed, the Court cited this rule when upholding the contempt conviction of a member of the Communist Party, who refused to disclose records of the organization to Congress in 1951.¹⁶ In so limiting the right for some, the Court erodes the protections of the Fifth Amendment that apply to all.¹⁷

The following pages carefully examine and challenge the Court's long-standing view that an individual who works for or joins an organization is not protected by the Fifth Amendment when compelled to produce incriminating records that ostensibly belong to the organization. Known as the "collective entity" or "artificial entity" rule,¹⁸ the Court has described this rule as having "a

¹⁴ Robert Marshall Heier, Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 BROOK. L. REV. 70, 84-85 (1966) ("[O]ne bizarre case has even held a ship's records to fall outside the privilege on the grounds that such records are *per se* not the records of the ship's owner." (citing *Korthinos v. Niarchos*, 175 F.2d 730, 734 (4th Cir. 1949))).

¹⁵ *United States v. White*, 322 U.S. 694, 699 (1944); see also Mitchell Lewis Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 389 (1987).

¹⁶ See *Rogers v. United States*, 340 U.S. 367, 372 (1951) ("[R]ecords kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'" (second alteration in original) (quoting *United States v. White*, 322 U.S. 694, 699 (1944))); see *infra* note 260 and accompanying text.

¹⁷ This happened in *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990). There, the Court relied upon the collective entity rule and the "required records" doctrine, which created an exception to the Fifth Amendment's plain text in order to promote the government's regulatory interests, to reject a mother's claim that jailing her for refusing to disclose to government officials the location of her presumed deceased infant violated her privilege against self-incrimination. See *id.* at 556.

¹⁸ Professor Mosteller calls this doctrine "the artificial entities *exception*" to the Fifth Amendment, and helpfully explains that the rule has two parts: "First, the artificial entity itself may not resist a subpoena on the grounds of self-incrimination. Second, a representative of the entity may not refuse to provide an entity document even if production would be personally incriminating." Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 49-50 (1987) [hereinafter Mosteller, *Simplifying Subpoena Law*] (emphasis added). This Article focuses on the second part of the rule—the fact that the representative of the entity is not protected by the Fifth Amendment.

lengthy and distinguished pedigree.”¹⁹ To be sure, the collective entity rule dates back to the start of the twentieth century. But there is nothing “distinguished,” and little to celebrate, about the rule. That is, unless one believes that certain persons, based on employment status or membership in an organization, should be compelled to give the government incriminating testimony.²⁰

As demonstrated in the pages that follow, dissimilar outcomes under the collective entity rule defy the text of the Fifth Amendment, the common law history of the privilege, and the Court’s Fifth Amendment precedents. Indeed, these precedents unmistakably establish that one’s employment status does not diminish the protection provided by the Fifth Amendment or the ability to invoke it. All of these failings can be found in the Court’s latest ruling on collective entities—*Braswell v. United States*.²¹ *Braswell* was a five-four decision decided in 1988.²² None of the current Justices were on the Court when *Braswell* was decided. Since then, two current members of the Court—Justices Thomas and Gorsuch—“have strongly suggested that they are prepared to reject current Fifth Amendment doctrine in favor of whatever an originalist approach might

¹⁹ *United States v. Braswell*, 487 U.S. 99, 104 (1988).

²⁰ Cf. Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 43-44 (2005) [hereinafter Cole, *Limited Liability Entities*] (“[T]he history of the collective entity doctrine may be long, but it is hardly distinguished. Instead, it is marked by shifting rationales, abandonment of no-longer-adequate conceptual underpinnings, and blatantly result-oriented analysis, largely prompted by the Court’s concerns about interfering unduly with law enforcement efforts” if earlier view of Fifth Amendment is applied to business records . . .”).

²¹ *Braswell*, 487 U.S. 99; see also *infra* Part III (discussing failures of cases like *Braswell*).

²² Professor Cole notes that “[i]n addition to the five-four split among the Justices, the difficult nature of the issues presented by the *Braswell* case is evidenced by the fact that the Justices did not divide along the usual ideological lines.” Cole, *Limited Liability Entities*, *supra* note 20, at 42 n.150. Chief Justice Rehnquist authored the majority opinion that was joined by Justices White, Blackmun, Stevens, and O’Connor. See *Braswell*, 487 U.S. at 100. Justice Kennedy wrote “a spirited dissent” that was joined by Justices Brennan, Marshall, and Scalia. *Leading Cases*, 102 HARV. L. REV. 143, 173 & n.29 (1988). Justice Stevens’s vote in *Braswell* may be explained by his view that occupation of certain job categories could result in the forfeiture of one’s Fifth Amendment right. For example, in *Lefkowitz v. Cunningham*, Justice Stevens’s dissenting opinion questioned the correctness of the Court’s earlier rulings that employment as a police officer could not be conditioned upon the waiver of one’s Fifth Amendment rights. 431 U.S. 801, 814 n.12 (1977) (Stevens, J., dissenting). For a discussion of these so-called “penalty cases,” see *infra* notes 543-46 and accompanying text.

reveal.”²³ Also, in *Chavez v. Martinez*,²⁴ Justice Thomas insisted that the text of the Fifth Amendment required the Court to reject a claim that the privilege was violated even when a police officer coerced an arrestee to incriminate himself.²⁵

If text and originalism are important to Fifth Amendment doctrine, the collective entity rule is ripe for repeal. It derives no support from the amendment’s text or history, and it eliminates what Justice Field deems the Fifth Amendment’s essential character: “[T]he shield of absolute silence.”²⁶ As such, the Court should overturn *Braswell*. Indeed, the Court may soon have an opportunity to do so. The federal circuit courts are split on *Braswell*’s applicability to former employees of artificial entities.²⁷ This Article shows why *Braswell* should be overturned.

²³ Orin S. Kerr, *Decryption Originalism: The Lessons of Burr*, 134 HARV. L. REV. 905, 907-08 (2021); see also *id.* at 908 n.5 (“See *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring) (stating that the Fifth Amendment act of production doctrine ‘may be inconsistent with the original meaning of the Fifth Amendment’s Self-Incrimination Clause’ and that he ‘would be willing to reconsider the scope and meaning’ of the Clause in a future case); *Carpenter v. United States*, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting) (stating that although existing Fifth Amendment precedent treats the privilege against self-incrimination as ‘applicable only to testimony, not the production of incriminating evidence[,] . . . there is substantial evidence that the privilege . . . was also originally understood to protect a person from being forced to turn over potentially incriminating evidence’).”). During her confirmation hearings, Justice Amy Coney Barrett expressed a strong preference to decide constitutional issues based on originalism. See *Nomination of the Honorable Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Amy Coney Barrett), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states> [<https://perma.cc/9MPH-8YZK>].

²⁴ 538 U.S. 760 (2003).

²⁵ *Id.* at 770 (“Although our cases have permitted the Fifth Amendment’s self-incrimination privilege to be asserted in noncriminal cases . . . that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination only occurs if one has been compelled to be a witness against himself in a criminal case.” (citations omitted)).

²⁶ *Brown v. Walker*, 161 U.S. 591, 630 (1896) (Field, J., dissenting).

²⁷ The Second, Third, and Ninth Circuits have held or stated that *Braswell*’s collective entity theory is not applicable to former employees. See *In re Three Grand Jury Subpoenas Duces Tecum* Dated Jan. 29, 1999, 191 F.3d 173, 181 (2d Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 133-34 & 133 n.2 (3d Cir. 1997); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995). The Eleventh and D.C. Circuits have held the opposite. See *In re Grand Jury Subpoena* Dated Nov. 12, 1991, 957 F.2d 807, 812 (11th Cir. 1992); *In re Sealed Case* (Government Records), 950 F.2d 736, 740 (D.C. Cir. 1991). See also Alice W. Yao, Comment, *Former Corporate Officers and Employees in the Context of the Collective Entity and Act of Production Doctrines*, 68 U. CHI. L. REV. 1487, 1489 (2001) (resolving circuit split by arguing doctrine “should apply to former employees in cases where there is a continuing fiduciary relationship”); Aaron Finesilver, Note, *A Refusal to Produce Corporate Documents: The Fifth Amendment’s Protection of Former Employees*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 103, 105 (2002) (concluding *Braswell* should apply to former employees by “compelling the production of corporate documents in their possession”).

Part I will set the stage: outlining the constitutional defects with the collective entity rule, that imperfect tool by which the Court has limited the constitutional rights of so many. Such defects include different outcomes for similar defendants and the refusal to recognize that the Fifth Amendment does not limit—in any manner—the type of “person” who is protected.

Part II describes the history and important rulings that comprise the Court’s collective entity doctrine. In the nineteenth century, cases such as *Boyd v. United States*²⁸ and *Counselman v. Hitchcock*²⁹ saw the Court vigorously securing the protections of the Fifth Amendment. But starting with *Hale v. Henkel*³⁰ in 1906, all the way to *Braswell* in 1988, the Court has used case after case to roll back the protections of the Fifth Amendment.

Part III explains why the collective entity doctrine cannot be reconciled with established Fifth Amendment doctrine and thus should be repealed. This final section of the Article examines the critical failures of cases like *Braswell* and shows how the Court can—and should—reset. Logic calls for such a change; the Constitution demands it.

I. THE PROBLEMS WITH THE COLLECTIVE ENTITY RULE

Judge Jerome Frank once described the Self-Incrimination Clause as a “noble principle [that] often transcends its origins, . . . account[ing] for some of our most cherished values and institutions.”³¹ Yet, at the same time, many respected legal scholars have condemned the privilege, and some have advocated for its repeal. The critics’ main complaint is that the privilege prevents law enforcement officials from questioning the person or persons most likely to know the facts surrounding a crime. In short, “[t]he Self-Incrimination Clause is probably our most schizophrenic amendment.”³² The Supreme Court has responded to this quandary mostly by siding with the interests of law enforcement when deciding Fifth Amendment cases. At times, the Court’s choice to diminish the amendment is untenable. Case in point is the collective entity doctrine.

Consider this scenario: A federal grand jury is investigating corruption in the awarding of county and municipal contracts to local businesses. The sole proprietor of one business, Sammy Sleaze, is suspected to have received such contracts. The Fifth Amendment bars the grand jury from forcing Sleaze to provide oral testimony unless he is given immunity for his testimony. The grand jury could subpoena Sleaze’s business records, but Sleaze’s act of producing those documents might also be testimony against him because it would reveal

²⁸ 116 U.S. 616 (1886).

²⁹ 142 U.S. 547 (1892).

³⁰ 201 U.S. 43 (1906).

³¹ *United States v. Grunewald*, 233 F.2d 556, 581 (2d Cir. 1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957).

³² Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 311 (1991).

that the records existed, Sleaze controlled the records, and the records produced were authentic. Thus, unless the government has an alternative source for the information it seeks regarding Sleaze's business records, the grand jury must grant Sleaze immunity to obtain the records.³³

The grand jury also suspects that Freddy Fraud, the sole shareholder of FF Inc., has been awarded corrupt contracts. Like Sleaze, Fraud cannot be compelled to provide oral testimony to the grand jury, but under the collective entity doctrine, Fraud cannot invoke the Fifth to resist the same type of subpoena that Sleaze received because Fraud operated his business as a corporation. According to the collective entity rule, Fraud, as a corporate officer, has no privilege because he has impliedly waived his Fifth Amendment right not to be compelled to incriminate himself, and when the records are disclosed to the grand jury, it is not really Fraud disclosing the records but the corporation performing the disclosure. Thus, the grand jury can compel disclosure of FF Inc.'s business documents—the same type of records it could not compel from Sleaze's business without an immunity grant. If those documents are incriminating, Fraud will be convicted and may serve time in prison.

What motivates the result in Fraud's case is the need for effective law enforcement, as the Court candidly admitted in *Braswell*,³⁴ its most recent opinion on the collective entity rule. If someone in Fraud's shoes "could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations."³⁵ But the need for effective law enforcement is equally important in Sleaze's situation. However, prosecutors in that scenario must live with the Fifth Amendment. Disparate results for essentially the same facts are intolerable in a legal system committed to "Equal Justice Under Law."³⁶

But these practical failings are made worse by logical failings. For starters, as applied to natural persons, the collective entity rule is circular.³⁷ Long ago, the Court decreed that corporations and other artificial entities are not protected by

³³ See *Lefkowitz v. Turley*, 414 U.S. 70, 79 (1973) (explaining that despite government's important interest in enforcement of its ordinary criminal laws, "the price for incriminating answers from third-party witnesses is sufficient immunity to satisfy the imperatives of the Fifth Amendment privilege against compelled self-incrimination").

³⁴ See *United States v. Braswell*, 487 U.S. 99, 115 (1988) (explaining that "a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities").

³⁵ *Id.* at 116.

³⁶ The words "Equal Justice Under Law" are engraved above the front entrance of the Supreme Court building in Washington, D.C. *About the Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/about.aspx> [<https://perma.cc/9FHZ-9JJ2>] (last visited Sept. 23, 2021).

³⁷ *Cf. Cole, Limited Liability Entities*, *supra* note 20, at 82 (noting Court's most recent defense of collective entity rule "is both circular and tautological; it fails to provide a satisfactory rationale for withholding the privilege from corporations and other collective entities").

the Fifth Amendment. Yet when a representative of the entity is subpoenaed to disclose organizational records that incriminate him personally, the Court ignores that a natural person—not a fictional entity—satisfies the three elements required to invoke the privilege: the person is subject to (1) official compulsion to produce, (2) incriminating, (3) testimony.³⁸ In its haste to deny corporations Fifth Amendment protection, the Court has jettisoned the rights of individuals. And in so doing, the Court has undermined the point of having the Fifth Amendment in the Constitution.³⁹

Rather than grapple with a valid invocation of the Fifth by an individual who happens to work for a collective entity, the Court instead addresses “the fifth amendment claims of corporate functionaries over corporate documents as a problem closely related to the corporation’s lack of fifth amendment protection.”⁴⁰ Under this approach, a “dubious asymmetry”⁴¹ is created: the corporate officer is not protected by the Fifth Amendment while the sole proprietor of a business is protected.⁴²

This is no trivial distinction.⁴³ Webster Hubbell’s invocation of the Fifth helped him avoid prosecution on federal tax and fraud charges, after a subpoena forced him to reveal thousands of pages documents and records.⁴⁴ But if Hubbell

³⁸ See Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 6 (“It is firmly established that the fifth amendment is violated only if the defendant’s conduct is compelled, testimonial, and incriminating.”).

³⁹ *Cf. id.* at 50 n.149 (“If the denial of the privilege against self-incrimination to corporations is interpreted to mean also that the real persons who work within it lose their personal privilege, then the supporting structure and theory of the fifth amendment are directly implicated.”).

⁴⁰ *Corporate Crime*, *supra* note 12, at 1281.

⁴¹ *Id.* at 1283.

⁴² *United States v. Doe*, 465 U.S. 605, 617 (1984) (concluding that Fifth Amendment applies to business records of sole proprietor).

⁴³ See Robert Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher’s Tangled Line*, 49 MO. L. REV. 439, 441-42 (1984) (noting that because person or business operating as sole proprietor may invoke Fifth Amendment to suppress records, they “enjoy a substantial advantage in litigation over entities denied the privilege” and “[t]his advantage is exploited most often to impede grand jury and tax investigations”); Yao, *supra* note 27, at 1488 (“Where the collective entity doctrine does not apply, however, the act of production doctrine precludes the production of documents altogether, thereby denying a prosecutor potentially incriminating evidence.”).

⁴⁴ See *United States v. Hubbell*, 530 U.S. 27, 46 (2000). In response to a federal subpoena for a wide range of documents—a federal judge described the subpoena “as ‘the quintessential fishing expedition,’” *id.* at 32 (quoting *United States v. Hubbell*, 11 F. Supp. 2d 25, 37 (D.D.C. 1998))—Hubbell took the Fifth. He received a grant of immunity and then disclosed 13,120 pages of documents to the Independent Counsel. *Hubbell*, 11 F. Supp. 2d at 33. The Independent Counsel’s examination of those documents led to an indictment of Hubbell for tax-related crimes and mail and wire fraud charges. *Id.* at 37. As the Court explained in *Hubbell*, the Independent Counsel needed Hubbell’s act of production “to identify potential sources of information and to produce those sources.” 530 U.S. at 41. Put another way, it was

had practiced law as a corporate entity, he could not have invoked the Fifth. As a constitutional norm, this distinction is arbitrary and ridiculous.⁴⁵

More importantly, as applied to individuals who work for or are members of organizations, the collective entity rule cannot be reconciled with the text of the Fifth Amendment itself, or even the amendment's common law origins.⁴⁶ Further, the Court's precedents constructing and applying the rule have offered various inconsistent justifications for an unvarying outcome: custodians of entity records cannot invoke the Fifth.⁴⁷

"abundantly clear that the testimonial aspect of [Hubbell's] act of producing subpoenaed documents was the first step in a chain of evidence that led to [his] prosecution." *Id.* at 42. A detailed examination of *Hubbell* is beyond the scope of this Article, but Lance Cole, Robert Mosteller, and H. Richard Uviller have provided excellent analyses of *Hubbell*. See generally Lance Cole, *The Fifth Amendment and Compelled Production of Personal Documents After United States v. Hubbell—New Protection for Private Papers?*, 29 AM. J. CRIM. L. 123 (2002) [hereinafter Cole, *The Fifth Amendment and Compelled Production*] (addressing whether Fifth Amendment protects against compelled production of incriminating personal documents by subject of criminal investigation); Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487 (2001) [hereinafter Mosteller, *Cowboy Prosecutors*] (considering modern importance of Fifth Amendment to prosecutors); H. Richard Uviller, *Foreword: Fisher Goes on the Quintessential Fishing Expedition and Hubbell Is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311 (2001) (discussing Fifth Amendment privilege in wake of *Hubbell* and *Fisher* decisions).

⁴⁵ See Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 425 (1993) [hereinafter Henning, *Testing the Limits*] ("That decision can have momentous consequences, because if the business is not incorporated, the owner may be able to shield the records through the assertion of the Fifth Amendment privilege. It is even possible under *Braswell* for a person to own two businesses, one a corporation and the other a sole proprietorship, and be able to assert the privilege to resist production of one set of records yet be forced to produce the records for the other business. It is odd that the seemingly inconsequential choice of what organizational form to use for a business, which may have little if any effect on its operations, can determine the applicability of a constitutional right.").

⁴⁶ See *infra* notes 454-70 and accompanying text.

⁴⁷ See Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 68 (1986) (noting that from *Hale v. Henkel*, 201 U.S. 43 (1906), to *Bellis v. United States*, 417 U.S. 85 (1974), "the cases dealing with subpoenas for institutional records were uniform in result but wavering in explanation"); Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 50 (listing five justifications the Court has proffered for collective entity rule); David N. Lathrop, *Braswell v. United States: The Collective Entity Doctrine and the Compelled Testimony Standard*, 16 HASTINGS CONST. L.Q. 553, 556-57 (1989) (listing various and differing rationales offered by Court for collective entity rule); cf. Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 801 (1996) [hereinafter Henning, *Corporate Criminal Liability*] ("Since [*Hale*], the Court has rejected corporate claims to the privilege against self-incrimination. This has been mainly because permitting the assertion of the right would have a deleterious effect on the enforcement of regulatory provisions, which were designed to curb corporate

At bottom, the collective entity rule is part legal realism and part hostility to the privilege: from its origins and continuing today, the collective entity rule arises from the belief that without the authority to inspect the books and documents of organizations, many economic crimes might go undetected.⁴⁸ The rule also reflects opposition to the Fifth Amendment.⁴⁹ Put simply, law

misconduct.”); *id.* at 861 (“The invariable, and even expansive, denial of the privilege against self-incrimination for a variety of organizations, including a single-shareholder corporation, shows that the Court is not willing to allow the government’s enforcement program to be adversely affected by permitting any corporate claim of the privilege.”).

⁴⁸ See, e.g., Henning, *Corporate Criminal Liability*, *supra* note 47, at 828 (“The Court’s rationale for adopting increasingly broad definitions of the types of entities that may not invoke the privilege against self-incrimination could be found in its expressed fear of undermining the government’s law enforcement effort if it construed the corporation’s constitutional rights too expansively.”); *Corporate Crime*, *supra* note 12, at 1283 (“[D]ocumentary evidence often supplies the only physical evidence for the government’s case, so a blanket privilege would thwart the enforcement of many economic regulations.”); Rothman, *supra* note 15, at 389 (stating result in *Wilson v. United States*, 221 U.S. 361 (1911), Court’s first case denying corporate officer Fifth Amendment protection under collective entity rule, was “apparently demanded by the fight against corporate crime”); Gregory I. Massing, Note, *The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White-Collar Crime*, 75 VA. L. REV. 1179, 1198 (1989) (“The collective entity doctrine owes its continuing vitality largely to a policy decision to facilitate the prosecution of economic crimes.”).

⁴⁹ The Justices, of course, would never admit such hostility in their opinions. They are too sophisticated to do so. *But cf.* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (remarking Self-Incrimination Clause “might be lost, and justice still be done”). Justice Cardozo also opined that “[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry.” *Id.* at 326. Others, however, are not so reticent. One scholar, writing at the time of the Court’s first important case on the Fifth Amendment rights of corporations and their officers, expressed open contempt for the Fifth. He stated that the Fifth Amendment ought to be abolished, at least in criminal cases. The reasons for it have ceased to exist, and it is now merely a protection to rogues against justice. . . .

How to deal with great business combinations, trusts, monopolies and large corporations that have recently grown up among us is one of the most serious problems that now confront the people. . . . Certain kinds of acts must be made criminal, if they are not so now, and the individuals who do such acts must be punished. It is of little use to take any sort of legal proceedings against the corporations, the artificial persons. The offending individuals must be reached and treated as criminals. But this cannot be done effectively so long as the rule that a person need not incriminate himself stands. That rule cripples the administration of the criminal law, and makes it an almost useless weapon against the evils and abuse of combination.

Henry T. Terry, *Constitutional Provisions Against Forcing Self-Incrimination*, 15 YALE L.J. 127, 127, 129 (1906).

Opposition to the principle against compelled self-incrimination is long-standing. Probably the best-known critique of the privilege was proffered by the British legal scholar Jeremy Bentham. See 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* bk. IX, pt. IV, ch. III, 230, 238-39 (Garland Publ’g 1978) (1827) (criticizing claim that it is cruel and unfair to compel accused persons to incriminate themselves as “old woman’s reason,” and describing

enforcement needs must prevail over the right of the individual not to be compelled to produce incriminating testimony.

argument that requiring accused persons to answer potentially incriminating questions gave unfair advantage to prosecution as “fox-hunter’s reason,” which confused sport with search for truth).

America’s foremost evidence scholar, John Henry Wigmore, proposed abolishing the amendment in 1891. John H. Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71, 87 (1891). A few years later, Wigmore’s view of the Fifth Amendment had softened—a bit:

For the sake, then, not of the guilty, but of the innocent accused, and of conservative and healthy principles of judicial conduct, the privilege should be preserved.

....

The privilege therefore should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached.

3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2251 (1905).

In 1959, Lewis Mayers wrote a book critiquing the Fifth Amendment and offered changes for interpreting the Fifth that would limit its scope. LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 183 (1959). Less than a decade later, in 1968, the well-respected federal appellate judge Henry Friendly offered an informal list of statements from “great and learned men” who have opposed or recommended limiting the privilege since the late nineteenth century to the mid-twentieth century. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 672-74 (1968); see also Mickey Kaus, *The Fifth Is Now Obsolete*, N.Y. TIMES, Dec. 30, 1986, at A19 (contending that there is no convincing justification for the privilege, and the amendment’s original purpose to protect religious and political freedoms can be served “by other, far less destructive, constitutional rules”). In 1986, David Dolinko argued that “contemporary efforts to justify the privilege as more than a historical relic are uniformly unsatisfactory and that no efforts along similar lines are likely to succeed.” David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986); see also *id.* at 1147 (“[T]he role of the privilege in American law can be explained by specific historical developments, but cannot be justified either functionally or conceptually.” (footnote omitted)). In a perceptive Article, Donald Dripps argued against both police interrogation and the Fifth Amendment. Donald A. Dripps, *Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 734 (1988) (“[Americans] do not really need to be persuaded that the privilege is a mistake. The institution of police interrogation proves our practical rejection of the privilege.”). *But cf.* Schulhofer, *supra* note 32, at 336 (responding to academic and judicial criticism of privilege and contending that Fifth Amendment “is a very practical and very important safeguard”). More recently, Akhil Reed Amar and Renée B. Lettow have called for a major reconsideration of what the Fifth Amendment requires. See generally Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (proposing new rationale and scope for Self-Incrimination Clause). For responses to Amar and Lettow’s proposals, see generally Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995); and Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559 (1996). For the response to the response, see Akhil Reed Amar & Renée B. Lettow, *Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011 (1995).

Of course, the government's interest "to regulate homicide is also important and abiding."⁵⁰ But the Court has not yet "suggested that the privilege against self-incrimination yield as well to that interest."⁵¹ Nor does the Fifth Amendment permit such naked policy choices. The amendment's command—that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself"—does not permit judicial balancing of interests.⁵²

Fairness and equal treatment should also matter. As the law currently stands, a person who operates his business as sole shareholder is not protected by the Fifth Amendment, but the sole proprietor is protected. This "anomalous result . . . represents the worst of all possible worlds—an unnecessary and unjustifiable legal doctrine that treats similarly situated people differently."⁵³ Lastly, several legal scholars have criticized or called for the abandonment of the collective entity rule.⁵⁴

⁵⁰ Heier, *supra* note 14, at 78.

⁵¹ *Id.*

⁵² U.S. CONST. amend. V. Where the privilege is properly invoked, the Court has unequivocally stated that "[b]alancing . . . is not simply unnecessary. It is impermissible." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979). *See Fisher v. United States*, 425 U.S. 391, 400 (1976) ("[T]he Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness."); *Braswell v. United States*, 487 U.S. 99, 129 (1988) (Kennedy, J., dissenting) (stating that "the text of the Fifth Amendment does not authorize exceptions premised on [the government's interest in law enforcement]"); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2634 (1996) ("The privilege afforded by the Fifth Amendment . . . is unqualified. The Framers of the Constitution apparently concluded that no amount of evidence could justify compelling a person to supply testimonial evidence against herself in a criminal case."); Nancy J. King, Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1565 n.123 (1986) (citing *United States v. Fox*, 721 F.2d 32, 40 n.6 (2d Cir. 1983)); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 368 (1979); Heier, *supra* note 14, at 79; Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 652-54 (1986) [hereinafter *Organizational Papers*]; *cf.* Alito, *supra* note 47, at 36 (stating Fifth Amendment applies only to compelled self-incrimination; "[n]evertheless, within this limited sphere its prohibition is absolute. It does not merely regulate procedures, and it forbids any force or compulsion for the purpose of extracting self-incrimination").

⁵³ Cole, *Limited Liability Entities*, *supra* note 20, at 107.

⁵⁴ *See, e.g., id.*; Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 2; Rothman, *supra* note 15, at 387-88; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 429-33 (1995) (describing ruling in *Hale v. Henkel*, 201 U.S. 43 (1906), as "result-oriented"); Marvin G. Pickholz & Paul N. Murphy, *Corporate Officers and Employees After Braswell: Is No Document Sacred?*, 18 SEC. REGUL. L.J. 359, 363 (1991); Lathrop, *supra* note 47, at 555; *Leading Cases*, *supra* note 22, at 170-80 (discussing *Braswell*); Robert Bonvouloir Foster, Comment, *The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine*, 80 NW. L. REV. 1605, 1607 (1986); King, *supra* note 52, at 1562; *Organizational Papers*, *supra* note 52, at 649-50; Scott D. Price, Note, *Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records*, 34 VILL. L. REV. 353, 359-62

One purpose of the Fifth Amendment is to bar “fishing expeditions” of a person’s mind to protect the individual from being forcibly “conscripted by [the government] to defeat himself.”⁵⁵ Put differently, “the privilege at its heart has always protected a form of secrecy—the right not to share one’s testimony with the government,”⁵⁶ specifically incriminating testimony.

If this is so, then the Justices need to reconsider the collective entity rule. In short, they need to explain why the Fifth Amendment, which commands that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself,”⁵⁷ does not protect a natural person who is the target of a criminal investigation when the government compels him to disclose testimony that personally incriminates him.

The next section, Part II, describes the history and important rulings that comprise the Court’s collective entity doctrine.

II. THE BEGINNINGS

In 1988, Justice Samuel Alito, then working in the Department of Justice, accurately and neatly summarized the collective entity cases: “[F]rom *Hale* in 1906 to *Bellis* in 1974, the cases dealing with subpoenas for institutional records were uniform in result but wavering in explanation.”⁵⁸ That is, the result in every case was that a natural person asserting a viable Fifth Amendment claim was told by the Court that he had no privilege because he worked for or was a member of an artificial entity.⁵⁹ In essence, the person invoking the Fifth, according to the Court, had waived his right by taking the job or joining a group.⁶⁰ But that wasn’t always the case. Before 1906, two cases set the stage for an entirely different interpretation of the Fifth Amendment. In fact, it was so

(1989); John M. Grogan, Jr., *Fifth Amendment—The Act of Production Privilege: The Supreme Court’s Portrait of a Dualistic Record Custodian*, 79 J. CRIM. L. & CRIMINOLOGY 701, 702 (1988); H. Robert Fiebach, Note, *The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. PA. L. REV. 394, 416 (1964).

⁵⁵ John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d’Etre and Miscellaneous Implications*, 51 J. CRIM. L. & CRIMINOLOGY 138, 151 (1960); see also *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (describing one policy of privilege as mandating “a fair state-individual balancing by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load” (quoting WIGMORE, *supra* note 49, at 317)).

⁵⁶ Stuntz, *supra* note 54, at 394.

⁵⁷ U.S. CONST. amend. V.

⁵⁸ Alito, *supra* note 47, at 68 (first citing *Hale v. Henkel*, 201 U.S. 43 (1906); and then citing *Bellis v. United States*, 417 U.S. 85 (1974)).

⁵⁹ Edwin F. Hale’s Fifth Amendment claim was denied because he was given immunity for his testimony and production of corporate documents. See *infra* notes 152-73 and accompanying text.

⁶⁰ Cf. Alito, *supra* note 47, at 69 (noting since *Wilson*, the Court has rejected claims of privilege on “the theory of implied waiver: by assuming custody of unprivileged records an individual was deemed to waive his personal privilege”).

powerful an assertion of privilege that the Court—looking to curtail the Fifth Amendment for an ever more powerful state—had to spend the next hundred years tearing it down.

In 1886—the same Court Term and calendar year that the Justices announced that corporations are “persons” within the meaning of the Fourteenth Amendment’s Equal Protection Clause—the Court decided *Boyd v. United States*.⁶¹ One of the Court’s best-known and controversial rulings, *Boyd* has been much praised and widely condemned by Justices who later sat on the Court and by legal scholars. Justice Brandeis described *Boyd* as “a case that will be remembered as long as civil liberty lives in the United States,”⁶² while Chief Justice Burger once told his colleagues that “[a] lot of *Boyd v. United States* is a lot of unmitigated nonsense.”⁶³

Looking back, it is ironic that *Boyd* laid the foundation for Fourth and Fifth Amendment doctrine because “*Boyd* was not a typical criminal case; in fact, it was not a criminal case at all.”⁶⁴ E.A. Boyd & Sons, a partnership owned by Edward and George Boyd, had a contract with the federal government to supply imported glass for the construction of a federal building in Philadelphia.⁶⁵ The company was permitted to import the glass duty-free.⁶⁶ A dispute arose between the parties about the amount of duty-free glass that was supplied by the company.⁶⁷

The Boyds claimed that they were entitled to more glass because some of the imported glass had been damaged during transit.⁶⁸ The government disagreed,

⁶¹ 116 U.S. 616 (1886). *Boyd* was decided on February 1, 1886, three months before the Court’s decision in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), which was announced on May 10, 1886. *Santa Clara County* held, without discussion, that corporations are “persons” entitled to equal protection from discriminatory state laws under the Fourteenth Amendment. Earlier during that same October 1885 Term, the Court was considering whether corporations were “persons” under the Due Process and Equal Protection Clauses of the Fourteenth Amendment in *San Mateo County v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885). However, *San Mateo County* was settled so the Court did not address the issue. For a fascinating account of the legal maneuverings surrounding *San Mateo County* and *Santa Clara County*, see WINKLER, *supra* note 4, at 113-60.

⁶² *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting); *see also* *Schmerber v. California*, 384 U.S. 757, 776 (1966) (Black, J., dissenting) (characterizing *Boyd* as “among the greatest constitutional decisions of this Court”). Professor Edward Corwin in his influential Article on the Fifth Amendment described *Boyd* and *Counselman v. Hitchcock*, 142 U.S. 547 (1892), discussed below, as “outstanding decisions.” Edward S. Corwin, *The Supreme Court’s Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 13 (1930) [hereinafter Corwin I].

⁶³ THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 468 (Del Dickson ed., 2001).

⁶⁴ Stuntz, *supra* note 54, at 422.

⁶⁵ Rothman, *supra* note 15, at 390.

⁶⁶ Stuntz, *supra* note 54, at 422.

⁶⁷ *Id.*

⁶⁸ *Id.*

and instituted a forfeiture proceeding after federal officers seized thirty-five cases of glass shipped to the company for which customs duties had not been paid.⁶⁹

Pursuant to an 1874 federal tax law, a district court judge ordered the company to produce an invoice for a previous shipment of glass.⁷⁰ Under the law, failure to comply with the court order meant that the government's allegations would be taken as confessed.⁷¹ The company complied under protest.⁷² After losing in the lower courts, the company took their claim to the Supreme Court, arguing that the court order for the invoice violated the firm's constitutional right to be free from unreasonable searches and seizures and their right not to be compelled to provide incriminating evidence.⁷³ The Court ruled for the Boyds.⁷⁴

This result was far from expected. Prior to *Boyd*, the Court had not said much about the Fourth Amendment or the Fifth Amendment's Self-Incrimination Clause.⁷⁵ Indeed, *Boyd* was "the first case in which the Court considered the fifth amendment's application to documents."⁷⁶ Writing for the majority, Justice Bradley conceded that no search or seizure was authorized by the court order for

⁶⁹ *Id.*

⁷⁰ 19 U.S.C. § 535 (1874). As Richard Epstein has helpfully explained, "the calculation of the proper tax on the thirty-five cases of plate glass seized by the tax collector depended on the 'quantity and value of the glass contained in twenty-nine cases previously imported [by the company].'" Richard A. Epstein, *Entick v. Carrington and Boyd v. United States: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 42 (2015). The court order sought the invoice for the shipment of the twenty-nine cases in order to prove that the company had fraudulently claimed credit for glass that had not been used in the construction for the building in Philadelphia. *Id.* ("The lower court already possessed the letter that Boyd had sent to the US Treasury stating his claim for the credit. It needed the earlier invoice to close the loop on the fraud." (footnote omitted)).

The Court's opinion did not clarify whether one of the Boyds, the brothers together, the partnership, or a combination of all was the party raising the constitutional objection to the court order. The Court refers to the "claimants of the invoice" in its opinion. *Boyd v. United States*, 116 U.S. 616, 618 (1886).

⁷¹ *Boyd*, 116 U.S. at 620.

⁷² *Id.* at 618.

⁷³ *Id.* at 621.

⁷⁴ *Id.* at 638.

⁷⁵ Alito, *supra* note 47, at 39 (describing *Boyd* as Court's "first significant case involving the fourth amendment or the fifth amendment privilege"); Gerstein, *supra* note 52, at 362 (asserting that "[t]hrough most of the course of the nineteenth century, . . . there was no development in America of the application of the self-incrimination privilege to private papers," and thus *Boyd* was Court's "first disquisition on the fifth amendment privilege"). Professor Corwin explains that one reason for the Court's silence on the Fifth Amendment from the Founding Era to the late nineteenth century was because "accused persons on trial in the federal courts were excluded from taking the stand at all, while the test which was applied to the immunities claimed by witnesses—not only in the federal courts but in the state courts as well—was the direct test of the common law." Corwin I, *supra* note 62, at 13.

⁷⁶ *Organizational Papers*, *supra* note 52, at 642.

the invoice and that the proceeding below was not “within the literal terms of the Fifth Amendment . . . any more than it is within the literal terms of the Fourth.”⁷⁷ Because failure to produce the invoice, however, meant that the government’s claims would be taken as proven, Justice Bradley concluded that the order was “tantamount to compelling” disclosure of the invoice.⁷⁸ Justice Bradley then reasoned that a compulsory production of a person’s papers triggered Fourth Amendment protection “because it is a material ingredient, and effects the sole object and purpose of search and seizure.”⁷⁹ And the court order was “unreasonable” under the Fourth Amendment because it sought private papers owned by the Boyds, which Justice Bradley distinguished from a search seeking stolen goods or contraband.⁸⁰

Justice Bradley then addressed the Boyds’ Fifth Amendment claim. He saw an “intimate relation between” the Fourth and Fifth Amendments.⁸¹ He explained that unreasonable searches and seizures are often performed for the purpose of “compelling a man to give evidence against himself, which in criminal cases is condemned” by the Fifth Amendment.⁸² Compelling a person to provide incriminating testimony “throws light on the question as to what is an ‘unreasonable search and seizure’” under the Fourth Amendment.⁸³ Thus, Justice Bradley believed that seizing a person’s private papers to be used against him was indistinguishable from compelling him to be a witness against himself.⁸⁴ When read this way, “the Fourth and Fifth Amendments run almost into each other.”⁸⁵

Justice Miller penned a concurring opinion, which was joined by Chief Justice Waite.⁸⁶ Justice Miller found that the statute did not authorize a search or seizure,⁸⁷ and he discerned no nexus between the Fourth and Fifth Amendments. Instead, Justice Miller relied solely on the Fifth Amendment to rule for the

⁷⁷ *Boyd*, 116 U.S. at 633.

⁷⁸ *Id.* at 621-22.

⁷⁹ *Id.* at 622.

⁸⁰ *Id.* at 623. (“The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man’s private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him.”).

⁸¹ *Id.* at 633.

⁸² *Id.* Professor Nagareda summarized Justice Bradley’s reasoning as follows: “The compelled production of self-incriminatory documents amounts to an unreasonable search and seizure within the meaning of the Fourth Amendment and, for that reason, also constitutes the compulsion of a person ‘to be a witness against himself’ in violation of the Fifth.” Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1585 (1999).

⁸³ *Boyd*, 116 U.S. at 633.

⁸⁴ *Id.*

⁸⁵ *Id.* at 630.

⁸⁶ *Id.* at 639 (Miller, J., concurring).

⁸⁷ *Id.*

Boyd. Like the majority, Justice Miller believed that the forfeiture proceeding was a criminal case within the meaning of the Fifth Amendment.⁸⁸ Next, Justice Miller found that the court order for the invoice was the equivalent of a subpoena *duces tecum* because failure to comply meant that the government's allegations against the Boyds were deemed confessed "and made the foundation of the judgment of the court."⁸⁹ For Justice Miller, that was a "clear" violation of the privilege because the Boyds were compelled to produce incriminating evidence against themselves.⁹⁰

Boyd's impact on the development of Fourth and Fifth Amendment jurisprudence cannot be understated.⁹¹ As a practical matter, *Boyd* planted the seeds for what would become the federal exclusionary rule, which barred in judicial proceedings the admission of evidence obtained by violating a person's Fourth Amendment rights.⁹² *Boyd* also seemed to announce a per se rule that forbade the government from searching for or seizing private property, "particularly private papers, in which it had no possessory or other property interest, even when it could assert a rational basis for the intrusion."⁹³

Regarding the meaning and scope of the Fifth Amendment, however, *Boyd* provided little guidance.⁹⁴ To be sure, Justice Bradley's opinion did not embrace

⁸⁸ *Id.* As Professor Nagareda perceptively noted, failure to produce the invoice would not only have amounted to a "confession" of the government's charges and resulted in the forfeiture of the seized thirty-five cases of glass "but also [subjected the Boyds or the partnership] to the prospect of criminal sanctions." Nagareda, *supra* note 82, at 1586.

⁸⁹ *Boyd*, 116 U.S. at 639 (Miller, J., concurring).

⁹⁰ *Id.* Regrettably, Justice Miller did not explain why there was a "clear" violation of the Fifth Amendment. See Nagareda, *supra* note 82, at 1590.

⁹¹ See, e.g., MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 163 (1980) (asserting *Boyd* was "for a long time the cornerstone of both Fourth and Fifth Amendment jurisprudence and is the necessary starting point in assessing the role of the privilege against self-incrimination in controlling government acquisition of incriminating evidence").

⁹² See Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 203 (1930) (noting *Boyd* established "the rule that evidence obtained in violation of a person's rights under the Fourth Amendment may not under the Fifth Amendment be validly received against him in any criminal prosecution in a federal court"). In 1914, the seeds planted by *Boyd* bore fruit when in *Weeks v. United States*, the Justices unanimously held that private papers discovered pursuant to an unconstitutional search and seizure could not be used in a federal criminal prosecution. 232 U.S. 383, 398 (1914). In contrast to *Boyd*, *Weeks* concluded that the Fourth Amendment alone barred the admission of illegally obtained evidence in a federal prosecution. *Id.* at 397. For a fuller analysis of *Boyd's* impact on the Fourth Amendment's exclusionary rule, see TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 3-17 (2013).

⁹³ Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 579 (1996).

⁹⁴ Before he was placed on the Court, Samuel Alito, Jr., remarked that *Boyd* "surely contains no independent fifth amendment analysis." Alito, *supra* note 47, at 38 n.55; see also

a literal or narrow view of the Self-Incrimination Clause. He could have said that the forfeiture proceeding was not a “criminal case” within the meaning of the Fifth Amendment, and he most certainly did not interpret the amendment’s scope as confined to the scenario of a criminal defendant being forced to take the stand in his own case. Rather, Justice Bradley (as well as Justice Miller) embraced a broad view of the Fifth Amendment and extended its protection to include compulsion of documents and other private objects.⁹⁵

History has not been kind to *Boyd*’s reasoning, perhaps because the Court offered so little substantive analysis to justify its result. One hundred years later, Justice Kennedy remarked that *Boyd* “generated nearly a century of doctrinal ambiguity.”⁹⁶ Most, if not all, of the constitutional rules announced in *Boyd* have been overruled by the modern Court.⁹⁷ Viewed in retrospect, the Justices should have followed Justice Miller’s lead and decided *Boyd* solely on Fifth Amendment grounds.⁹⁸ Although *Boyd* would be studied by early twentieth century lawyers as a Fourth Amendment case, by today’s legal standards, the court order for the invoice was not an unreasonable search or seizure. Indeed, “no search or seizure occurred.”⁹⁹

Friendly, *supra* note 49, at 682. Judge Friendly described Justice Bradley’s Fifth Amendment analysis as “surprising blindness,” “vacuous,” and suggested that the *Boyd* Court was, like the Warren Court eighty years later, “[o]bsess[ed]” with the Fifth Amendment. *Id.* at 681-82. As noted above, besides correctly characterizing the court order for the invoice as the equivalent of a subpoena *duces tecum*, Justice Miller’s conclusion that the Fifth Amendment was violated is entirely conclusory. See Nagareda, *supra* note 83, at 1590.

⁹⁵ See Corwin I, *supra* note 62, at 13-14 (explaining *Boyd* rejected views adopted by several lower federal courts which read Fifth Amendment not to apply to forfeiture proceedings and “meant to cover only oral testimony given under oath, not evidence afforded by books and papers”).

⁹⁶ *Braswell v. United States*, 487 U.S. 99, 121 (1988) (Kennedy, J., dissenting).

⁹⁷ See *Fisher v. United States*, 425 U.S. 391, 407 (1976) (“Several of *Boyd*’s express or implicit declarations have not stood the test of time.”).

⁹⁸ Professor Nagareda’s insightful Article makes a compelling case for the “rehabilitation of *Boyd*, and for a consequent reorientation of Fifth Amendment jurisprudence as a whole, by explicating the wisdom of the Miller view.” Nagareda, *supra* note 83, at 1581. Nagareda’s thesis is:

The phrase “to be a witness” in the Fifth Amendment is best understood as *synonymous* with the phrase “to give evidence” used in the proposals for a bill of rights formulated by state ratifying conventions upon consideration of the original Constitution. The compulsion of a person to produce self-incriminatory documents is literally the compulsion of that person “to give evidence” against himself—that is, to turn over documents for possible use as incriminatory evidence in a subsequent criminal trial.

Id. at 1580 (footnote omitted).

⁹⁹ Rothman, *supra* note 15, at 391-92 (“[T]he trial court’s order demanding the invoice was the functional equivalent of a subpoena *duces tecum* requiring production of business documents for preliminary investigation or proof at trial. When seen in this light, *Boyd* is not really a fourth amendment case at all; it is a fifth amendment opinion.” (footnote omitted)).

Further, merging the Fourth and Fifth Amendments to rule in favor of the Boyds “only confused matters, making privacy more important in self-incrimination cases than it otherwise might have been.”¹⁰⁰

If analyzed solely as a Fifth Amendment case, however, *Boyd* stands on a stronger constitutional foundation. And if viewed through the lens of the prohibition of forced self-incrimination, *Boyd* offers certain insights for determining the rights of persons who work for collective entities.

First, as the law stood in the late nineteenth century, the Boyds did have a valid Fifth Amendment objection to the court order demanding the production of the invoice. As Wigmore explained in his 1905 evidence treatise, “[t]he privilege protects a person from any disclosure sought by legal process against him as a witness.”¹⁰¹ Indeed, Wigmore thought the Fifth Amendment aspect of *Boyd* was “properly” decided, although he vigorously opposed Justice Bradley’s merging of the Fourth and Fifth Amendments to rule in favor of the Boyds.¹⁰² Wigmore did not have an iconoclastic view of the Fifth Amendment. As many have noted, as applied to the Boyds, the 1874 federal law violated the Fifth Amendment because the amendment “was intended to preserve the common law privilege against compelled self-incrimination and . . . the privilege, as interpreted at the time of the Bill of Rights, encompassed the compulsory production of papers.”¹⁰³ At the Founding, the “common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents.”¹⁰⁴ That is why *Boyd* asserted that prior to the Founding era, “one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of crime.”¹⁰⁵

This view of the Fifth Amendment is consistent with the constitutional text as well as common sense. “*A priori*, . . . one might . . . believe that being

¹⁰⁰ *Id.* at 392. Many have criticized *Boyd*’s merging theory, and rightfully so. For example, the *Boyd* Court’s inability to distinguish the invasion of privacy by unlawful search and seizure from the compelled disclosure of inculpatory facts ultimately doomed the case. Security in person and place has nothing whatever to do with freedom from government coercion. . . . [Thus,] the two Amendments do not “run almost into each other.” They diverge sharply to protect in different ways two very different aspects of personal security and autonomy.

Uviller, *supra* note 44, at 329-30. For criticism of *Boyd*’s reliance on the Fourth Amendment, see Rothman, *supra* note 15, at 392 n.19.

¹⁰¹ WIGMORE, *supra* note 49, § 2263.

¹⁰² *Id.* § 2264 (stating *Boyd*’s holding that “an order for production of documents involving self-criminating matter was properly held to be within the privilege”; condemning *Boyd*’s use of the Fourth Amendment to prohibit “seizure describing specific documents in the possession of a specific person”; and highlighting that, “apart from this error, the radical fallacy of the opinion lies in its attempt to wrest the Fourth Amendment to the aid of the Fifth” because “[t]he ‘intimate relation between them,’ which the opinion predicates, must be wholly denied”)

¹⁰³ Alito, *supra* note 47, at 35.

¹⁰⁴ *United States v. Hubbell*, 530 U.S. 27, 51 (2000) (Thomas, J., concurring).

¹⁰⁵ *Boyd v. United States*, 116 U.S. 616, 631 (1886).

compelled (by court process or otherwise) to furnish previously-expressed cerebral evidence that might be used in securing a conviction violates the explicit terms of the Fifth Amendment: not to be compelled to be a witness against oneself.¹⁰⁶ And thinking sensibly, compelling a person to reveal documents, especially documents that he or she may have authored, is comparable to probing the person's mental facilities—albeit after the person's thoughts have been memorialized on paper or, in modern times, typed into a computer.¹⁰⁷ Thus, “the attraction” of *Boyd*'s Fifth Amendment reasoning was “[s]elf-inculpatory words spoken under compulsion, which emanates either from interrogation or the process of the subpoena *ad testificandum*, do not seem intuitively so different from words spoken or written freely but produced under compulsion of the subpoena *duces tecum*.”¹⁰⁸

Second, who actually owned the invoice—the partnership, the Boyd brothers, or some combination of the two—was irrelevant to the *Boyd* Court. “*Boyd* proceeded on the assumption that the organization and its constituent members

¹⁰⁶ Uviller, *supra* note 44, at 314.

¹⁰⁷ See Alito, *supra* note 47, at 39 (suggesting that certain preexisting intimate personal documents, like diaries, should be protected by Fifth Amendment privilege). Justice Alito stated that:

Boyd may have survived because its reasoning contained a kernel of truth. Certain intimate personal documents—a diary is the best example—are like an extension of the individual's mind. They are a substitute for the perfect memory that humans lack. Forcing an individual to give up possession of these intimate writings may be psychologically comparable to prying words from his lips. But *Boyd*'s reasoning was not limited to such documents, and there was nothing intimate or personal about the contested documents in that case—invoices for a shipment of glass. In short, *Boyd* rested on a defective foundation.

Id. (footnote omitted); cf. Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461, 463 (1981) (arguing “certain private communications, because they are the physical embodiment of the mental process, should be entitled to special protection under the fourth amendment”).

If a subpoena's forced disclosure of documents is “comparable to prying words from [the target's] lips” and thus implicates Fifth Amendment interests, it is not self-evident why protection is extended only to “intimate personal documents” like diaries. Business records, drug cartel agreements, and a host of other written materials that may not involve intimate subjects can be just as incriminating and testimonial as a diary for Fifth Amendment purposes. Cf. Larry J. Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 397 (1977) (“Private papers clearly contain ‘testimonial’ evidence; unlike real evidence (the gun, mask, or contract) or identification evidence (fingerprints or voice recognition), private writings derive from the mind of the accused, and are a ‘mere physical extension of [his] thoughts and knowledge.’” (alteration in original)).

¹⁰⁸ Uviller, *supra* note 44, at 329.

were inseparable.”¹⁰⁹ The *Boyd* Court placed no constitutional weight on the nature of the compelled document.¹¹⁰

Finally, once the Justices in *Boyd* concluded that the Fifth Amendment applied to the facts, they eschewed a balancing analysis that weighed the government’s interests in effective law enforcement against the individual’s interest not to be compelled to incriminate himself.¹¹¹ This is exactly the sort of analysis that the modern Court has avoided. Thus, it was plausible to read *Boyd* as preventing the government from obtaining documents owned or possessed by persons or businesses pursuant to a subpoena.¹¹² Such a rule would stop many white-collar investigations before they could begin. “In other words: no documents, no case.”¹¹³ This stance certainly has significant costs. As William Stuntz has noted, “*Boyd*’s reasoning had potentially huge effects on business regulation.”¹¹⁴ Practically speaking, the upshot of *Boyd* meant that the government could not have enforced record keeping requirements,¹¹⁵ which may explain why the Court subsequently created a “required records” exception to

¹⁰⁹ Rothman, *supra* note 15, at 393; *cf.* Stuntz, *supra* note 54, at 427 n.146 (“Even if one treated corporations and natural persons differently for some purposes, however, it was hard to justify treating them differently for purposes of *Boyd*, which itself involved documents used in the course of running a business.”).

¹¹⁰ Heidt, *supra* note 43, at 446 (“In fact, th[e] invoice had not been prepared by the [Boyd], but by the sellers, the Union Plate and Glass Company. Moreover, a statute required the partnership to keep the invoice and to present it at the customs office when the glass was imported. In short, the invoice related only to business matters, had not been authored by either of the two partners subpoenaed or by their employees, had previously been revealed to public officials and had been prepared and kept pursuant to a statutory requirement.” (footnote omitted)).

¹¹¹ Rothman, *supra* note 15, at 393 (“If the scope of fifth amendment protection is to be defined in some general fashion by balancing state and individual interests, it is significant that *Boyd* pays virtually no attention to the former.”).

¹¹² See Heidt, *supra* note 43, at 449 (“Logically, *Boyd* would suppress property owned by corporations as well as by natural persons.”); Henning, *Testing the Limits*, *supra* note 45, at 416 (“If taken to its logical extreme, *Boyd* would prevent the government from obtaining any documents that qualified as the property of the person subpoenaed, including a corporation, because of the recognition that their entity has certain property rights under the Constitution.”); Peter J. Henning, *Finding What Was Lost: Sorting Out the Custodian’s Privilege Against Self-Incrimination from the Compelled Production of Records*, 77 NEB. L. REV. 34, 45 (1998) [hereinafter Henning, *Finding What Was Lost*] (“Taken at face value, *Boyd*’s broad interpretation of the constitutional privacy right would make it virtually impossible to force any person to surrender records in a government investigation.”).

¹¹³ Uviller, *supra* note 44, at 334.

¹¹⁴ Stuntz, *supra* note 54, at 424.

¹¹⁵ *Id.* (“If people could not be forced to disclose records because they might have violated a record-keeping rule, the government could not *have* record-keeping rules, at least not meaningful ones. And if requiring the keeping of records was impermissible, a good deal of regulation would be, in practical terms, impermissible as well. Meanwhile, more direct disclosure—asking someone to turn over documents in order to show whether the suspect had violated some conduct rule—was barred by *Boyd* itself. . . . Nor was oral testimony an acceptable substitute, because its use would violate the privilege against self-incrimination.”).

the Fifth Amendment in 1948.¹¹⁶ While these arguments were not addressed by the Justices in *Boyd*, one can imagine the Court responding that the Fifth Amendment is worth the costs.¹¹⁷

Within a decade after the announcement of *Boyd*, the Court would decide two more Fifth Amendment cases that would make it harder to investigate and prosecute white-collar criminal cases. Charles Counselman, the sole member of Charles Counselman & Co., was a grain merchant in Chicago.¹¹⁸ He received a subpoena from a federal grand jury investigating whether Chicago-area railroads were conducting illegal price discrimination in violation of the Interstate Commerce Act.¹¹⁹ Counselman was asked, inter alia, whether he had received favorable price quotes to ship grain into Chicago.¹²⁰ Counselman took the Fifth.¹²¹ After being held in contempt for refusing to answer this and other questions from the grand jury, Counselman appealed to the Court.¹²²

Interestingly, at the Court, the government conceded that the common law privilege offered greater protection than the Fifth Amendment. According to the government, under the common law “a witness in any case in any court was entitled to refuse to answer where the answer would have a tendency to criminate him.”¹²³ But the government insisted that the Framers “intended to limit and qualify the common law rule.”¹²⁴ Reading the amendment literally, the government argued that the privilege only protects a person who is called to testify in a criminal trial. In other words, a person can only plead the Fifth in his own criminal prosecution. A grand jury inquiry, the government lectured, “is in no sense ‘a criminal case’” within the words of the amendment.¹²⁵

The Court was not persuaded. In response, a unanimous Court in *Counselman v. Hitchcock* announced two significant holdings. First, writing for the Court, Justice Blatchford took issue with the government’s view that the words of the amendment did not cover Counselman’s case: “The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had

¹¹⁶ *Shapiro v. United States*, 335 U.S. 1, 19 (1948) (“[T]he ‘required records’ doctrine which this Court approved as applied to non-corporate businessmen in the state cases would appear equally applicable in the case at bar.”).

¹¹⁷ *See Boyd v. United States*, 116 U.S. 616, 635 (1886) (“[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”).

¹¹⁸ *Counselman v. Hitchcock*, 142 U.S. 547, 548 (1892).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 549.

¹²¹ *Id.*

¹²² *Id.* at 552.

¹²³ *Id.* 553-54.

¹²⁴ *Id.* at 554.

¹²⁵ *Id.*

been a criminal violation of the Interstate Commerce Act.¹²⁶ Further, Justice Blatchford explained that the protection provided by the privilege extends beyond its literal words. The point of the amendment

was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.¹²⁷

Of course, this reasoning and holding followed *Boyd*'s logic that the Fifth Amendment would not be read narrowly.

Second, *Counselman* rejected the government's position on the type of immunity required by the Fifth Amendment to force a witness to testify. The Interstate Commerce Act provided that Counselman's compelled testimony to the grand jury could not be used against him in a later criminal prosecution.¹²⁸ Counselman argued that this degree of immunity was constitutionally deficient because it did not extend complete or absolute immunity from future prosecution.¹²⁹ The government countered that such a requirement "would nullify most investigations instituted under legislative authority."¹³⁰ Again, the Court was unconvinced by the government's view of the Fifth Amendment. Justice Blatchford explained that an immunity law, in order to conform with the privilege, "must afford absolute immunity against future prosecution for the offence to which the question relates."¹³¹ Citing *Boyd* as support, he noted that the immunity offered to Counselman did not prevent the government from using his compelled testimony to gain knowledge about the details of the crimes or from locating sources of information that would assist the government in prosecuting Counselman.¹³² Put in plain terms, the federal law barred direct use of a witness's compelled testimony but did not preclude the government from making derivative use of the forced testimony.¹³³

Congress responded to *Counselman* by enacting a new immunity law under the Interstate Commerce Act, which provided a person could not be prosecuted

¹²⁶ *Id.* at 562.

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 558-59.

¹³⁰ *Id.* at 559.

¹³¹ *Id.* at 586.

¹³² *Id.* (explaining that immunity provided by Interstate Commerce Act "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party").

¹³³ The federal immunity law protected witnesses like Counselman against the use of his testimony in a later prosecution. However, such immunity would not "prevent the use of his testimony to search out other testimony to be used in evidence against him It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion." *Id.* at 564.

for any transaction related to testimony compelled by a subpoena.¹³⁴ In 1896, a divided Court in *Brown v. Walker*¹³⁵ ruled that transactional immunity satisfied the Fifth Amendment.¹³⁶ One interesting aspect of *Brown* was that the Court split over whether transactional or absolute immunity was even constitutional. The majority found it was because otherwise enforcement of the Interstate Commerce Act would be impossible.¹³⁷ The dissenters, taking the words of the privilege literally—“no person should be compelled in any criminal case to be a witness against himself”—believed the Fifth Amendment meant what it said: Congress cannot compel a person to be a witness against himself.¹³⁸ Three dissenting Justices believed that the point of the privilege was “not merely that every person should have such immunity, but that his right thereto should not be divested or impaired by any act of Congress.”¹³⁹

Writing for himself, Justice Field’s dissent contended that the Fifth Amendment provided “absolute protection” not only “against the compulsory enforcement of any criminating testimony against himself,” but also protection “relating to any act which may lead to a criminal prosecution therefor.”¹⁴⁰ Transactional immunity was not sufficient “because the statute does not purport to abrogate the offence, but only provides protection against any proceeding to punish it.”¹⁴¹ That is not enough, because the Fifth Amendment gives “the shield of absolute silence.”¹⁴²

¹³⁴ See *Brown v. Walker*, 161 U.S. 591, 629 (1896) (Field, J., dissenting) (discussing immunity law passed by Congress).

¹³⁵ *Id.*

¹³⁶ *Id.* at 610 (“While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness was compellable to answer . . .”).

¹³⁷ See *id.* Of course, the fact that transactional immunity would promote the needs of the government would seem to be constitutionally irrelevant if the Court was truly focused on the text of the Fifth Amendment, which speaks in absolute terms about compelling incriminating testimony. “In short, [*Brown*] declared that if legislative acts could not be enforced without violating the Constitution, then the Constitution would have to be violated to uphold those acts.” Richard Harris, *Annals of Law: Taking the Fifth*, *NEW YORKER MAG.*, Apr. 12, 1976, at 70.

¹³⁸ *Brown*, 161 U.S. at 610 (Shiras, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 630 (Field, J., dissenting).

¹⁴¹ *Id.* at 636.

¹⁴² *Id.* at 631. While acknowledging that the Fifth Amendment could be interpreted in the way proposed by the dissenters, according to the majority, the upshot of a literal reading of the amendment would mean that Congress could never secure a person’s testimony “unless [the individual] chose to [give it].” *Id.* at 595. On the other hand, if the point of the Fifth is to ensure that no criminal prosecution is possible after compelling a person’s testimony, transactional immunity—which acts “as a complete pardon for the offence to which it relates”—“satisf[ies] the demands of the [privilege].” *Id.*

A. *The End of Boyd v. United States (1886) and the Emergence of Hale v. Henkel (1906)*

Boyd was undoubtedly “a victory for powerful business interests.”¹⁴³ When combined with *Counselman*, *Boyd* made investigating and prosecuting corporate officers difficult.¹⁴⁴ But by judicial standards, it would not take long for the Court to cabin *Boyd*’s frail logic—especially its application to newly emerging corporations and business trusts. In 1906, the Court took an important step to limit—some would say dispatch—*Boyd* in *Hale v. Henkel*.¹⁴⁵ When read carefully, *Hale* announced a narrow holding.¹⁴⁶ However, *Hale*—like *Boyd*—was poorly written and lacked tight legal analysis. As a result, it could be, and was, interpreted broadly. By the end of the twentieth century—as Justice Alito noted in 1986—*Hale* and its progeny would be interpreted as not only denying corporations Fifth Amendment protection but also stripping representatives of collective entities—natural persons—of their rights under the Fifth Amendment.¹⁴⁷

At the start of the twentieth century, MacAndrews & Forbes Co. controlled the importation of licorice into America, an essential ingredient in the making of tobacco.¹⁴⁸ MacAndrews & Forbes, along with several other companies, was affiliated with the American Tobacco Company, “the ring-leader of the powerful Tobacco Trust.”¹⁴⁹

On April 28, 1905, a federal grand jury sitting in Manhattan issued a subpoena *duces tecum* to Edwin F. Hale, secretary and treasurer of MacAndrews & Forbes.¹⁵⁰ The subpoena ordered Hale to bring all written understandings, agreements, correspondence, contracts, letters, and documents concerning MacAndrews & Forbes and six other companies involved with the American Tobacco Company.¹⁵¹ Hale was not the target of federal prosecutor Henry Waters Taft, who was in charge of the Manhattan grand jury.¹⁵² President

Seventy-five years later, in *Kastigar v. United States*, 406 U.S. 441 (1972), the Court ruled that transactional immunity was not required to displace a person’s Fifth Amendment right. “Use immunity” was sufficient to override the protection provided by the Fifth. *Id.* at 458.

¹⁴³ Alito, *supra* note 47, at 36.

¹⁴⁴ See Stuntz, *supra* note 54, at 427 (“*Boyd* and *Counselman* made it much harder to punish corporate officers.”).

¹⁴⁵ 201 U.S. 43 (1906); see Stuntz, *supra* note 54, at 430 (asserting after *Hale*, “notion of any *Boyd*-type of protection for corporations, whether grounded in the Fourth Amendment or the Fifth, was dead”).

¹⁴⁶ See *Hale*, 201 U.S. at 77.

¹⁴⁷ Alito, *supra* note 47, at 66.

¹⁴⁸ Henry W. Taft, *The Tobacco Trust Decisions*, 6 COLUM. L. REV. 375, 377 (1906).

¹⁴⁹ WINKLER, *supra* note 4, at 161.

¹⁵⁰ *Hale*, 201 U.S. at 44-45.

¹⁵¹ *Id.* at 45.

¹⁵² Taft, an accomplished attorney and an expert in antitrust law, was the younger brother of William Howard Taft, who would later become President of the United States and Chief Justice of the United States. WINKLER, *supra* note 4, at 163.

Theodore Roosevelt's Administration had initiated a high-profile investigation of alleged Sherman Antitrust Act violations by tobacco companies.¹⁵³ The real target was the Tobacco Trust and J.B. Duke, the founder of the American Tobacco Company. Hale was summoned to testify with the aim that he "would prove a wellspring of information on MacAndrews & Forbes's anticompetitive practices. . . . Taft was going after MacAndrews & Forbes to get Buck Duke."¹⁵⁴

As was the case when Charles Counselman and Theodore Brown were subpoenaed to testify before a grand jury, federal law granted immunity to Hale for his testimony and production of corporate documents.¹⁵⁵ Nevertheless, Hale refused to supply the requested documents. He was held in contempt and sent to jail.¹⁵⁶ When Hale's case arrived at the Court, several issues concerning the privilege were in the mix.¹⁵⁷ However, Justice Brown's opinion for the majority did a poor job separating and addressing those issues.¹⁵⁸

The government's position was plain. Relying upon a literal interpretation of the Fifth Amendment, the government argued that Hale had no right to invoke the privilege on behalf of a corporation because the Fifth Amendment only protects persons, not corporations.¹⁵⁹ The government further submitted that the text of the amendment "does not include corporations, as the mischief intended to be reached did not apply to corporations."¹⁶⁰ Ultimately, according to the

¹⁵³ See *id.* at 172-73.

¹⁵⁴ *Id.* at 173.

¹⁵⁵ *Hale*, 201 U.S. at 46.

¹⁵⁶ *Id.*

¹⁵⁷ Some Fourth Amendment issues were in the mix as well, including whether "the Fourth Amendment was . . . intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence," and whether "an order for the production of books and papers [by a corporation] may constitute an unreasonable search and seizure within the Fourth Amendment." *Id.* at 76. *Hale* ruled that corporations were protected by the Fourth Amendment. *Id.* at 76 ("[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures."). The scope of Fourth Amendment protection for corporations and others subject to subpoenas for documents is beyond the scope of this Article. Suffice it to say, however, that under current law, the Fourth Amendment gives scant protection against a subpoena seeking business or other documents. See CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 140 (2007); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 808 (2005).

¹⁵⁸ See WINKLER, *supra* note 4, at 185-86 ("[Justice]Brown's opinion was hardly a model of clarity and has confused readers ever since. . . . [Justice] Brown's opinion in the *Hale* case has never prompted anyone to argue he was underrated."). Ten years earlier, Justice Brown had authored the Court's ruling upholding state-imposed racial segregation of railroad passengers. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

¹⁵⁹ *Hale*, 201 U.S. at 57 (finding that officer of corporation must produce books of company even though books may incriminate corporation because "one of its officers may not assert in its behalf the privilege secured to persons by the Fifth Amendment of the Constitution").

¹⁶⁰ *Id.* at 58.

government, “the privilege is personal and is based upon the consideration of the law for the individual in his capacity as a witness.”¹⁶¹

Justice Brown’s opinion would ultimately affirm Hale’s contempt order, but his opinion was at times confusing and needlessly expansive.¹⁶² First, regarding Hale’s refusal to answer certain questions posed to him by the grand jury on the ground that he might incriminate himself, Justice Brown correctly explained that Hale had no Fifth Amendment complaint because he was given immunity for his testimony and production of corporate documents. “[I]f the criminality has already been taken away, the Amendment ceases to apply.”¹⁶³

Next, the defense contended that though the immunity law protected Hale, it did not protect MacAndrews & Forbes, of which Hale was the agent and representative.¹⁶⁴ Justice Brown’s response was straightforward:

The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.¹⁶⁵

Although Justice Brown’s conclusion—that the privilege is a personal right that cannot be invoked on behalf of third persons—was generally sound, this conclusion has complications when the third party is a corporation like MacAndrews & Forbes. As one commentator noted when *Hale* was announced, a corporation can only be questioned or examined through the testimony or acts of production of one of its officers: “The rights of the corporation could be asserted, on its behalf, only by such an officer.”¹⁶⁶ When an officer asserts the rights of a corporation, he is

not seeking to invoke the privilege for the benefit of a *third* person, *but the corporation itself claims its own privilege in the only manner and by the only method it can do so*. The corporation was a witness impersonated in and speaking through Hale. His voice was its voice. The privilege he set up was its privilege. He was there in no individual or personal capacity, but was, in a real sense and substantial sense, the corporation itself, its *alter*

¹⁶¹ *Id.* The government did, however, concede a conflict among the cases in America and England on whether a corporate officer may assert the privilege on behalf of a corporation. *See id.*

¹⁶² *Id.* at 77. *McAlister v. Henkel*, 201 U.S. 90 (1906), was a companion case to *Hale*. *McAlister* was the secretary and a director of the American Tobacco Company. He refused to answer the grand jury’s questions or to produce corporate documents for the same reasons asserted by Hale. The Court concluded that *McAlister*’s Fifth Amendment claims were controlled by *Hale*. *See id.* at 90-91.

¹⁶³ *Hale*, 201 U.S. at 67.

¹⁶⁴ *Id.* at 69.

¹⁶⁵ *Id.* at 69-70.

¹⁶⁶ Paul A. Moses, *Corporate Self-Incrimination (A Critical Analysis of Hale v. Henkel)*, 32 NAT’L CORP. REP. 349, 349 (1906).

ego, which, through him, asserted its constitutional rights. If it cannot so assert them through him, it can never assert them at all.¹⁶⁷

Recognizing this reality, and perhaps anticipating a future case, Justice Brown explicitly stated, “The question whether a corporation is a ‘person’ within the meaning of [the Fifth] Amendment really does not arise”¹⁶⁸ This is where Justice Brown should have ended his opinion.¹⁶⁹ Enough had been written to resolve Hale’s Fifth Amendment claims. There was no need to say more. But he kept writing.

Four pages later Justice Brown opined that if Hale could refuse to produce corporate documents on the ground that the documents would incriminate the corporation, that “would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.”¹⁷⁰ Analogizing to a state’s reserve power of visitation to examine and regulate a corporation’s activities, Justice Brown found that Congress had equivalent authority, under its Article I Commerce Clause powers, to regulate corporations and that corporate interests “must also be exercised in subordination” to the powers of Congress.¹⁷¹ In other words, permitting Hale to invoke the Fifth on behalf of the corporation would undermine law enforcement goals and make enforcing federal antitrust law difficult or impossible.

Even more perplexing and unnecessary was Justice Brown’s next assertion:

Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ *Hale*, 201 U.S. at 70.

¹⁶⁹ See *Moses*, *supra* note 166, at 349 (“The actual decision was, that the witness, though an officer of the corporation, was not entitled to claim *for his corporation* that the corporation would be incriminated, in violation of the Fifth Amendment, by *his* being compelled to produce its books and papers, and forced to testify respecting its business. . . . This is the crux of the decision.”).

¹⁷⁰ *Hale*, 201 U.S. at 74. Justice Brown made a similar point when discussing the prosecution’s need for Hale’s oral testimony. *Id.* at 70 (“As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employes [sic], the privilege claimed would practically nullify the whole act of Congress.”).

¹⁷¹ *Id.* at 75.

¹⁷² *Id.* at 74-75.

This discussion on the Fifth Amendment rights of corporations was confusing and contradictory. Not only was the above quoted passage unnecessary in light of Justice Brown's earlier reservation that the Court was not deciding whether a corporation was a "person" under the Fifth Amendment, it resolves the issue—in favor of the government—the Court supposedly left open.¹⁷³ Denying a corporation Fifth Amendment protection also seemed to conflict with previous Court rulings concluding that a corporation was a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁴

In the final analysis, as understood by lawyers and policy makers in 1906, *Hale* was an extremely important ruling.¹⁷⁵ It marked a clear departure from the constitutional direction announced in *Boyd*.¹⁷⁶ *Hale* gave Congress more power to regulate and investigate corporations engaged in interstate commerce than had previously been imagined.¹⁷⁷ Put simply, it gave federal authorities "a potent weapon to compel obedience to the law."¹⁷⁸ And, regarding the rights of representatives of collective entities, *Hale* signaled that the Court would delineate the rights of corporate officers from the rights of the corporations that employed them.¹⁷⁹ At the same time, it did not go unnoticed that *Hale* proffered

¹⁷³ Professor Henning notes that under *Hale*'s logic, the corporation and its agents are separate entities, and because the corporation did not testify, it could not invoke the Fifth. Henning, *Corporate Criminal Liability*, *supra* note 47, at 818-19 ("This analysis permitted the Court to avoid deciding whether a corporation was a 'person' protected by the Self-Incrimination Clause because the company itself was not asserting the Fifth Amendment protection . . . [T]he end result of the decision was that a corporation is *incapable* of ever insisting on the Fifth Amendment right because it could not speak except through its agents.")

¹⁷⁴ *Hale*, 201 U.S. at 84-85 (Brewer, J., dissenting) ("[I]f the word 'person' in th[e] [Fourteenth] Amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.")

¹⁷⁵ Writing contemporaneously to *Hale*, one commentator described the decision as "one of the most momentous and far-reaching in its present and ultimate consequences, that has even been made by that august tribunal." Moses, *supra* note 166, at 349. Another attorney close to the action noted that "[t]he importance and far-reaching effect of the decision cannot be overestimated." Taft, *supra* note 148, at 383.

¹⁷⁶ *Cf.* Taft, *supra* note 148, at 385 (arguing that when *Hale* is read in conjunction with decisions in *Adams v. New York*, 192 U.S. 585 (1904), and *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904), it seems "to make the decision in the *Boyd* case rest alone upon the Fifth Amendment and prevent the extension of the Fourth Amendment beyond the limits justified by its historical and political origin").

¹⁷⁷ *See id.* at 383 (stating that *Hale* "must inevitably result in making the subjection of State corporations engaged in interstate trade to the authority of the national government much more complete than it has hitherto been").

¹⁷⁸ *Id.* at 386.

¹⁷⁹ *See* WINKLER, *supra* note 4, at 187-88 ("[Justice Brown] approached the corporation as an independent legal actor, separate and distinct from the members who composed it. . . . Although *Hale* was called [to testify] as an agent of the corporation, Brown saw a strict separation between the corporate entity and its members—including, in this case, its employees.")

“a result-oriented rationale, justifying its holding on the ground that permitting a corporation to assert the privilege ‘would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.’”¹⁸⁰ This way of thinking about the Fifth Amendment would continue throughout the twentieth century.

B. *Wilson v. United States (1911): No Fifth Amendment Rights for Corporate Officers*

In June 1910, Christopher Columbus Wilson was president of the United Wireless Telegraph Company.¹⁸¹ Wilson was a colorful character. Born in Mississippi in 1845, several newspaper accounts described Wilson as “a financier of the self-made school,”¹⁸² who “never had more than three months of schooling.”¹⁸³ Wilson was a successful cotton farmer, a banker in Denver, a miner, and finally, a promoter of wireless securities in New York City. According to the press, Wilson lived at the Waldorf-Astoria Hotel when in New York City.¹⁸⁴

A federal grand jury was investigating United Wireless in 1910.¹⁸⁵ On August 3, two indictments were returned against Wilson and other officers of the company.¹⁸⁶ On October 7, the grand jury issued a subpoena *duces tecum* to the company requiring its appearance before the grand jury and production of a letter

Professor Henning views *Hale* as a compromise decision. “[T]he Court chose the Solomonic approach . . . denying protection under the Fifth Amendment while recognizing some measure of protection under the Fourth Amendment.” Henning, *Corporate Criminal Liability*, *supra* note 47, at 818 (arguing that according normal Fourth and Fifth Amendment protection to corporations would make “investigation of a corporation’s crimes virtually impossible[.]” while completely denying constitutional protections “might be too extreme because the Court had frequently recognized that corporations were persons or citizens under other provisions of the Constitution”). Henning, however, concedes that *Hale* “failed to explain why corporations should be treated differently under the Fourth and Fifth Amendments” nor explained “why a corporation could assert only a Fourth Amendment right that the Court in *Boyd* said was intimately related to the Fifth Amendment.” *Id.* at 820. The text of the two amendments certainly does not justify the “discordant treatment of the corporation in criminal proceedings.” *Id.* at 796.

¹⁸⁰ Henning, *Finding What Was Lost*, *supra* note 112, at 46 (quoting *Hale v. Henkel*, 201 U.S. 43, 74 (1906)).

¹⁸¹ *Raid Wireless, Arrest Three: Frauds of Millions in Stock Alleged*, BOS. DAILY GLOBE, June 16, 1910, at 5.

¹⁸² *Id.*; *United Wireless Offices Raided: President and Two Others Are Arrested on Charge of Alleged Fraud*, CHI. DAILY TRIB., June 16, 1910, at 13.

¹⁸³ *Charge Huge Fraud: Postal Inspectors Arrest United Wireless Head*, WASH. POST, June 16, 1910, at 1.

¹⁸⁴ *See id.*

¹⁸⁵ *Put Col. Wilson in a Tombs Cell: United Wireless President Committed by Judge Lacombe for Contempt*, N.Y. TIMES, Nov. 2, 1910, at 5.

¹⁸⁶ *Wilson v. United States*, 221 U.S. 361, 367 (1911).

press copy book belonging to the company.¹⁸⁷ Wilson was served with the subpoena as president of the company, as were other directors of the company.¹⁸⁸ Wilson appeared before the grand jury, but he invoked the Fifth and refused to produce the letter press copy book.¹⁸⁹ The other directors told the grand jury that the company was not resisting the grand jury request and wanted Wilson to produce the letter press copy book, which they claimed Wilson possessed.¹⁹⁰ When Wilson's contempt order was upheld by a lower court, he sought relief in the Supreme Court.¹⁹¹

The facts left no doubt that Wilson was the target of a criminal investigation.¹⁹² And by early twentieth century legal standards, Wilson asserted a compelling Fifth Amendment claim. Wigmore's 1905 treatise stated "where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them."¹⁹³ British cases applying the common law privilege ruled that corporate officers or employees could refuse to disclose corporate documents.¹⁹⁴ The same principle was embraced by American courts. "No court in the years immediately following *Hale* thought the Supreme Court had upset the law in this regard; corporate officers and employees, if called upon to produce incriminating corporate documents in their

¹⁸⁷ *Id.* at 367-68.

¹⁸⁸ *Id.*

¹⁸⁹ After Wilson was ruled in contempt for failure to produce the letter press copy book, he told reporters outside of the jail that he did not know the contents of the book. *Put Col. Wilson in a Tombs Cell*, *supra* note 185 ("I don't know what's in it myself. I'll put it in evidence on the trial, but I don't propose to let the Government get it now to use on a fishing excursion."). He even offered reporters who had followed him to the jail to take a look: "Boys . . . there's the book. You can all of you look in it if you like, for is it just one of my letter books." *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Dreier v. United States*, 221 U.S. 394 (1911), was a companion case to *Wilson*. The only notable difference between *Dreier* and *Wilson* was that the federal grand jury subpoena was issued directly to Dreier, who was the custodian of the corporate papers, whereas in *Wilson* the subpoena was issued to the company. *Dreier*, 221 U.S. at 400; *Wilson*, 221 U.S. at 362. That difference was constitutionally irrelevant. *Dreier*, 221 U.S. at 400.

¹⁹² *Wilson*, 221 U.S. at 387 (McKenna, J., dissenting) ("Three indictments had already been found against him. Crime, therefore, had been formally charged, and further crime was being investigated—not crime by the corporation, but crime by him, and the proof, it was supposed, lay in the books. They were sought for no other reason. They were demanded of him to convict him.").

¹⁹³ WIGMORE, *supra* note 49, § 2259.

¹⁹⁴ Rothman, *supra* note 15, at 405-06 ("Virtually every precedent said the same thing: Witnesses required to produce corporate books and records that were self-incriminating *could* refuse to comply. This principle was established in England by the middle of the eighteenth century. . . . [T]he rule had become well-enough established in England by the nineteenth century to be recited in popular treatises of the day and applied in at least one reported case involving a recognizably modern business corporation.").

legitimate possession, could refuse to comply on fifth amendment grounds.”¹⁹⁵ Put another way, where a person was facing an imminent prosecution and compelled to reveal incriminating evidence against himself, he could invoke his own personal privilege. Even if one thought the dicta from *Hale* regarding a corporation’s lack of standing to invoke the privilege was sound, *Hale* did not diminish the Fifth Amendment rights of individuals.

Wilson’s lawyers told the Justices that the privilege permitted Wilson to withhold corporate documents in his *possession* because those documents would incriminate him.¹⁹⁶ Wilson was invoking his own privilege, not the privilege of United Wireless. A majority of the Court rejected this argument and explained that “the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production.”¹⁹⁷ Instead of emphasizing who possessed the documents or whether production of the documents had testimonial qualities, as Wigmore argued was important,¹⁹⁸ the Court focused on “the nature of the documents and the capacity in which they are held.”¹⁹⁹ If the contested documents are entity documents—and not personal papers—then “the custodian has voluntarily assumed a duty which overrides his claim of privilege.”²⁰⁰ In other words, by becoming president of the company, Wilson had waived his Fifth Amendment right.

When these criteria were applied to Wilson’s case, the result was predictable. The letter press copy book was a corporate document; thus, Wilson was required

¹⁹⁵ *Id.* at 408.

¹⁹⁶ During the grand jury proceedings, Wilson submitted a written statement contending that the letter press copy book contained a mixture of personal and corporate papers. *Wilson*, 221 U.S. at 368. Justice Hughes’s opinion for the majority made clear that the subpoena sought only corporate documents. *Id.* at 377 (“The copies of letters written by the president of the corporation in the course of its transactions were as much a part of its documentary property, subject to its control and to its duty to produce when lawfully required in judicial proceedings, as its ledgers and minute books.”). Justice Hughes did acknowledge that Wilson’s private papers were protected, citing *Boyd*, but emphasized “his personal letters were not demanded; these the subpoena did not seek to reach; and as to these no question of violation of privilege is presented.” *Id.* at 377-78. The fact that Wilson may have commingled some of his private papers with corporate papers could not convert the latter into constitutionally protected papers.

¹⁹⁷ *Id.* at 380.

¹⁹⁸ WIGMORE, *supra* note 49, § 2264 (stating it “is universally conceded” that production of documents by person in response to subpoena may be resisted and is protected by privilege). Wigmore acknowledged that production of documents pursuant to a subpoena did not require oral testimony, and though such documents were

already in existence and not desired to be first written and created by a testimonial of the process in response to the [subpoena], still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the identity or authenticity or origin of the articles produced.

Id.

¹⁹⁹ *Wilson*, 221 U.S. at 380.

²⁰⁰ *Id.*

to produce it. Perhaps to bolster his holding, Justice Hughes noted that “the corporation has no privilege to refuse. It cannot refuse production upon the ground of self-incrimination.”²⁰¹ This was a curious comment because United Wireless was not resisting the subpoena and Wilson was not invoking the privilege on behalf of the corporation.

Of course, *Hale* had reserved the question of whether a corporation is a “person” within the meaning of the Fifth Amendment, and no corporation in *Wilson* was invoking the privilege.²⁰² Thus, repeating *Hale*’s dicta that a corporation has no right to invoke the Fifth was pointless, and it did not fortify *Wilson*’s holding.²⁰³ For good measure, Justice Hughes opined that if Wilson could refuse to disclose corporate records, the “reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise.”²⁰⁴ Wilson’s “personal privilege” did not require that result; indeed, such a result—undermining the state’s power of visitation—would be “an unjustifiable extension” of Wilson’s “personal right[.]”²⁰⁵ But Justice Hughes then immediately added that corporate officers “may decline to utter upon the witness stand a single self-incrimination word.”²⁰⁶ Justice Hughes did not bother explaining why allowing corporate officers to invoke the Fifth when forced to provide oral testimony did not equally embarrass or defeat the state’s visitatorial powers over corporations and their officers.

Finally, Justice Hughes saw no significance in the fact that the grand jury inquiry “was not directed against the corporation itself.”²⁰⁷ Wilson had “no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses.”²⁰⁸ Though Wilson had physical custody over the documents, they belonged to the corporation. Thus, Wilson “could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize.”²⁰⁹ Determining the scope of Fifth Amendment protection with a property-centric focus “was consistent with

²⁰¹ *Id.* at 382.

²⁰² *See Hale v. Henkel*, 201 U.S. 43, 70 (1905).

²⁰³ Fourteen days after *Wilson* was decided, the Court decided *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U.S. 612 (1911), which addressed, inter alia, whether the Interstate Commerce Commission required railroads to make and disclose reports regarding the hours of labor of its employees. At the end of his opinion, Justice Hughes ruled that the Fifth Amendment posed no barrier to the making and disclosure of such reports because a corporation cannot plead a privilege against self-incrimination, citing *Hale* and *Wilson* for the principle that “officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement.” *Id.* at 623 (citing *Wilson*, 221 U.S. at 361).

²⁰⁴ *Wilson*, 221 U.S. at 384-85.

²⁰⁵ *Id.* at 385.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

the property-rights approach taken in *Boyd*²¹⁰ but conflicted with the reasoning of *Hale* which drew “a clear distinction” between a corporate officer and the corporation that employed him.²¹¹

Read dispassionately, *Hale* did not control *Wilson*.²¹² Ultimately, the crucial reasoning in *Wilson* was the Court’s conclusion that when a person accepts employment with a corporation, he “voluntarily assume[s] a duty which overrides his claim of privilege,” and the fact that the subpoenaed documents were corporate property.²¹³ Justice Hughes may have injected a dose of confusion when he noted the Court was not addressing whether oral testimony could be compelled from someone in *Wilson*’s shoes,²¹⁴ especially when he later stated a corporate officer could not be compelled to provide oral testimony.²¹⁵ While *Hale*’s holding did not control *Wilson*, the motivation behind *Wilson* was the same motivation behind *Hale*: namely, that interpreting the Fifth Amendment to permit someone in *Wilson*’s shoes to invoke the privilege would stymie law enforcement.²¹⁶

C. *Wheeler v. United States (1913)*

The result in *Wilson* was a “marked departure” from the protection offered by the common law privilege²¹⁷ and was an obvious and significant extension of *Hale*’s understanding of how the Fifth Amendment applied in the corporate

²¹⁰ Foster, *supra* note 54, at 1611.

²¹¹ *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906) (“While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.”).

²¹² See *Wilson*, 221 U.S. at 390 (McKenna, J., dissenting) (“What privilege an officer of the corporation had from producing the books on the ground that they might criminate him was not necessary to decide [in *Hale*], as immunity from prosecution was given by statute for any matter as to which he should testify. It may be contended that it is a natural inference from [*Hale*] that but for the immunity granted he could have claimed such privilege.”).

²¹³ *Id.* at 380; cf. Heier, *supra* note 14, at 77 (asserting *Wilson* was “based on the familiar Trinity principle, a corporate officer was merely a custodian of someone else’s books and records and could assert no privilege despite the fact that the contents of the books tended to incriminate him”).

²¹⁴ See *Wilson*, 221 U.S. at 377 (“There is no question, of course, of oral testimony, for he was not required to give any.”).

²¹⁵ *Id.* at 385 (stating corporate officers “may demand that any accusation against them individually be established without the aid of their oral testimony or the compulsory production by them of their private papers”).

²¹⁶ Compare *Wilson*, 221 U.S. at 384-85 (“The reserved power of visitation would be seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation.”), with *Hale*, 201 U.S. at 74 (noting that if corporate officers could refuse to produce corporate papers by invoking privilege on behalf of corporation, “it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers”).

²¹⁷ See Corwin I, *supra* note 62, at 17 n.39.

context. Two years later in *Wheeler v. United States*,²¹⁸ the Court constricted the Fifth Amendment even further.²¹⁹

In April 1911, the corporation Wheeler & Shaw, Inc., was dissolved.²²⁰ Upon dissolution, all of the papers and books belonging to the company were lawfully transferred to Warren B. Wheeler and Stillman Shaw, the former treasurer and president, respectively, of the corporation.²²¹ On April 12, a federal grand jury sitting in Boston served a subpoena *duces tecum* on Wheeler and Shaw, in their capacity as officers of the firm.²²² The grand jury was investigating whether Wheeler and Shaw had committed mail fraud and sought all of the company's books and papers covering the period from October 1, 1909, to January 1, 1911.²²³ Wheeler and Shaw conceded possession of the sought documents but argued that because the company was dissolved and the documents were rightfully possessed by them personally, compulsory production of the books violated the Fifth Amendment.²²⁴ They lost in the lower court and then appealed to the Court.

In three brief paragraphs, a unanimous Court, speaking through Justice Day, ruled that *Wilson* controlled and rejected the defendants' Fifth Amendment claims.²²⁵ Concededly, the corporation was dissolved, "but its books and papers were still in existence and were still impressed with the incidents attending corporate documents."²²⁶ And yes, after dissolution, the documents belonged to the defendants, "but this did not change the essential character of the books and papers or make them any more privileged in the investigation of crime than they were before."²²⁷ Put simply, though the corporation was gone, the defendants were no longer corporate officers, the documents were lawfully possessed by the defendants, and the defendants were invoking the Fifth "in order to protect what were now their own private papers,"²²⁸ which would have been enough to trigger

²¹⁸ 226 U.S. 478 (1913).

²¹⁹ See *id.* at 489-90 (holding that books of corporation are not private books of any of officers, and do not become so by dissolution of corporation and transfer of books to one of those officers).

²²⁰ *Id.* at 486.

²²¹ *Id.* at 483, 486.

²²² *Id.* at 482.

²²³ *Id.* at 482-83.

²²⁴ *Id.* at 484.

²²⁵ *Id.* at 489-90. Interestingly, Justice McKenna joined Justice Day's majority opinion in *Wheeler* notwithstanding his strong dissent in *Wilson*. One year after authoring *Wheeler*, Justice Day wrote one of his more noteworthy opinions: *Weeks v. United States*, 232 U.S. 383 (1914). *Weeks* ruled that the Fourth Amendment alone forbids the admission of illegally obtained evidence in a federal prosecution. See *id.* at 398; MACLIN, *supra* note 92, at 8.

²²⁶ *Wheeler*, 226 U.S. at 489-90.

²²⁷ *Id.* at 490.

²²⁸ Heier, *supra* note 14, at 77 n.39.

constitutional protection under *Boyd*, Justice Day concluded “the character of the books” had not changed for Fifth Amendment purposes.²²⁹

Just as *Wilson* extended *Hale*, *Wheeler* extended *Wilson*. *Wilson* emphasized that the corporation owned the subpoenaed documents to reject *Wilson*’s invocation of the privilege. In *Wheeler*, *Wheeler* and *Shaw* owned the subpoenaed documents, but the Court found that fact constitutionally irrelevant and instead focused on the corporate character of the documents to deny the claim of privilege.

Wheeler’s *ipse dixit* holding drew no support from *Wilson* because “logically speaking, the books could no longer belong to a corporation that no longer existed.”²³⁰ And the other prong of *Wilson*’s holding—that corporate officers voluntarily waive their privilege by taking the job—was not utilized in *Wheeler* for good reason. *Wilson*’s waiver theory was itself manufactured from whole cloth; it was not based on precedent or constitutional principle. Extending *Wilson*’s waiver theory to *Wheeler* was a bridge too far. It would require embracing the principle that a person who formerly worked for a corporation that no longer exists has implicitly agreed to waive their privilege against self-incrimination when targeted for a criminal investigation based on a duty that ceases to be applicable.²³¹

Invoking *Wilson* as support for the result in *Wheeler* was disingenuous. The legal basis for denying the claim of privilege in *Wilson* was flimsy at best. “But it becomes totally unjustified when applied to a post-dissolution situation on the basis of an obscure notion about the inherent quality of corporate books,”²³² especially when the books no longer belong to the corporation and the government’s visitorial power over the corporation is imaginary.²³³

²²⁹ *Wheeler*, 226 U.S. at 490.

²³⁰ Heier, *supra* note 14, at 77.

²³¹ See Alito, *supra* note 47, at 67 n.176 (commenting that *Wilson*’s waiver theory was not used in *Wheeler*, perhaps because that would have required holding that waiver theory “survived corporate dissolution” and “[t]he [*Wheeler*] Court may have felt that this controversial theory could not be stretched that far”).

²³² Heier, *supra* note 14, at 79.

²³³ Two weeks after *Wheeler* was decided, the Court applied *Wheeler*’s holding to the records of a dissolved corporation where the records were in the possession of the individual who had been the corporation’s sole shareholder. *Grant & Burlingame v. United States*, 227 U.S. 74, 80 (1913) (explaining that regardless of whether title to documents passed to *Burlingame* when firm dissolved, “their essential character was not changed,” and documents could not have been withheld by *Burlingame* because they would incriminate him). The ruling in *Grant & Burlingame*, like the rulings in *Wilson* and *Wheeler*, was even furthered removed from the logic of *Hale*. In *Hale*, Justice Brown emphasized the “clear distinction” between the corporation and its employee. *Hale v. Henkel*, 201 U.S. 43, 74 (1906). That difference was razor thin in *Grant & Burlingame*, “but the Court did not discuss the issue. Instead, it looked solely at the ‘essential character’ of the books as corporate documents to deny the claim of privilege.” Foster, *supra* note 54, at 1612.

D. *United States v. White (1944)*

Before he sat on the Court, Justice Frank Murphy, who had been Mayor of Detroit from 1930-1933, was considered a friend of organized labor and workers generally.²³⁴ As Governor of Michigan, Justice Murphy successfully mediated a historic and violent strike between the United Auto Workers and General Motors.²³⁵ As a member of the Court, it has been said that Justice Murphy embraced a broad view of the Bill of Rights.²³⁶ On June 12, 1944, Justice Murphy's opinion in *United States v. White*²³⁷ was announced.

A federal grand jury was investigating possible union corruption in the construction of a Naval Supply Depot in Pennsylvania, and a subpoena *duces tecum* was served on the president of Local No. 542, International Union of Operating Engineers.²³⁸ Jasper White appeared before the grand jury and identified himself as the "assistant supervisor" of the union.²³⁹ White possessed the subpoenaed documents but declined to disclose them because the contents might incriminate him.²⁴⁰ A district court found White guilty of contempt; however, a federal appellate court ruled that "the records of an unincorporated labor union were the property of all its members and that, if [White] were a union member and if the books and records would have tended to incriminate him, he properly could refuse to produce them before the grand jury."²⁴¹ After the government appealed this ruling, the Court reversed.²⁴²

Justice Murphy began his analysis by stating that the privilege is a personal right "applying only to natural individuals."²⁴³ And because the right is personal, "it cannot be utilized by or on behalf of any organization, such as a

²³⁴ HAROLD NORRIS, MR. JUSTICE MURPHY AND THE BILL OF RIGHTS 57 (1965).

²³⁵ *Id.* at 58.

²³⁶ *Id.* at 1 (describing Justice Murphy as committed "civil libertarian" and noting he used time on Court "to record in word and deed an approach to the understanding and defense of constitutional rights from which his countrymen and men everywhere striving for freedom can derive ever increasing strength, direction and devotion"); J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 490 (1968) ("Above all, his vote and impassioned pen were key elements in a revolutionary development of civil liberties."); Eugene Gressman, Book Review, 67 MICH. L. REV. 1278, 1280 (1969) (reviewing J. WOODFORD HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968)) ("In forceful and colorful language, [Justice Murphy] gave voice to the libertarian idealism that underlies the Bill of Rights and that came into greater prominence in the subsequent years of the Warren Court."). Justice Felix Frankfurter derisively called Justice Murphy "the Saint." HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 125 (1996).

²³⁷ 322 U.S. 694 (1944).

²³⁸ *Id.* at 695.

²³⁹ *Id.*

²⁴⁰ *Id.* at 696.

²⁴¹ *Id.* at 696-97; *see also* *United States v. White*, 137 F.2d 24, 26 (3d Cir. 1943).

²⁴² *White*, 322 U.S. at 705.

²⁴³ *Id.* at 698.

corporation.”²⁴⁴ Thus far, Justice Murphy was merely restating principles settled since *Hale* and its progeny. His next point, however, was new and far-reaching: Justice Murphy reasoned that when people act as representatives of a collective body, they cannot rely on their personal rights—instead, they assume the duties and obligations of the collective group.²⁴⁵ In that role, they have no Fifth Amendment protection. If they possess documents of the collective group, they hold the records in their representative capacity, and thus cannot invoke the privilege to withhold those documents even though production of the documents will incriminate them personally.²⁴⁶

To bolster his rationale for denying invocation of the privilege, Justice Murphy stated that “the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective.”²⁴⁷ That the federal government lacked visitorial powers over labor unions posed no obstacle to constricting the privilege.²⁴⁸ The authority to compel production of documents from any organization stems from “the inherent and necessary power of the federal and state governments to enforce their laws,”²⁴⁹ and the privilege is confined to protecting a natural person “from compulsory incrimination through his own testimony or personal records.”²⁵⁰

The reasoning of *White* was an extraordinary expansion of government power to investigate free of the protections the Fifth Amendment would otherwise provide. *Hale* and its progeny had justified precluding invocation of the privilege in order to vindicate the visitorial power of the state to monitor and regulate corporations and their officers. Since the visitorial power theory was unavailable in *White*, Justice Murphy simply turned to “public necessity” and the “inherent” power of government to enforce the law.²⁵¹ He offered no legal analysis

²⁴⁴ *Id.* at 699.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 700.

²⁴⁸ *Id.* The appellate court below had concluded that the state visitorial power, so important to the analysis of *Hale* and *Wilson*, could not be invoked to shrink the privilege because that power was confined to examining and regulating corporate records since corporations derived all of their powers from the state. The state had no similar power over an unincorporated union. *United States v. White*, 137 F.2d 24, 27-28 (3d Cir. 1943).

²⁴⁹ *White*, 322 U.S. at 701.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 700-01. At one point in his opinion, Justice Murphy invoked the support of the Framers of the Constitution, noting that they “cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.” *Id.* at 700. This type of legal reasoning is embarrassing. Professor Henning politely notes that this claim is “interesting because the framers never considered corporations in drafting the Constitution. The various protections afforded to individuals can equally frustrate government law enforcement, yet one would never use that as the basis for denying all constitutional protection.” Henning, *Corporate Criminal Liability*, *supra* note 47, at 828 n.157.

explaining why the purposes or policies of the privilege did not protect a natural person like Jasper White.²⁵²

White's status as the custodian of the documents was obviously the decisive factor, revealing that Justice Murphy was silently adopting the waiver theory embraced by *Wilson*.²⁵³ Nor did Justice Murphy proffer a neutral principle justifying barring invocation of the privilege—other than the government's need for effective law enforcement, which, of course, can be utilized every time a person takes the Fifth. In one way, however, *White* “was more candid than its predecessors”²⁵⁴ in acknowledging the motivation behind its holding and confessing that the collective entity rule “was in reality nothing more than a means to accomplish a law enforcement end that the Court concluded had to be facilitated.”²⁵⁵

Casually read, *White*'s rationale that custodians and representatives of collective groups could not invoke the Fifth applied to a myriad of organizations and groups. As such, it freed prosecutors and other government officials to go on fishing expeditions to examine the records and documents of any group subject to state or federal regulation. Perhaps to cabin this eventuality, Justice Murphy explained that whether the Fifth Amendment can be invoked turns on whether “a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.”²⁵⁶ But this “test,”²⁵⁷ like Justice Murphy's other reasoning, had no nexus with the Fifth Amendment's text or its underlying purpose or policies. Rather, this test was keyed to privacy concerns, but it also worked hand in hand with the Court's long-standing desire—dating back to *Hale*—to prevent the privilege from interfering with effective law enforcement.²⁵⁸ Although the justifications had changed, the results were the same. Persons were barred from invoking the Fifth in order to facilitate

²⁵² See WIGMORE, *supra* note 49, § 2259 (“[W]here the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him producing them.”).

²⁵³ See *supra* note 231 and accompanying text (discussing origins of *Wilson*'s waiver theory).

²⁵⁴ Cole, *Limited Liability Entities*, *supra* note 20, at 32.

²⁵⁵ *Id.* at 34; see also Stuntz, *supra* note 54, at 433 n.173 (calling *White* “[a]n usually blunt example” of the Court's motivation in collective entity cases).

²⁵⁶ *White*, 322 U.S. at 701.

²⁵⁷ *Id.*

²⁵⁸ Cf. Rothman, *supra* note 15, at 419-20 (“The *White* test is phrased in terms of privacy, but it follows logically from the Court's overriding social control concerns. . . . [A]s organizations grow in size, they become more powerful and less amenable to government supervision and control. Social organization is the most potent of the weapons in the white-collar criminal's arsenal; organized, institutional activity of the kind pinpointed by the *White* test is exactly the sort of nonviolent criminal activity that poses the gravest threat to the community.” (footnote omitted)).

enforcement of the criminal laws. Understood this way, *White* was following the steps of *Hale*, *Wilson*, and *Wheeler*—a continuing chain down to the dangerously limited Fifth Amendment of our own time.

The breadth of *White*'s reasoning and its vacuous analysis raise the question why liberal Justices Hugo Black, William Douglas, and Wiley Rutledge signed Justice Murphy's opinion.²⁵⁹ *White*'s broad rationale was especially useful to politicians and prosecutors seeking to pry documents from left-leaning political groups during the political witch hunts of the 1950s. When members of the Communist Party and the Civil Rights Congress claimed the privilege to resist subpoenas to produce organizational documents, a majority of the Court simply cited *White* to remind claimants that they had "no privilege" to resist even though disclosure of the documents was personally incriminating.²⁶⁰

E. *Curcio v. United States (1957): Two Types of Fifth Amendment Testimony?*

The constitutional framework established by *Wilson*, *Wheeler*, and *White* could be read to mean that representatives and custodians of collective entities implicitly waive protection of the Fifth Amendment whenever they are ordered to disclose information regarding the collective entity—even if the disclosure is personally incriminating. To be sure, all three cases involved scenarios where representatives were only compelled to produce entity documents; none involved forced oral testimony from a representative. Yet, the Court ruled the privilege was unavailable in each case assuming that production of entity documents would personally incriminate *Wilson*, *Wheeler*, and *White*. In fact, a passage in *White* appeared to adopt the view that waiver of the privilege applied across the board, not just to forced production of documents. *White* reasoned that when people act as representatives of a collective body, they cannot rely on their personal rights; instead, they assume the duties and obligations of the

²⁵⁹ Equally puzzling is why Justices Frankfurter and Jackson concurred in the result. Professor Howard has observed that Justice Murphy's opinion contained "generous references to older decisions supporting antitrust suits against trade unions" that caused Justice Frankfurter to concur without an opinion. HOWARD, *supra* note 236, at 384. In his seminal biography of Justice Murphy, Professor Howard noted the *White* opinion may have been assigned to Justice Murphy "because of unexpected votes" among the Justices. *Id.* at 490.

²⁶⁰ See *Rogers v. United States*, 340 U.S. 367, 371-72 (1951); *McPhaul v. United States*, 364 U.S. 372, 380 (1960). In *Rogers*, Justice Black, joined by Justices Frankfurter and Douglas, dissented and remarked:

Some people are hostile to the Fifth Amendment's provision unequivocally commanding that no United States official shall compel a person to be a witness against himself. They consider the provision as an outmoded relic of past fears generated by ancient inquisitorial practices that could not possibly happen here. For this reason the privilege to be silent is sometimes accepted as being more or less of a constitutional nuisance which the courts should abate whenever and however possible.

Rogers, 340 U.S. at 375-76 (Black, J., dissenting). Despite his strong words in support of the Fifth Amendment, Justice Black's dissent did not question the continued validity of *Wilson* or *White*. *Id.* at 375-81.

collective group.²⁶¹ “In their official capacity, therefore, they have no privilege against self-incrimination.”²⁶²

A broad notion of waiver was certainly logical. If someone like Wilson or White “voluntarily assumed a duty which overrides his claim of privilege,”²⁶³ regarding production of documents, why treat oral testimony differently? Compelled production of documents from a custodian triggers the Fifth Amendment as much as compelled oral testimony. The former can be just as testimonial as oral testimony. Wigmore recognized this point as early as 1905.²⁶⁴ Contemporary scholars have reached the same conclusion: “Admissions implicit in producing records do not lose their testimonial quality if the records belong to a corporation rather than to an individual.”²⁶⁵ And if compelled production of records is constitutionally permissible because the custodian has waived his privilege—as *Wilson*, *Wheeler*, and *White* establish—the same waiver can be used to compel oral testimony. As *Wilson* put it, by accepting the job as custodian, a person “has voluntarily assumed a duty which overrides his claim of privilege.”²⁶⁶ The text of the Fifth Amendment certainly does not distinguish between types of testimony that are incriminating. Indeed, the terms “testimony” or “oral testimony” nowhere appear in the text of the amendment, which bars a person from being compelled in a criminal case “to be a witness against himself.”²⁶⁷ Ironically, a half century later, the Court would note in a case involving a defendant who was not an officer of a collective entity that there was “no cogent argument as to why the ‘testimonial’ requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements.”²⁶⁸

Indeed, in 1926 and 1929, two decisions from highly respected federal judges applied *Wilson*’s waiver theory to certain types of oral testimony compelled

²⁶¹ See *White*, 322 U.S. at 699.

²⁶² *Id.*

²⁶³ *Wilson v. United States*, 221 U.S. 361, 380 (1911).

²⁶⁴ WIGMORE, *supra* note 49, at § 2264 (“[I]t is not merely compulsion which is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*.”).

²⁶⁵ King, *supra* note 52, at 1556. This was true even before *Fisher v. United States*, 425 U.S. 391 (1976), acknowledged that the act of production can sometimes be testimonial. WIGMORE, *supra* note 49, § 2264(1).

²⁶⁶ *Wilson*, 221 U.S. at 380.

²⁶⁷ U.S. CONST. amend. V.

²⁶⁸ *Doe v. United States (Doe II)*, 487 U.S. 201, 210 n.8 (1988); see also Mosteller, *Cowboy Prosecutors*, *supra* note 44, at 527 n.174 (noting distinction between “compelling explicit speech and indirect communication through the act of production under the Fifth Amendment, was apparently rejected by *Doe I*”); *id.* at 529 (“Because the Supreme Court has never extensively examined the issue, some possibility remains that it may develop an important difference in treatment between compulsion of testimony per se and compulsion of implicit testimony through production. However, any such distinction would be very difficult to justify under established Fifth Amendment doctrine.”).

from custodians of collective entities.²⁶⁹ In the first case, Judge Augustus Noble Hand, sitting as a federal district judge, ruled that corporate officers were not entitled to statutory immunity for incriminating grand jury testimony as to the identity of corporate documents.²⁷⁰ Because the officer could be forced to disclose the documents notwithstanding their personally incriminating contents, Judge Hand saw “little difference between testimony of the character given and a production of the books under a subpoena without it.”²⁷¹ Then, three years later, Judge Learned Hand, writing for the Second Circuit, found no constitutional infirmity when a corporate officer was called to the stand and compelled to identify the minutes of the corporation, despite his invocation of the privilege.²⁷² According to Judge Learned Hand, if production can be compelled, compelling oral testimony to authenticate the documents was equally permissible: “[W]e think that the greater includes the less, and that, since the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine.”²⁷³

So matters stood when *Curcio v. United States*²⁷⁴ arrived at the Court. Joseph Curcio, the secretary-treasurer of Local 269 of the International Brotherhood of Teamsters, was subpoenaed by a federal grand jury sitting in Manhattan that was investigating racketeering in the garment and trucking industries.²⁷⁵ Two subpoenas—“a personal subpoena *ad testificandum* and a subpoena *duces tecum* addressed to [Curcio] in his capacity” as an officer of the union were served on Curcio.²⁷⁶ Curcio testified that the union had the requested documents, but they were not in his possession.²⁷⁷ When asked about the location of the documents, Curcio took the Fifth, claiming that any answers regarding the whereabouts or who possessed the documents would incriminate him.²⁷⁸ A federal district judge

²⁶⁹ *United States v. Lay Fish Co.*, 13 F.2d 136, 136 (S.D.N.Y. 1926); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233-34 (2d Cir. 1929).

²⁷⁰ *Lay Fish Co.*, 13 F.2d at 136.

²⁷¹ *Id.* at 137.

²⁷² *Austin-Bagley Corp.*, 31 F.2d at 233-34. Judge Learned Hand was the younger first cousin of Judge Augustus Noble Hand. The latter was elevated to the Second Circuit by President Calvin Coolidge and confirmed by the Senate on January 18, 1928. Burt Neuborne, *A Tale of Two Hands: One Clapping; One Not*, 50 ARIZ. ST. L.J. 831, 834, 845 (2018). Judge Augustus Noble Hand sat on the panel with Judge Learned Hand in *Austin-Bagley Corp.*, 31 F.2d at 232.

²⁷³ *Id.* at 234; *see also id.* (stating “testimony auxiliary to the production is as unprivileged as are the documents themselves”). After *Austin-Bagley Corp.* was decided, several lower federal courts adopted its reasoning. *See, e.g.*, *Pulford v. United States*, 155 F.2d 944, 947 (6th Cir. 1946); *Lumber Prods. Ass’n v. United States*, 144 F.2d 546, 553 (9th Cir. 1944); *Carolene Prods. Co. v. United States*, 140 F.2d 61, 66-67 (4th Cir. 1944), *aff’d*, 323 U.S. 18 (1944); *United States v. Ill. Alcohol Co.*, 45 F.2d 145, 149 (2d Cir. 1930).

²⁷⁴ 354 U.S. 118 (1957).

²⁷⁵ *Id.* at 119.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

found Curcio guilty of contempt due solely to his refusal to answer questions pursuant to the personal subpoena *ad testificandum*; Curcio was not charged with failing to produce the union documents ordered by the subpoena *duces tecum*.²⁷⁹ After the appellate court affirmed Curcio's contempt conviction, the Court addressed whether a custodian of entity documents may invoke the Fifth when asked to explain the whereabouts of documents which he has not produced.²⁸⁰

The government contended that *Wilson's* waiver theory controlled.²⁸¹ Because a custodian has an obligation to produce the documents, the government reasoned, that same obligation requires the custodian to account for documents which have not been produced.²⁸² Because Curcio, "as custodian, was obliged to produce the books, regardless of their incriminatory character, he must also, as custodian, explain their nonproduction even if such explanation would incriminate him."²⁸³ Otherwise, the power to compel production "would be largely illusory if the custodian of unprivileged organization records could escape his responsibility by the simple expedient of passing records from one person to another without explanation."²⁸⁴ A unanimous Court disagreed.²⁸⁵

Writing for the Court, and presumably viewing the government's position as seeking an exception to the Fifth Amendment, Justice Burton opined that the "Fifth Amendment suggests no such exception."²⁸⁶ Justice Burton explained that a "custodian, by assuming the duties of his office, undertakes the obligation to produce the books" when subpoenaed.²⁸⁷ However, that custodian cannot lawfully be compelled, without a grant of immunity, "to condemn himself by his own oral testimony."²⁸⁸ As support for this distinction, Justice Burton cited dicta from *Wilson* stating that custodians "may decline to utter upon the witness stand a single self-incriminating word," and language from *White* which noted that *White* "had not been subpoenaed personally to testify."²⁸⁹ According to Justice

²⁷⁹ *Id.* at 119-21 (sentencing Curcio to six months confinement unless he sooner answered such questions surrounding personal subpoena).

²⁸⁰ *See id.* at 122. The Court framed the issue as follows: "[W]hether the custodian of a union's books and records may, on the ground of his Fifth Amendment privilege against self-incrimination, refuse to answer questions asked by a federal grand jury as to the whereabouts of such books and records which he has not produced pursuant to subpoena." *Id.* at 118-19.

²⁸¹ *See* Brief for the United States at 20-21, *Curcio*, 354 U.S. 118 (No. 260).

²⁸² *Id.* at 13.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Curcio*, 354 U.S. at 118.

²⁸⁶ *Id.* at 123.

²⁸⁷ *Id.* at 123-24.

²⁸⁸ *Id.* at 124.

²⁸⁹ *Id.* (first quoting *Wilson v. United States*, 221 U.S. 361, 385 (1911); and then quoting *White v. United States*, 322 U.S. 694, 696 (1944)). Justice Burton noted that "oral testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege." *Curcio*, 354 U.S. at 124 (quoting *Shapiro v. United States*, 335 U.S. 1, 27 (1948)).

Burton, these rulings merely established that a custodian waives his privilege for the production of documents; none held that a custodian “waives his constitutional privilege as to oral testimony by assuming the duties of his office.”²⁹⁰

As for the lower court rulings, like Judge Learned Hand’s decision in *Austin-Bagley Corp.*, Justice Burton asserted those cases were “distinguishable” and there was no need for the Court to assess their correctness.²⁹¹ Requiring a representative or custodian to identify or authenticate documents for admission in evidence “merely makes explicit what is implicit in the production itself.”²⁹² In other words, compelled production poses “little, if any, further danger of incrimination” for the custodian.²⁹³ *Curcio*, by contrast, was asked to do more than merely identify documents already disclosed. The government sought to compel him to reveal, by oral testimony, the location of documents which he had failed to produce, or to name the persons who might have possessed those documents. Those answers go beyond being merely “auxiliary to the production” of corporate records.²⁹⁴

After putting aside Judge Learned Hand’s analysis, Justice Burton offered a final justification for his holding. Shifting his legal analysis, he explained that the Fifth Amendment was unavailable to a custodian compelled to produce entity documents “because he does not own the records and has no legally cognizable interest in them.”²⁹⁵ Compelled oral testimony about the whereabouts of nonproduced documents is different because it requires the custodian “to disclose the contents of his own mind,” which might cause the custodian “to convict himself out of his own mouth.”²⁹⁶

Of course, this explanation permitted the Court to distance itself, at least partially, from *Wilson*’s waiver theory and resurrect the other core of *Wilson*’s two part holding—the property rights basis of *Wilson*.²⁹⁷ This shift in reasoning also excused the Court from offering a principled explanation of why *Wilson*’s waiver theory operates only against forced production of documents. After *Curcio*, availability of the waiver theory turns on the type of testimony being compelled—a custodian waives the Fifth regarding compelled production of records, but not so for compelled oral testimony.²⁹⁸ Left unresolved was how

²⁹⁰ *Id.* at 124-25.

²⁹¹ *Id.* at 125.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 128.

²⁹⁶ *Id.*

²⁹⁷ *See supra* notes 207-11 and accompanying text (discussing corporate officer’s inability to retain possession over corporate books which belonged to organization of which he was employee).

²⁹⁸ The flaw in *Wilson*’s waiver theory and *Curcio*’s untenable distinction between types of testimony protected by the Fifth Amendment was on display for the Justices in *McPhaul v.*

this reinterpretation of *Wilson* affected cases like *Wheeler* which involved former entity records lawfully owned and possessed by former custodians.²⁹⁹ *Wheeler* had relied on *Wilson*'s waiver theory to deny a claim of privilege by former corporate officers who rightfully possessed documents of a dissolved corporation.³⁰⁰ The fact that the subpoenaed documents in *Wheeler* "belonged to" the defendants was constitutionally irrelevant.³⁰¹ Without admitting it, *Curcio* limited *Wilson*'s waiver theory by drawing a nontextual and arbitrary line between different types of incriminating testimony from representatives of collective entities.³⁰²

United States, 364 U.S. 372 (1960), but they paid no attention to it. There, McPhaul, an officer of the Civil Rights Congress, an organization deemed to be subversive by the Attorney General of the United States, refused to disclose entity documents after being subpoenaed by the House Committee on Un-American Activities. *Id.* at 373-74. When asked by the committee chairman whether he would produce the requested records, McPhaul refused to answer "this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment." *Id.* at 375. McPhaul was later convicted of contempt, and the Court upheld the conviction. *Id.* at 373-83. A majority rejected McPhaul's constitutional claim that answering questions about the custody or possession of the documents' location would be incriminating, simply citing the waiver analysis reaffirmed in *White*. *See id.* at 380. As one commentator has noted, *Curcio* and *McPhaul* are different sides of the same testimonial coin: "[T]estimony and production are indistinguishable in the rare case when mere knowledge of the documents' location is the incriminating fact, since both require the witness to reveal the same knowledge from within his own mind." Fiebach, *supra* note 54, at 406.

²⁹⁹ *See Wheeler v. United States*, 226 U.S. 478, 478 (1913).

³⁰⁰ *See id.* at 490.

³⁰¹ *Id.*

³⁰² *Cf.* Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 41 n.179 (1986) ("If a witness would not have to answer questions as to whether he possesses certain documents, whether he knows the nature of them, whether the documents belong to some specific person, and many similar questions, there is no reason why he should be compelled to answer such questions implicitly by producing the documents. Ruling on privilege claims is never easy, since courts must be concerned lest they compel the very disclosure that they seek to avoid in the process of ruling on a claim. Bright-line rules are no more justified with respect to documents than with respect to oral testimony.").

The arbitrary nature of the distinction created by *Curcio* does not disappear if one relies on the state's visitatorial powers to force testimony from a custodian. In *Wilson*, Justice Hughes stressed that the "reserved power of visitation would be seriously embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation." *Wilson v. United States*, 221 U.S. 361, 384-85 (1910). However, Justice Hughes quickly noted that a corporate officer "may decline to utter upon the witness stand a single self-criminating word." *Id.* at 385. Thus, the visitatorial power "gives the state the right to drag from [a custodian's] custody documents but not to compel his lips to open." *Compelling a Corporate Officer to Produce Official Records in His Custody Which May Incriminate Him*, 73 CENT. L.J. 19, 19 (1911). As noted by one commentator contemporaneous to the announcement of *Wilson*, "it is hard to see why refusal for an officer to produce books might any more seriously embarrass 'the reserved power of visitation' than the officer's refusal to give oral testimony." *Id.* at 20 (quoting *Wilson*, 221 U.S. at 384).

F. *Bellis v. United States (1974)*

Before the Court announced a groundbreaking ruling in 1976, there was one additional case in the collective entity saga that had the potential to undo the collective entity doctrine as it applied to custodians and representatives of artificial entities. For approximately fourteen years, Isadore Bellis was the senior partner in Bellis, Kolsby & Wolf, a Philadelphia law firm.³⁰³ In 1969, Bellis left the firm, the partnership dissolved, and Bellis joined a new firm.³⁰⁴ Under instructions from Bellis or his attorney, Bellis's secretary removed the partnership records to Bellis's new office.³⁰⁵ On May 1, 1973, Bellis was served with a subpoena ordering him to appear and testify before a federal grand jury and to bring certain partnership records of Bellis, Kolsby & Wolf, because Bellis was the target of an income tax investigation.³⁰⁶ Bellis appeared but refused to produce the records, invoking the Fifth, and the lower courts found him in civil contempt.³⁰⁷ He then asked the Court to decide whether a partner in a small law firm may plead the Fifth to justify refusing to produce partnership financial records. The Court ruled that the privilege was unavailable in these circumstances.³⁰⁸

Writing for eight members of the Court, Justice Marshall explained that the Court's previous precedents were based on the following reasoning: First, the privilege is a personal right and applies to the "business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life."³⁰⁹ But the individual "cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity," even if these records are personally incriminating.³¹⁰ Thus, the Fifth Amendment is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."³¹¹

Second, these same precedents finding the privilege inapplicable to the records of artificial entities parallels the Fifth Amendment's concern with individual privacy.³¹² Momentarily reviving *Boyd*, Justice Marshall drew a connection between *Boyd* and *Wilson*. Protecting privacy was the main concern in *Boyd*, and was the basis for distinguishing the corporate records subject to valid governmental compulsion in *Wilson* from the private papers

³⁰³ *Bellis v. United States*, 417 U.S. 85, 86 (1974).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 86, 96-97.

³⁰⁷ *Id.* at 86-87.

³⁰⁸ *See id.* at 95.

³⁰⁹ *Id.* at 87-88.

³¹⁰ *Id.* at 88.

³¹¹ *Id.* at 89-90 (quoting *United States v. White*, 322 U.S. 694, 701 (1944)).

³¹² *See id.* at 90.

constitutionally protected in *Boyd*.³¹³ A “substantial claim of privacy or confidentiality” is typically inapt for the financial records of a collective entity.³¹⁴ These records are often regulated by statute and accessible to other members of the firm. Justice Marshall then identified the relevance of the visitatorial powers doctrine invoked in *Wilson*: “[C]orporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach.”³¹⁵ The result in *White* was consistent with this reasoning because the union records subpoenaed related to “organized, institutional activity,” and not the personal records of individual union members.³¹⁶

It was a short step to apply this logic to partnerships, which “may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership’s financial records.”³¹⁷ When confronted by *Bellis*’s assertion that he had a direct ownership interest in partnership records which entitled him to invoke the Fifth, a claim that *Wilson* could not make regarding corporate records, Justice Marshall acknowledged the point but countered that previous cases, including *White* and *Wheeler*, had presented similar claims for the invoking privilege.³¹⁸ Although a property-based theory for invoking the Fifth had prevailed in *Boyd*, Justice Marshall now dismissed the relevance of title or ownership in the subpoenaed documents with the assertion that “*White* clearly established that the mere existence of such an ownership interest is not in itself sufficient to establish a claim of privilege.”³¹⁹

³¹³ *Id.* at 91-92 (citing *Wilson v. United States*, 221 U.S. 361, 384-85 (1910); *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Professor Cole rightly describes Marshall’s description here as close to “disingenuous” since the records at issue in *Boyd*—invoices for imported plate glass—“could hardly be characterized as more ‘private’ than the corporate documents at issue in *Wilson*—copies of letters and telegrams signed by the president of the corporation relating to alleged antitrust violations.” Cole, *Limited Liability Entities*, *supra* note 20, at 37.

³¹⁴ *Bellis*, 417 U.S. at 92.

³¹⁵ *Id.*

³¹⁶ *Id.* (quoting *White*, 322 at 701). Professor Rothman describes *Bellis*’s reliance on privacy as a shift in rationale and “a new, independent justification” for the results in *Wilson* and *White*. Rothman, *supra* note 15, at 422-25.

³¹⁷ *Bellis*, 417 U.S. at 93.

³¹⁸ *Id.* at 88.

³¹⁹ *Id.* at 97 n.8. Justice Marshall also dispatched in a footnote *Bellis*’s argument that *Boyd* had already decided the Fifth Amendment issue in his favor. *Id.* at 95 n.2. Acknowledging that the court order in *Boyd* was issued to a partnership, Justice Marshall explained that *Boyd* was decided during the infancy of the Court’s Fifth Amendment doctrine and neither the parties nor the Court had recognized the significance of this fact. *Id.* Further, the *Boyd* Court did not probe the nature of the partnership or “the capacity in which the invoice was acquired or held.” *Id.* Tellingly, Justice Marshall concluded with the observation that it was uncertain “how our decision today would affect the result of *Boyd* on the facts of that case.” *Id.* After reading this passage, students of the Court knew that *Boyd* was all but dead. *See id.* at 105

Bellis, as Justice Alito noted, was the capstone of seven decades of judicial constriction of the Fifth Amendment.³²⁰ Justice Alito also recognized that “these decisions focused on the contents of the subpoenaed records, not on the act of production.”³²¹ When a defendant did object that the act of producing records would incriminate him, the Justices ignored the point, as they did in *McPhaul*; in *Curcio*, the Justices dismissed as trivial the implied admission associated with the act of production.³²²

In any event, the distinction Justice Alito highlighted did not matter to the Court. The contents of subpoenaed documents were inevitably incriminating, which is why government officials wanted to examine the records. Put simply, whatever the focus—the contents of the records themselves, or the implicit incriminating admission in the act of production—“neither were privileged.”³²³ While *Bellis* certainly shifted gears slightly by injecting privacy as a factor in the collective entity cases, like its predecessors from *Wilson* onward, the result in *Bellis* was motivated by the needs of law enforcement, which meant the privilege could not be tolerated.³²⁴

(Douglas, J., dissenting) (arguing Court had effectively overruled *Boyd* by holding government can force person to produce private records to promote criminal investigation of him); Cole, *Limited Liability Entities*, *supra* note 20, at 37 n.129 (“[T]he *Bellis* Court was essentially able to overrule *Boyd* and reject its Fifth Amendment holding without explicitly acknowledging that it had done so.”).

There was one final housekeeping matter Justice Marshall resolved. *Bellis* claimed that the “test” announced in *White* for determining the applicability of the Fifth Amendment in cases like his was whether the entity “has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or groups interests only.” *Bellis*, 417 U.S. at 100 (quoting *White*, 322 U.S. at 701). Justice Marshall found that this test was vague and unhelpful in deciding how to apply the privilege in collective entity contexts. *See id.* Justice Marshall was willing to say that the Court’s result might be different if this case concerned “a small family partnership” or “some other pre-existing relationship of confidentiality among the partners.” *Id.* at 101. But the facts in *Bellis* indicated that *Bellis* held the records in a representative capacity, and thus, he could not invoke the Fifth. *Id.* While Justice Marshall’s holding is confined to the “circumstances of this case,” *id.* at 95, Professor Rothman contends that the logic of *Bellis* “carried out consistently, would make denial of fifth amendment protection for the records of any partnership a virtual certainty.” Rothman, *supra* note 15, at 423.

³²⁰ *See* Alito, *supra* note 47, at 68.

³²¹ *Id.*

³²² The only type of testimony the *Curcio* Court was willing to recognize under the Fifth Amendment was “oral” testimony. *See* King, *supra* note 52, at 1550-51 (“[*Curcio*] noted that the act of producing union records involved potentially incriminating admissions, but reasoned that the fifth amendment protected only a producer’s ‘oral’ testimony, not those admissions implicit in production.”).

³²³ *Id.* at 1549.

³²⁴ *Bellis*, 417 U.S. at 90 (explaining that if custodian of entity records could invoke his personal privilege, that result would undermine long-standing rule that artificial entities are not protected by Fifth Amendment and “largely frustrate legitimate governmental regulation

In 1976, however, the Court's view of what the Fifth Amendment protects regarding the production and disclosure of documents changed dramatically. *Fisher v. United States*³²⁵ issued a jolt to the law of documents and the privilege.³²⁶ Among other things, *Fisher* embraced a literal and narrow interpretation of the privilege.³²⁷ As a result, privacy was no longer a concern for the Fifth Amendment. Similarly, under *Fisher*'s analysis, the contents of preexisting business records are not protected by the privilege.³²⁸ *Fisher* also contemplated that some forms of the act of production might be sufficiently testimonial to trigger Fifth Amendment protection, which meant that *Fisher* intuitively resuscitated the privilege for custodians and representatives of collective entities.³²⁹

Twelve years later, *United States v. Doe*³³⁰ demonstrated that the Justices took seriously what *Fisher* said about certain acts of production being protected by the Constitution.³³¹ As a result, *Fisher*'s act of production doctrine could provide

of such organizations"); see also Cole, *Limited Liability Entities*, *supra* note 20, at 35 ("The needs of law enforcement led the Court to stretch the collective entity doctrine further in [*Bellis*] . . ."); Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 57 (arguing the Court in *Bellis* "relied heavily, as it had in *White*, on the policy of aiding effective law enforcement"); MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 115 (1986) (stating "only considerable hostility to the privilege" explains result in *Bellis*).

³²⁵ 425 U.S. 391 (1976).

³²⁶ *Id.* at 391 (focusing on act of production of documents rather than contents of subpoenaed records).

³²⁷ *Id.*

³²⁸ After the ruling in *United States v. Hubbell*, 530 U.S. 27 (2000), scholars have questioned whether this aspect of *Fisher* remains good law. See Cole, *The Fifth Amendment and Compelled Production*, *supra* note 44, at 129 (arguing *Hubbell* was correctly decided and it "effectively, if not explicitly, overruled *Fisher* in cases where prosecutors are seeking private documents from an individual"); Mosteller, *Cowboy Prosecutors*, *supra* note 44, at 519 (acknowledging that though *Hubbell* "gave no indication that it was overruling any aspect of *Fisher*[,] . . . *Hubbell* should be interpreted as reformulating *Fisher*"); Uviller, *supra* note 44, at 335 (criticizing *Hubbell* for going "well beyond what *Fisher* requires and com[ing] dangerously close to allowing the Fifth Amendment . . . to shield the contents of freely written documents"); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 859 n.65 (2001) (noting *Fisher* "may have been largely (albeit tacitly) overruled by [*Hubbell*]"). It is important to note that a majority of the Court has not signaled dissatisfaction with the part of *Fisher*'s holding that allows prosecutors to subpoena voluntarily created private documents without triggering Fifth Amendment protection. It is equally vital to understand that *Hubbell* is a significant ruling and certainly restrains the subpoena power of prosecutors and grand juries. Whether *Hubbell* has substantially altered or overruled *Fisher* is beyond the scope of this Article.

³²⁹ See *Fisher*, 425 U.S. at 391.

³³⁰ 465 U.S. 605 (1984).

³³¹ *Id.* at 605 (holding while contents of business records are not protected by privilege because they were voluntarily prepared, compelled act of producing those records are protected because act of production is testimonial).

meaningful Fifth Amendment protection in contexts where the government was on a fishing expedition for incriminating records. Together, these cases finally closed the door on *Boyd's* expansive view of the Fifth Amendment.

G. *Fisher v. United States (1976)*

In *Fisher*, taxpayers who were under investigation for possible civil or criminal violations of the federal income tax laws pled the Fifth when served with summonses from the Internal Revenue Service to disclose documents prepared by their accountants.³³² In rejecting their claims, Justice White's opinion for the Court fundamentally altered Fifth Amendment law. For purposes of this Article, *Fisher* transformed the privilege in three important ways. First, Justice White made plain that personal privacy is not protected by the privilege.³³³ Emphasizing the text of the provision, he explained that the Fifth Amendment has never barred the use of evidence that "did not involve compelled testimonial self-incrimination of some sort."³³⁴ The Fourth Amendment addresses "the subject of personal privacy directly," and the Framers did not intend the Fifth Amendment to shield the same subject "but to deal with the more specific issue of compelled self-incrimination."³³⁵

Second, *Fisher* revisited *Boyd* and found that many of "*Boyd's* express or implicit declarations have not stood the test of time."³³⁶ Justice White granted that *Boyd* had been read to establish the rule that the Fifth Amendment "prevents compelled production of documents over objection that such production might incriminate" a person.³³⁷ But *Boyd's* holding originally rested upon Fourth and Fifth Amendment norms that the modern Court no longer approved. Thus, "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."³³⁸

Using the specific facts of *Fisher* as a backdrop, Justice White then devised *Boyd's* death certificate. He explained that a summons or subpoena served on a taxpayer to disclose an accountant's workpapers clearly involves "substantial compulsion" from the government.³³⁹ But it would not require oral testimony from the taxpayer, nor compel the "taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought."³⁴⁰ Thus, though the contents of the documents might incriminate the taxpayer, there is no violation of the privilege

³³² *Fisher*, 425 U.S. at 394-95.

³³³ *See id.* at 399.

³³⁴ *Id.*

³³⁵ *Id.* at 400.

³³⁶ *Id.* at 407.

³³⁷ *Id.* at 405.

³³⁸ *Id.* at 409.

³³⁹ *Id.*

³⁴⁰ *Id.*

because the Fifth Amendment “protects a person only against being incriminated by his own compelled testimonial communications.”³⁴¹ The summonses did not force the taxpayers to say anything about the accountants’ papers. Moreover, because the preparation of the documents “was wholly voluntary,” the contents of the documents was not compelled testimony “either of the taxpayers or of anyone else.”³⁴² The upshot of this aspect of *Fisher* was that the Fifth Amendment was to be read literally and narrowly: it would only protect against “the compulsory extraction of testimony.”³⁴³ Voluntarily prepared papers or business records were not protected.³⁴⁴

Third, after transcribing *Boyd*’s death certificate, Justice White took a step back to note that the “act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.”³⁴⁵ In other words, the act of production provides testimonial evidence because it acknowledges “the existence of the papers demanded and their possession or control by the taxpayer,” and authenticates the papers demanded.³⁴⁶

This was a significant move; it was the first time that the Court had signaled “that the fifth amendment may protect *testimony implicit in the act* of producing records even when it does not protect the *contents* of the records.”³⁴⁷ But after formulating additional protection under the privilege, Justice White reversed field again by creating a judge-made exception to the freshly minted protection

³⁴¹ *Id.*

³⁴² *Id.* at 409-10. Justice White also observed that “[t]he fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege,” and “unless the Government has compelled the subpoenaed person to write the document, the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.” *Id.* at 410 n.11 (citations omitted).

³⁴³ Alito, *supra* note 47, at 43.

³⁴⁴ Applied in a principled manner, “*Fisher*’s analysis did not logically allow distinctions to be drawn between different types of voluntarily created records.” *Id.* at 44 n.86. Indeed, *Fisher*’s rejection of *Boyd*’s view of the privilege “appeared to apply to all documents, not just tax records.” Slobogin, *supra* note 157, at 820. Yet, at the end of his opinion, Justice White noted that the Court was not deciding whether the Fifth Amendment would shield a taxpayer from producing his own tax records in his possession because the papers compelled in *Fisher* were not the taxpayers’ “private papers.” *Fisher*, 425 U.S. at 414 (citing *Boyd v. United States*, 116 U.S. 616, 634-35 (1886)). Reserving this issue conflicts with the entirety of *Fisher*’s logic. See Alito, *supra* note 47, at 44 n.86.

³⁴⁵ *Fisher*, 425 U.S. at 410.

³⁴⁶ *Id.*

³⁴⁷ King, *supra* note 52, at 1549. As noted above, the act of production “theory was not an innovation conceived by the *Fisher* Court but had existed for most of the [twentieth] century.” Alito, *supra* note 47, at 45. In 1904, Wigmore apparently was the first academic to write about the theory. *Id.* Justice Alito also notes that the theory was later endorsed by some prominent jurists, including then-Judge Benjamin Cardozo when he sat on the Court of Appeals of New York and Judge Henry Friendly. *Id.* at 45-46. Ultimately, Justice Alito says: “The theory . . . was an academic creation and found judicial acceptance more as an excuse than a reason.” *Id.* at 46.

he had just crafted. Focusing on the specific facts before the Court, Justice White found it “doubtful” that the taxpayers’ implied admissions of existence and possession would constitute “testimony” under the Fifth Amendment.³⁴⁸

Why not? Because the demanded records were prepared by the accountants, and the government did not need the taxpayers’ “truthtelling” to prove the existence of, or the taxpayers’ access to, the records.³⁴⁹ “The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the papers.”³⁵⁰ Put differently, the taxpayers’ disclosure of the documents is not “testimony” but “surrender.”³⁵¹

Although Justice White may have thought that his analysis in *Fisher* was a conventional application of the privilege to the facts,³⁵² legal scholars had a different reaction to *Fisher*. For some, *Fisher* was a “revolutionary opinion” that “turned fifth amendment jurisprudence upside-down” and had a “cataclysmic” effect regarding the production of documentary evidence.³⁵³ Another scholar wrote that *Fisher* had an “extraordinary impact on the law of documentary subpoenas.”³⁵⁴ A third scholar stated that *Fisher* “adopted an entirely new form of analysis for determining the application of the Fifth Amendment privilege to subpoenas for documents.”³⁵⁵ Finally, another scholar called *Fisher* a “bombshell” due to its “new conception of the manner in which the Fifth Amendment applies to documents.”³⁵⁶ The consensus among legal scholars was

³⁴⁸ *Fisher*, 425 U.S. at 411.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.* At this point in his opinion, Justice White references the collective entity cases and states that the Court has “time and again” upheld subpoenas served on custodians who hold the documents of artificial entities, “despite the fact that producing the documents tacitly admits their existence and their location in the hands of their possessor.” *Id.* at 411-12. Because the taxpayers’ act of producing the documents provided no more additional information than the act of disclosing documents in the artificial entity cases did, the summonses were constitutionally valid. *Id.* at 412. Of course, Justice White ignores the fact that the collective entity cases never fully addressed whether a custodian’s act of production was testimonial under the Fifth Amendment.

³⁵² *See, e.g., id.* at 401 (“We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text . . .”).

³⁵³ Rothman, *supra* note 15, at 387, 425, 428.

³⁵⁴ Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 4-5 (noting *Fisher* “brushed aside many of the doctrines that had previously dominated fifth amendment analysis,” and replaced it with a “new system in which the availability of the privilege turns, apparently exclusively, upon whether the act of production involves testimonial self-incrimination”).

³⁵⁵ Henning, *Testing the Limits*, *supra* note 45, at 419.

³⁵⁶ Cole, *Limited Liability Entities*, *supra* note 20, at 48. Even Justice Alito described *Fisher* as a “more radical approach” than the Court’s most contemporaneous precedent addressing the scope of the Fifth Amendment’s protection when the government seizes

that, after *Fisher*, “the contents of all business documents—perhaps writings of all kinds—are now unprivileged.”³⁵⁷ The only thing the privilege protects concerning preexisting documents is the “incriminating information communicated by the act of responding to a subpoena duces tecum or a summons for documents,”³⁵⁸ and some questioned, as a practical matter, how much protection would be offered by the new act of production doctrine.³⁵⁹

H. *United States v. Doe (1984)*

Twelve years later, the Court applied *Fisher* in *Doe* and showed it was adhering to *Fisher*'s vision of the privilege.³⁶⁰ The issue in *Doe* was whether, and to what extent, the privilege applies when a sole proprietor is served a subpoena for his business records.³⁶¹ In one way, *Doe* was a significant case because the type of subpoena involved was “issued daily by federal grand juries across the country.”³⁶² *Doe* was the owner of several sole proprietorships.³⁶³ A grand jury, investigating political corruption, served five subpoenas on *Doe* demanding various types of business records of his companies, including phone and bank records.³⁶⁴ Two lower courts upheld *Doe*'s claim of privilege in response to the subpoenas because producing the records would incriminate *Doe* under *Fisher*'s act of production rule.³⁶⁵ The government appealed to the Court.

Doe announced two principal rulings: First, the contents of the business records were not protected by the privilege because they were not compelled by the government.³⁶⁶ Second, the Court ruled that the act of producing the records

incriminating documents. Alito, *supra* note 47, at 43 (discussing *Andresen v. Maryland*, 427 U.S. 463 (1976)).

³⁵⁷ Rothman, *supra* note 15, at 388; *see also* Cole, *Limited Liability Entities*, *supra* note 20, at 48 (describing *Fisher* as holding “that the contents of voluntarily created preexisting documents are not subject to the Self-Incrimination Clause, no matter how incriminating the contents may be to their creator, because their creation was not ‘compelled’ within the meaning of the Fifth Amendment”).

³⁵⁸ Rothman, *supra* note 15, at 388.

³⁵⁹ *See* Cole, *Limited Liability Enterprises*, *supra* note 20, at 48-49 (notwithstanding *Fisher*'s acceptance of act of production theory, “its practical effect was to make the Self-Incrimination Clause inapplicable to most document productions”); Henning, *Testing the Limits*, *supra* note 45, at 421 (discussing practical restrictions on utilizing act of production theory); Alito, *supra* note 47, at 95. Professor Heidt was critical of this aspect of *Fisher*. He argued that “*Fisher* forces upon the lower courts a standard pettifogging in principle and unworkable in practice.” Heidt, *supra* note 43, at 443.

³⁶⁰ 465 U.S. 605, 610 (1984). For what it is worth, Justice Alito argued *Doe* on behalf of the government while working for the Solicitor General's Office.

³⁶¹ *Id.* at 606.

³⁶² Alito, *supra* note 47, at 51.

³⁶³ *Doe*, 465 U.S. at 606.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 607-09.

³⁶⁶ *Id.* at 611-12.

was protected because it was testimonial.³⁶⁷ The second part of the holding could be read as being based on deference to the conclusions of the courts below, which found Doe's production of the documents would be testimonial because disclosure to the grand jury would admit their existence and authenticity.³⁶⁸

After *Fisher*, the first holding in *Doe* was expected. *Fisher* established that the contents of voluntarily created business documents are not protected by the Fifth Amendment; the privilege only protects against compelled self-incrimination.³⁶⁹ "Where the preparation of business records is voluntary, no compulsion is present."³⁷⁰ Because Doe did not argue that he prepared the documents involuntarily, or that the subpoena would "force him to restate, repeat, or affirm the truth of their contents," the privilege did not apply to the subpoenaed documents.³⁷¹ Doe's possession of the documents was irrelevant to the issue of whether the creation of the documents was compelled. Thus, "the contents of [the] records are not privileged."³⁷²

Regarding its second holding, *Doe* ruled that the act of producing the business records was protected by the privilege because it "involve[d] testimonial self-incrimination."³⁷³ A government subpoena compels the holder of documents to perform an act that may have testimonial aspects and an incriminating effect. Relying on *Fisher*, the Court explained that compliance with a subpoena concedes the existence of the documents demanded and their possession or control of the target.³⁷⁴ Compliance also indicates that the holder believes that the papers are those described in the subpoena.³⁷⁵ *Fisher* ruled that whether the act of production is testimonial often depends on the facts and circumstances of particular cases.³⁷⁶ Here, the Court deferred to the factual findings of the courts below, although in a footnote it stated that the findings and allegations below "were sufficient to establish a valid claim of the privilege against self-

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 607-10.

³⁶⁹ *Fisher v. United States*, 425 U.S. 391, 401 (1976).

³⁷⁰ *Doe*, 465 U.S. at 610. At this point, Justice Powell dropped a footnote wherein he responded to Doe's claim that the Fifth Amendment protects a zone of privacy, recognized in *Boyd*. *Id.* at 610 n.8. Justice Powell noted that earlier cases, including *Fisher*, 425 U.S. at 399, *Andresen v. Maryland*, 427 U.S. 463, 472 (1976), and *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975), had rejected this aspect of *Boyd*. *Id.*

³⁷¹ *Id.* at 612.

³⁷² *Id.* At the end of this passage, Justice Powell approvingly cited an appellate ruling, which noted that the "line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection." *Id.* at 612 n.10 (quoting *In re Grand Jury Proceedings*, 626 F.2d 1051, 1055 (1st Cir. 1980)). In that same footnote, Justice Powell stated, "If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged." *Id.* Of course, this logic also applies to a personal diary.

³⁷³ *Id.* at 613.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

incrimination,” suggesting that the Court independently found a constitutional violation.³⁷⁷

Lastly, the Court turned aside the government’s request that it adopt a doctrine of constructive use immunity. Conceding that it could have compelled Doe to disclose the documents by granting statutory use immunity, the government urged the Court to adopt a judicial doctrine of constructive use immunity, where the judiciary would bar the government from using “the incriminatory aspects of the act of production against the person claiming the privilege even though statutory procedures have not been followed.”³⁷⁸ The Court repeated its view that immunity is a tool for Congress and the Executive Branch.³⁷⁹

Justice O’Connor wrote separately “to make explicit what is implicit in the analysis [of the majority opinion]: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.”³⁸⁰ She also stated that *Fisher* had “sounded the death knell” for *Boyd*’s understanding that the Fifth Amendment protects the privacy of papers.³⁸¹ Justice Marshall disputed Justice O’Connor’s view that the majority’s reasoning provided no Fifth Amendment protection “for the contents of private papers of any kind.”³⁸² Justice Marshall countered that the records demanded in *Doe* were “business records which implicate a lesser degree of concern for privacy interests than, for example, personal diaries.”³⁸³

I. *Braswell v. United States (1988)*

Not surprisingly in light of their innovative approach to the privilege, *Fisher* and *Doe* raised many questions about the future of Fifth Amendment law. The most important was whether the act of production doctrine, reaffirmed and applied to quash subpoenas in *Doe*, would apply to representatives of collective

³⁷⁷ *Id.* at 614 n.13.

³⁷⁸ *Id.* at 616.

³⁷⁹ *Id.* (“Congress gave certain officials in the Department of Justice exclusive authority to grant immunities.” (quoting *Pillsbury Co. v. Conboy*, 459 U.S. 248, 253-54 (1983) (footnote omitted))).

³⁸⁰ *Id.* at 618 (O’Connor, J., concurring).

³⁸¹ *Id.*

³⁸² *Id.* at 619 (Marshall, J., concurring in part and dissenting in part).

³⁸³ *Id.* (footnote omitted). One final thought about *Doe* is worth noting: the Fourth Circuit read *Doe* as leaving open whether a subpoena for voluntarily prepared individual business and financial records of a suspected drug dealer were protected under the Fifth Amendment. *United States v. (Under Seal)*, 745 F.2d 834, 839 (4th Cir. 1984), *cert. granted sub nom. United States v. Doe No. 462*, 471 U.S. 1001 (1985), and *vacated as moot*, 105 S. Ct. 1861 (1985). The Fourth Circuit ruled that *Doe*’s first holding applied only to the business records of a sole proprietor and not to the records of an individual. The latter, according to the Fourth Circuit, remained protected by *Boyd*. See *United States v. Lang*, 792 F.2d 1235, 1238 (4th Cir. 1986), *abrogated by Braswell v. United States*, 487 U.S. 99 (1988). Justice Alito contends that this distinction is “essentially meaningless” because the term “sole proprietorship” is “nothing more than the name given to a business owned by an individual rather than a collective entity.” Alito, *supra* note 47, at 54.

entities and allow them to take the Fifth when subpoenaed for entity documents that are personally incriminating. For almost a century, the collective entity cases established that custodians and representatives had no Fifth Amendment protection when served with government subpoenas looking for entity documents that could send them to prison.³⁸⁴

By contrast, *Doe* showed that the act of production theory could provide meaningful protection against a government fishing expedition for incriminating business documents. There was no way to reconcile the act of production rule, which was now part of Fifth Amendment law and thus “the supreme Law of the Land,”³⁸⁵ and the collective entity rule. As Professor Rothman quipped, after “a sea change in fifth amendment jurisprudence,” the judiciary could “no longer conduct ‘business as usual’ when determining the scope of fifth amendment protection for business documents.”³⁸⁶ The Court granted review in *Braswell v. United States*³⁸⁷ to decide whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him.³⁸⁸ The Court held the custodian had no privilege.³⁸⁹

Randy Braswell owned and operated two Mississippi corporations, Worldwide Machinery Sales, Inc., and Worldwide Purchasing, Inc.³⁹⁰ Braswell was the sole shareholder.³⁹¹ As required by Mississippi law, both companies had three directors, Braswell, his wife, and his mother, though the latter two individuals had no “authority over the business affairs of either corporation.”³⁹² A federal grand jury issued a subpoena to Braswell in his capacity as president of the companies, demanding he produce the books and records of his companies.³⁹³ The subpoena did not require that Braswell testify, but he moved

³⁸⁴ See Rothman, *supra* note 15, at 387.

³⁸⁵ U.S. CONST. art. VI, § 2.

³⁸⁶ Rothman, *supra* note 15, at 387. Many others saw the problem as well. See Alito, *supra* note 47, at 65 (noting collective entity rule which bars custodians of entity records from invoking privilege to resist subpoenas has “been called into question by *Fisher* and *Doe*”); Foster, *supra* note 54, at 1607 (arguing that “jurisprudential underpinnings of the representative capacity doctrine have been impliedly rejected by *Fisher* and other recent Court decisions”); King, *supra* note 52, at 1544-45 (describing split in lower courts as to whether *Fisher* and *Doe* altered collective entity doctrine); *Organizational Papers*, *supra* note 52, at 640-41.

³⁸⁷ 487 U.S. 99 (1988).

³⁸⁸ *Id.* at 100.

³⁸⁹ *Id.* at 117-18.

³⁹⁰ *Id.* at 100-01.

³⁹¹ *Id.* at 101.

³⁹² *Id.* at 101.

³⁹³ Significantly, the subpoena was not directed to Worldwide Machinery Sales, Inc., or Worldwide Purchasing, Inc. During oral argument, the government explained why the subpoena was served on a specific individual rather than the corporation itself:

[Justice John Paul Stevens]: In other words, what you’re saying is you want to be able to ask the individual whether he has in fact disclosed everything he knows about the

to quash the subpoena because producing the records would incriminate him.³⁹⁴ The district court denied the motion, ruling that the collective entity doctrine barred Braswell from taking the Fifth.³⁹⁵ The court rejected Braswell's argument that "the collective entity doctrine does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego."³⁹⁶ The Fifth Circuit affirmed, citing *Bellis* for the rule that a custodian may not claim the privilege "no matter how small the corporation may be."³⁹⁷ The Fifth Circuit noted that *Bellis* remained controlling following *Doe*, and therefore, "Braswell, as custodian of corporate documents, has no act of production privilege under the fifth amendment regarding corporate documents."³⁹⁸

At the Court, Braswell argued, relying upon *Fisher* and *Doe*, that disclosure of the records had independent testimonial significance, which would have incriminated him individually, and that the Fifth Amendment barred government compulsion of that act.³⁹⁹ Braswell's assertion of the privilege was not based on the claim that the contents of the business records would incriminate him but instead upon the premise that the act of production would do so.⁴⁰⁰ Significantly, the government was willing to assume that compliance with the subpoena would require acts of testimonial self-incrimination from Braswell.⁴⁰¹ None of the Court's prior collective entity cases squarely presented the claim that the custodian would be incriminated by the act of production, in contrast to the contents of the documents. That fact made *Braswell* different from all of the prior collective entity cases. None of this mattered, however. A five-Justice majority, led by Chief Justice Rehnquist, held the collective entity rule meant that Braswell had no privilege.⁴⁰² In a "spirited dissent, joined by an unusual

corporate documents? That's asking an individual rather than an officer of the corporation when you put it that way.

[Roy T. Englert, Jr.]: . . . We want the right to issue the subpoena to the individual. We want the right to make that individual comply with the subpoena.

Transcript of Oral Argument at 43, *Braswell*, 487 U.S. 99 (No. 87-3).

³⁹⁴ *Braswell*, 487 U.S. at 101.

³⁹⁵ *Id.* at 101-02.

³⁹⁶ *Id.* at 102.

³⁹⁷ *Id.*

³⁹⁸ *Id.* (quoting *In re Grand Jury Proceedings*, 814 F.2d 190, 193 (5th Cir. 1987)).

³⁹⁹ See Transcript of Oral Argument, *supra* note 393, at 12.

⁴⁰⁰ *Braswell*, 487 U.S. at 102-03.

⁴⁰¹ During oral argument, Justice Kennedy asked counsel for the government whether the government was submitting the case "on the assumption that Braswell might well incriminate himself by reference to the knowledge or the existence of the documents." Transcript of Oral Argument, *supra* note 393, at 26. Counsel for the government stated: "We're willing to submit the case to this Court on that assumption." *Id.*; see also *id.* at 36 (counsel for the government stating that "we're submitting this case on the assumption—not the concession—but the assumption, that there could be a testimonial incident to this act of production, as the Court held there was in *Doe*").

⁴⁰² *Braswell*, 487 U.S. at 100, 113.

coalition of his colleagues,”⁴⁰³ Justice Kennedy challenged the foundation of the majority’s reasoning and captured the fundamental flaw with the collective entity rule: namely, an individual is denied “his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself.”⁴⁰⁴

Chief Justice Rehnquist explained that had Braswell “conducted his business as a sole proprietorship, [*Doe*] would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination.”⁴⁰⁵ But Braswell operated his businesses as corporations, and under the Court’s Fifth Amendment cases, “corporations and other collective entities are treated differently from individuals.”⁴⁰⁶ Moreover, the “plain mandate” of the collective entity decisions “is that without regard to whether the subpoena is addressed to the corporation,” or as in Braswell’s situation, “to the individual in his capacity as a custodian,” a corporate custodian like Braswell has no privilege.⁴⁰⁷

Braswell told the Court that the collective entity rule was a response to *Boyd*, which protected private papers.⁴⁰⁸ Braswell argued that the collective entity cases “were concerned with the contents of the documents subpoenaed, however, and not with the act of production.”⁴⁰⁹ He reminded the Court that *Fisher* and *Doe* departed from the privacy-or-not focus of the collective entity rule, “replacing it with a compelled-testimony standard under which the contents of business documents are never privileged but the act of producing the documents may be.”⁴¹⁰ Under this view, “the act of production privilege is available without regard to the entity whose records are being sought.”⁴¹¹

The Chief Justice conceded that *Fisher* and *Doe* “embarked upon a new course of Fifth Amendment analysis,” but that change in direction did not render the collective entity rule “obsolete.”⁴¹² Why not? The Chief Justice explained that the “agency rationale” supporting the collective entity cases “survives.”⁴¹³ The custodian of corporate or entity records holds those documents in a representative, rather than a personal, capacity. The custodian has “certain obligations,” including the duty to disclose entity documents when demanded

⁴⁰³ *Leading Cases*, *supra* note 22, at 173. Justice Kennedy’s dissent was joined by Justices Brennan, Marshall, and Scalia. Along with the close split among the Justices, Professor Cole notes the “difficult nature of the issues presented” in *Braswell* is “evidenced by the fact that the Justices did not divide along the usual ideological lines.” Cole, *Limited Liability Entities*, *supra* note 20, at 42 n.150.

⁴⁰⁴ *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting).

⁴⁰⁵ *Id.* at 104 (majority opinion).

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 108-09.

⁴⁰⁸ *Id.* at 109 (discussing *Boyd v. United States*, 116 U.S. 616 (1886)).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

by the government.⁴¹⁴ Under the “agency rationale,” when Braswell discloses incriminating documents indicating that they were in his possession or under his control, it is not Randy Braswell providing the incriminating testimony but instead the corporation providing the incriminating testimony. And “[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.”⁴¹⁵ In other words, “Braswell, when producing the documents, is a stand-in for the corporation; the corporation has no privilege against itself; therefore, Braswell, when producing the documents, has no privilege against incriminating himself.”⁴¹⁶

Braswell’s agency rationale was the latest in a long line of shifting justifications proffered by the Court to deny custodians Fifth Amendment protection. “The traditional agency theory underlying the collective entity doctrine was one of waiver.”⁴¹⁷ Although not disavowing the “waiver” rationale,⁴¹⁸ *Braswell* added “a new wrinkle to this agency rationale through the attributed act theory.”⁴¹⁹ But the agency rationale, like the waiver rationale, is pure legal fiction.

The Chief Justice did acknowledge that prior cases, such as *Wilson, Dreier v. United States*,⁴²⁰ and *Bellis*, “did not focus on the testimonial aspect of the act of production,” but he found, without explaining why, that even if they had, the results would have been the same.⁴²¹ Further, the Chief Justice insisted that

⁴¹⁴ *Id.* at 110.

⁴¹⁵ *Id.* at 110. The “agency rationale” came from the Solicitor General’s brief in *Braswell*. The government argued that under the collective entity cases

the individual who produces corporate documents on behalf of the corporation does not do so in his individual capacity, but rather as the agent of the corporation, so that the act of production, if incriminatory, constitutes incrimination of the individual by the corporation, rather than incrimination of the individual by his own words or deeds. . . . Therefore, when an individual acts as the agent of the corporation—as he does whenever he produces corporate documents—it is the corporation and not the individual who is turning over the documents, and there is no privilege available for either the individual or the corporation to claim.

Brief for the United States at 21-22, *Braswell*, 487 U.S. 99 (No. 87-3).

⁴¹⁶ *Leading Cases, supra* note 22, at 176.

⁴¹⁷ Lathrop, *supra* note 47, at 573 (explaining that under *Wilson* a person, “by voluntarily assuming the duties of custodian, assumes a duty to fulfill all of the obligations of the artificial entity, thereby waiving his personal privilege to refuse production of incriminating documents”).

⁴¹⁸ *See Braswell*, 487 U.S. at 113 (explaining “a custodian waives the right to exercise the privilege”).

⁴¹⁹ Lathrop, *supra* note 47, at 573.

⁴²⁰ 221 U.S. 394 (1911).

⁴²¹ *Braswell*, 487 U.S. at 111. The misleading nature of this statement is obvious to anyone well-versed in the collective entity rulings. As Justice Kennedy’s dissent noted, none of the Court’s prior cases addressed the claim that the custodian would be incriminated by the act of

Fisher reaffirms “the obligation of a corporate custodian to comply with a subpoena addressed to him.”⁴²² This, of course, is revisionist history. Yes, *Fisher* referenced the collective entity cases, but did so in the context of its discussion of whether the taxpayers’ production of their accountants’ workpapers constituted testimony *vel non*.⁴²³ Unlike *Fisher*, however, *Braswell* was decided “on the assumption that the act of producing the subpoenaed documents [would] effect personal incrimination of Randy Braswell, the individual to whom the subpoena is directed.”⁴²⁴ In *Fisher*, the government certainly did not concede that the act of disclosure by the taxpayers would incriminate them. And, of course, neither *Fisher* nor *Doe* involved a custodian of an entity invoking the privilege. Thus, *Fisher* could not have addressed, let alone reaffirmed, a legal principle that was never before it.

The Chief Justice also stated that *Curcio* not only did not help Braswell’s position, it “substantiate[d] the Government’s position.”⁴²⁵ *Curcio* held that a custodian cannot be forced to provide oral testimony about the location of entity documents.⁴²⁶ Braswell contended that because *Fisher* and *Doe* established that an act of production can provide incriminating testimony, that act cannot be compelled either.⁴²⁷ The Chief Justice distinguished *Curcio* with the *ipse dixit* that it involved *oral testimony*.⁴²⁸

Yes, *Curcio* ruled that oral testimony could not be compelled, but the Fifth Amendment bans *all* compelled incriminating testimony—including incriminating testimony generated by compelled disclosure of documents. Put differently, the Chief Justice did not (and could not) explain why a custodian can be forced to produce documents that constitute incriminating testimony but cannot be forced to provide oral testimony. The only basis for this distinction is a judge-made edict, which lacks any nexus to the Fifth Amendment. Indeed, the actual basis for the result in *Braswell* came when the Chief Justice stated that recognizing Braswell’s privilege claim “would have a detrimental impact on the

production, in contrast to the contents of the documents. *Id.* at 123 (Kennedy, J., dissenting). That made *Braswell* different from all of the prior collective entity cases. The Chief Justice offered no basis for why this sharp distinction would have been deemed irrelevant by all the Justices who heard *Wilson*, *Dreier*, *Wheeler*, *White*, and *Bellis*. The distinction was not irrelevant to Professor Wigmore, who noted that “where the corporate misconduct involves also the claimant’s misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him producing them.” WIGMORE, *supra* note 49, at § 2259.

⁴²² *Braswell*, 487 U.S. at 112.

⁴²³ See *Fisher v. United States*, 425 U.S. 391, 411-12 (1976).

⁴²⁴ *Braswell*, 487 U.S. at 120 (Kennedy, J., dissenting).

⁴²⁵ *Id.* at 113 (majority opinion).

⁴²⁶ *Curcio v. United States*, 354 U.S. 118, 128 (1957).

⁴²⁷ *Braswell*, 487 U.S. at 114.

⁴²⁸ *Id.*

Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities."⁴²⁹

Braswell countered that the Court's concerns about effective law enforcement could be alleviated by granting a corporate custodian like himself statutory immunity regarding the act of production, or alternatively, requiring that grand juries address subpoenas "to the corporation and allow[] it to [select] an agent to produce the records who can do so without incriminating himself."⁴³⁰ The Court was not interested in either alternative because it would make prosecution more arduous for the government.⁴³¹

First, granting a custodian statutory immunity has "significant drawback[s]," the biggest being that if the government wants to prosecute the custodian, onerous burdens would be imposed on the government to prove that all of its evidence submitted at trial was derived from independent sources.⁴³² That obstacle might "result in the preclusion of crucial evidence that was obtained legitimately."⁴³³ And Braswell's second proposal, according to the Court, was unworkable. Especially in fact patterns like Braswell's where the corporate custodian is the only one who knows the location of the demanded documents, if the targeted custodian cannot be compelled to assist the appointed custodian in any way, Braswell's proposal would mean that "the appointed custodian will essentially be sent on an unguided search."⁴³⁴

After rejecting Braswell's efforts to resist the subpoena because disclosure of the documents provided incriminating testimony, the Chief Justice curiously noted "certain consequences flow"⁴³⁵ from the fact that Braswell had waived his privilege. First, the government must "make no evidentiary use of the 'individual act' against the individual."⁴³⁶ This means that if the custodian is prosecuted, the government may not admit into evidence "the fact that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian."⁴³⁷ In other words, while the government could force

⁴²⁹ *Id.* at 115.

⁴³⁰ *Id.* at 116.

⁴³¹ *See id.*

⁴³² *See id.* at 117.

⁴³³ *Id.*

⁴³⁴ *Id.* Two commentators with experience on the prosecution and criminal defense side of the courtroom have noted that the Chief Justice's concerns regarding immunity for a custodian hide the real basis for the result in *Braswell*. See Pickholz & Murphy, *supra* note 54, at 372 ("[A] grant of use immunity for the act of production would not significantly impede most investigations. The narrow scope of immunity would cover only the act itself, and the government would retain access to the records that it sought, have free use of the contents against everyone, and could use any testimonial act implicit in production against all but the immunized custodian."). The actual basis for *Braswell* was promoting effective law enforcement.

⁴³⁵ *Braswell*, 487 U.S. at 117.

⁴³⁶ *Id.* at 118.

⁴³⁷ *Id.*

Randy Braswell to produce certain documents, the prosecutor could not tell the jury that Randy Braswell produced the documents. The government, however, could “use the corporation’s act of production against the custodian.”⁴³⁸ Accordingly, because the jury could not be told that the custodian-defendant disclosed the documents, “any nexus between the defendant and the documents results solely from the corporation’s act of production and other evidence in the case.”⁴³⁹

This is legal gobbledygook. Under *Braswell*’s agency theory, any incrimination supposedly comes not from Randy Braswell but rather from the corporation. That, of course, is nonsense. When Braswell produces the records, “the act of production is inescapably his own.”⁴⁴⁰ Any juror paying attention to the evidence submitted at trial will know this. When a prosecutor admits the entity’s production of documents at trial, that information “can lead to an inference [by the jury] that the defendant’s position in the collective entity is such that he must have been involved in responding to the subpoena, and therefore has knowledge of the content or existence of the documents.”⁴⁴¹ That inference undeniably implicates the Fifth Amendment. “Although the nexus between the evidence and the custodian is left for the jury to determine, if the jury infers such a nexus, the custodian has been compelled to provide testimonial, incriminating evidence that could help convict him.”⁴⁴² And it is Randy Braswell, not the corporation, who will go to prison.⁴⁴³

⁴³⁸ *Id.*

⁴³⁹ *Id.* Although the Chief Justice denied that this judge-made evidentiary use restriction was precluded by *United States v. Doe*, 465 U.S. 605, 614-17 (1984), which expressly rejected the government’s invitation to have courts grant constructive use immunity in the absence of a formal request that the federal immunity statute requires, “it is difficult to distinguish the two approaches.” Massing, *supra* note 48, at 1190. Indeed, the Chief Justice’s distinction “is semantic,” and the result is that *Braswell* “conferred constructive use immunity, in reality if not in name, and the use of such immunity was expressly prohibited in *Doe*.” Grogan, *supra* note 54, at 732.

⁴⁴⁰ *Braswell*, 487 U.S. at 124 (Kennedy, J., dissenting).

⁴⁴¹ Henning, *Finding What Was Lost*, *supra* note 112, at 60. Professor Henning also remarked that the Justices in the *Braswell* majority understood that this “evidentiary limitation would not prevent the prosecution from introducing an organization’s production in the hope that it would incriminate the custodian, only that it must do so indirectly.” *Id.* (citing *Braswell*, 487 U.S. at 118).

⁴⁴² Price, *supra* note 54, at 394. In Randy Braswell’s case, “the inference of the nexus between the act of production and Braswell’s participation is not difficult for the jury to make.” *Id.* at 394 n.285. While Braswell’s wife and mother were officers of the company, “they had little or no actual authority.” *Id.* Braswell was solely responsible for running the business. “The implication that Braswell possessed the books and was responsible for their production is clear. Indeed, the smaller the size of the entity, the easier it is for the government to link the custodian to the act of production.” *Id.*

⁴⁴³ One commentator notes that *Braswell*’s agency theory

created a dualistic record custodian: while the government viewed Braswell as an individual, the Court effectively viewed Braswell as a corporate entity, and accordingly

The Chief Justice never explains why this sleight of hand is necessary if Braswell has no privilege. Interestingly, the government conceded that it could not inform the jury that Randy Braswell disclosed the documents and, when pressed by the Chief Justice during oral argument to identify which case required that concession, counsel for the government told the Court that no case required the concession or the requirement eventually imposed by the Court.⁴⁴⁴

This “shell game” is necessary because the government’s constitutional claim rested solely on a legal fiction. If the prosecutor could not inform the jury that Randy Braswell produced the documents, it is because the Fifth Amendment protected him notwithstanding the fact that he operated his businesses as corporate entities. But, of course, Chief Justice Rehnquist’s evidentiary rule could not rest upon the privilege because “[i]t would be illogical to rely on the Fifth Amendment privilege as the basis for protecting the person who must comply with a subpoena when the justification for compelling production is that the privilege does not apply.”⁴⁴⁵ As the dissent noted, once this is admitted, the legal fiction providing the sole support for the majority’s result dissolves.⁴⁴⁶

Part III demonstrates that the collective entity rule, from its origins in *Wilson* to its most recent application in *Braswell*, has always been in conflict with a traditional understanding of the Fifth Amendment. The Court has stood by the rule, however, because allowing representatives of collective entities to invoke the Fifth would undermine law enforcement interests. This reason, of course, does not justify the rule. Repeal of the collective entity rule is long overdue.

III. THE COLLECTIVE ENTITY RULE CANNOT BE RECONCILED WITH ESTABLISHED FIFTH AMENDMENT DOCTRINE

A. *The Text of the Fifth Amendment Is Unambiguous: It Protects All Persons*

When studying law—and the Constitution *is* the “supreme Law of the Land” in the United States⁴⁴⁷—law students are taught to start with the text of the

denied his claimed personal privilege; in doing so, however, the Court allowed the government to prosecute Braswell as an individual despite the Court’s insistence that he was not an individual possessing a personal fifth amendment right.

Grogan, *supra* note 54, at 726.

⁴⁴⁴ See Transcript of Oral Argument, *supra* note 393, at 27-31. Even a supporter of the result in *Braswell* acknowledged that the Court “failed to explain either the constitutional basis for the evidentiary prohibition [on the government] or what use the government could make of the act of production.” Henning, *Testing the Limits*, *supra* note 45, at 424. In a later Article, Professor Henning noted that “[t]he origin of this narrow evidentiary protection is obscure.” Henning, *Finding What Was Lost*, *supra* note 112, at 61.

⁴⁴⁵ Henning, *supra* note 112, at 61; see also Price, *supra* note 54, at 394 (“Logically, the Court cannot invoke the fifth amendment to limit the government’s use of the information. To do so would be to admit that a custodian’s act of production implicates the fifth amendment.”).

⁴⁴⁶ See *Braswell*, 487 U.S. at 128-29 (Kennedy, J., dissenting).

⁴⁴⁷ U.S. CONST. art. VI.

relevant statute or constitutional provision. The issue here is whether the representative of a collective entity may resist a subpoena for entity records when producing those records would personally incriminate him. Therefore, a lawyer's focus starts and ends with the term "person" in the Fifth Amendment, which mandates that "[n]o *person* . . . shall be compelled in any criminal case to be a witness against himself."⁴⁴⁸ This is the sole focus because all of the other necessary elements to invoking the Fifth have been satisfied. The subpoena constitutes government compulsion and the act of producing the records provides incriminating testimony. If the text is determinative, then an officer of a corporation or a union official, who is subpoenaed to disclose records of the artificial entity that personally incriminate him, is entitled to the amendment's protection. One does not need to attend three years of law school to know that the representative of a collective entity is a "person" within the meaning of the Fifth Amendment.

For some unexplained reason, the Court has never directly confronted this straightforward proposition, though Justice McKenna's dissent in *Wilson* forcefully made the point that under the Fifth Amendment, "[t]he accused person cannot be made the source" of incriminating testimony as a result of government compulsion.⁴⁴⁹ In cases like *Wilson*, *White*, and *Bellis*, the incriminating testimony was found in the contents of the documents that the custodian was compelled to disclose. After *Fisher* and *Doe* altered Fifth Amendment law to deny protection to the contents of written records voluntarily created, a custodian cannot take the Fifth due to the incriminatory nature of the contents of records he was compelled to produce.

Today, when a subpoena compels a custodian to produce records, the incriminatory testimony is generated by the custodian's compelled production of documents. The act of disclosure provides testimony because it communicates information from the custodian's mind. The custodian who discloses documents is conveying the fact that the records exist, that they are the ones demanded by the subpoena, and that he had control or possession of the records. "Those assertions can convey information about that individual's knowledge and state of mind as effectively as spoken statements, and the Fifth Amendment protects individuals from having such assertions compelled by their own acts."⁴⁵⁰ Put differently, producing the records "is the functional equivalent of placing the [custodian] on a witness stand to testify that the records exist, that they are in her possession, and that they are those requested by the subpoena."⁴⁵¹

⁴⁴⁸ U.S. CONST. amend. V (emphasis added). This Article takes no position on whether corporations or other artificial entities should be protected under the Fifth Amendment. That question, although never directly addressed by the Court, has been settled since *Hale* and been resolved against extending the privilege to collective entities. See *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

⁴⁴⁹ *Wilson v. United States*, 221 U.S. 361, 393 (1911) (McKenna, J., dissenting).

⁴⁵⁰ *Braswell*, 487 U.S. at 122 (Kennedy, J., dissenting).

⁴⁵¹ *Foster*, *supra* note 54, at 1640 (footnotes omitted).

All of this is now black letter Fifth Amendment law, yet a majority of the Court in *Braswell* ruled that a natural person—a real human being, Randy Braswell—had no Fifth Amendment protection when compelled to perform an act that was personally incriminating. Some current Justices claim that the text of the Constitution is determinative when deciding cases.⁴⁵² Well, the plain meaning of the text is that all persons are protected. Thus, “[t]he text of the Self-Incrimination Clause simply cannot support”⁴⁵³ the collective entity rule. Christopher Columbus Wilson, Jasper White, Randy Braswell, and others similarly situated are undoubtedly “person[s]” within the meaning of the Fifth Amendment and should have been permitted to invoke the Fifth, just as Webster Hubbell did, when compelled to provide incriminatory testimony.

B. *History: The Collective Entity Rule Is Inconsistent with the Common Law Privilege*

The common law privilege was instrumental to the creation and development of the Fifth Amendment privilege. James Madison’s original proposal for the Fifth Amendment “revealed an intent to incorporate into the Constitution the whole scope of the common-law right.”⁴⁵⁴ In 1807, when Chief Justice John Marshall presided over Aaron Burr’s treason prosecution and a question arose regarding the right of a witness to invoke the Fifth Amendment, all of the lawyers involved “understood the Fifth Amendment privilege against self-incrimination as the common law privilege against self-incrimination.”⁴⁵⁵ Later in the nineteenth century, when discussing the protection afforded by the Fifth Amendment, *Brown* noted the importance of the common law and stated, referring to the Bill of Rights generally, that “the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them.”⁴⁵⁶ By 1930, Professor Corwin would state that judicial application of the Fifth Amendment has rested “upon the English common law as this stood at the time of the establishment of our government.”⁴⁵⁷

⁴⁵² For example, *Chavez v. Martinez* and *Salinas v. Texas* both turned on a strict (and literal) reading of the Fifth Amendment. See *Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003); *Salinas v. Texas*, 570 U.S. 178, 181 (2013).

⁴⁵³ *Chavez*, 538 U.S. at 767.

⁴⁵⁴ LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 423 (1968). As John Langbein states, “the true origins of the common law privilege are to be found not in the high politics of the English revolutions but in the rise of adversary criminal procedure at the end of the eighteenth century. The privilege against self-incrimination at common law was the work of defense counsel.” John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994).

⁴⁵⁵ Kerr, *supra* note 23, at 925.

⁴⁵⁶ *Brown v. Walker*, 161 U.S. 591, 600 (1896).

⁴⁵⁷ Corwin I, *supra* note 62, at 3. Professor McNaughton has explained that until the start

Because “[t]he history of the privilege against self-incrimination is so rich and dramatic,” and “the risk of overvaluing the available historical evidence is significant,”⁴⁵⁸ in some contexts, judges should be cautious when drawing conclusions from the vast history of the privilege.⁴⁵⁹ Here, however, the deep history of the privilege should not deter the Justices. There is no debate that the privilege, as originally conceived, protected against the compulsory production of documents. “It is indisputable—indeed, all commentators to address the question concur—that common law, at the time of the founding, specifically forbade the compelled production of self-incriminatory documents.”⁴⁶⁰ As Justice Thomas has noted, “[t]he 18th-century common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents.”⁴⁶¹ Put differently, “not only was an accused protected from all judicial questioning under the common law as this country inherited it, his papers which might contain incriminating matter were immune from judicial process.”⁴⁶²

And the common law privilege also protected corporate officers and employees from compelled disclosure of corporate records. As Justice Alito has written, the “English precedents at the time of the adoption of the fifth amendment extended the protection of the privilege against self-incrimination

of the 1900s, Fifth Amendment issues rarely arose in litigation because criminal defendants were disqualified from testifying in most states, and “broader protection—of witnesses, and in civil cases—was given during the first years of this nation solely on the basis of well-established common law, without reference to constitutions.” McNaughton, *supra* note 55, at 139; *see also* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 829 (1999) (arguing that “for almost three quarters of a century after the enactment of constitutional self-incrimination provisions in the United States, the law of self-incrimination was common-law doctrine rather than constitutional law”).

⁴⁵⁸ BERGER, *supra* note 91, at 1.

⁴⁵⁹ *See* Witt, *supra* note 457, at 831 (“Crossing the bridge between historical analysis and doctrinal reasoning can be a risky venture; changes in institutions, practices, and surrounding legal rules make most moves from historical narrative to contemporary legal interpretation exceedingly complicated. Thus, the history of a doctrine can rarely, if ever, be relied on to lead to determinate conclusions about contemporary legal questions.”).

⁴⁶⁰ Nagareda, *supra* note 82, at 1580. Professor Nagareda also notes that the crucial historical observation—one not seriously disputed by the Supreme Court, legal commentators, or historians on the subject—is that the common law at the time of the Bill of Rights specifically recognized a privilege against self-incrimination by way of documents. . . . At the very least, this observation reinforces the view that those who ratified the Fifth Amendment would not have been surprised in the least by the proposition that self-incriminatory documents come within the category of evidence that a person may not be compelled to give.

Id. at 1619 (footnote omitted).

⁴⁶¹ *United States v. Hubbell*, 530 U.S. 27, 51 (2000) (Thomas, J., concurring).

⁴⁶² Corwin I, *supra* note 62, at 11.

to incorporate as well as individual records.”⁴⁶³ Further, though the common law precedents on whether a corporation could invoke the privilege were conflicting,⁴⁶⁴ there was consensus on the right of a corporate officer or employee to invoke the privilege: “Virtually every precedent said the same thing: Witnesses required to produce corporate books and records that were self-incriminating *could* refuse to comply. This principle was established in England by the middle of the eighteenth century.”⁴⁶⁵ Finally, the esteemed Wigmore recognized custodians and representatives were protected by the privilege when called to produce corporate documents.⁴⁶⁶

What this all means is that if Christopher Columbus Wilson’s or Randy Braswell’s Fifth Amendment claims had been raised prior to *Hale*, there is good reason to believe that a court, looking to the common law as it existed prior to 1906 or 1911, would have upheld their claims.⁴⁶⁷ The Justices were aware of this history and law, but they dismissed it because the duty of a custodian is “to be determined by our laws.”⁴⁶⁸ This is classic question-begging. Of course, the scope of the Fifth Amendment must be determined and measured by American legal principles. Wilson urged the Court to interpret the Fifth Amendment in the same manner that both American and British courts had read the privilege when they upheld claims of corporate employees resisting legal orders for incriminating records. The *Wilson* majority brushed aside the common law (and

⁴⁶³ Alito, *supra* note 47, at 65. After recognizing that the common law privilege applied to documents, Justice Alito contends that “it does not necessarily follow that the fifth amendment was meant to freeze every aspect of the common law privilege as it existed at the time of the adoption of the Bill of Rights.” *Id.* at 79. Relying on Professor Levy’s conclusion that the Framers “left too few clues” on whether the amendment was “intended . . . to be fully co-extensive with the common law,” LEVY, *supra* note 454, at 429-30, Justice Alito ultimately argues that “[t]he lack of proof” on whether the Fifth was intended to apply to subpoenas for existing documents “should end the [constitutional] inquiry” and the issue should be left to a legislative solution. Alito, *supra* note 47, at 80.

⁴⁶⁴ See Rothman, *supra* note 15, at 403.

⁴⁶⁵ *Id.* at 405.

⁴⁶⁶ WIGMORE, *supra* note 49, at § 2259.

⁴⁶⁷ *Hale* did not control Wilson’s Fifth Amendment claim. “What privilege an officer of the corporation had from producing the books on the ground that they might criminate him was not necessary to decide [in *Hale*], as immunity from prosecution was given by statute for any matter as to which [Hale] should testify.” *Wilson v. United States*, 221 U.S. 361, 390 (1911) (McKenna, J., dissenting). As Professor Rothman has noted, the trial court in *Hale* found that Hale’s “fifth amendment claim would have been ‘clearly sound’ in the absence of an immunity statute.” Rothman, *supra* note 15, at 407 (quoting *In re Hale*, 139 F. 496, 501 (C.C.S.D.N.Y. 1905), *aff’d sub nom. Hale v. Henkel*, 201 U.S. 43 (1906)).

William Stuntz has argued that “a turn-of-the-century observer might well have thought that *Boyd* and *Counselman* would apply to corporations, that the privilege against self-incrimination—with its attendant limits on the compelled production of documents—would cover institutions as well as individuals.” Stuntz, *supra* note 54, at 427. If the privilege, circa 1906, would have protected a corporation, as Stuntz argues, then *a fortiori* it would have protected a real person like Christopher Columbus Wilson or Randy Braswell.

⁴⁶⁸ *Wilson*, 221 U.S. at 386.

Wigmore's endorsement of the common law privilege) because it was at odds with the result the Court wanted. But the upshot has had long-term consequences for individual freedom: today some Americans have less Fifth Amendment protection "than they enjoyed under the common law of the eighteenth century."⁴⁶⁹ Justices preferring an originalist approach to the Fifth Amendment should reject the collective entity rule as it applies to real persons because it is at odds with the common law roots of the privilege.⁴⁷⁰

C. *The Court's Waiver Theory Is Pure Legal Fiction*

Wilson's dismissal of the common law privilege was not the most wrongheaded aspect of the opinion. Worse was the Court's embrace of a waiver theory to deny *Wilson's* Fifth Amendment claim. *Wilson* was decided five years after *Hale*, which ruled that a corporate officer could not invoke the Fifth on behalf of a corporation and opined that corporations are not protected by the Fifth Amendment.⁴⁷¹ *Hale* relied heavily upon a state's visitorial authority to inspect corporate documents to deny corporations Fifth Amendment protection.⁴⁷²

But the visitorial theory could not help the government in *Wilson* because no corporation was invoking the Fifth and *Wilson* was taking the Fifth to protect himself—not the corporation that employed him. Unwilling to follow common law principles and concerned that an officer's taking the Fifth would stymie prosecution of white-collar crime, *Wilson* invented a new theory analogous to the visitorial power to conclude that an officer implicitly waives his right against self-incrimination when subpoenaed for corporate records. Because corporate documents are subject to government scrutiny, the Court declared that "the custodian has voluntarily assumed a duty which overrides his claim of privilege."⁴⁷³

This legal principle was created out of thin air. At the time *Wilson* was decided, no case interpreting the Fifth Amendment had held that a person waived

⁴⁶⁹ Nagareda, *supra* note 82, at 1577. Professor Nagareda's statement was directed at the larger issue of the Court's treatment of self-incriminatory documents generally. *See id.* ("The origin of the Court's error lies in its treatment of self-incriminatory documents.") But his point equally applies to a corporate officer being compelled to disclose corporate documents that are personally incriminating.

⁴⁷⁰ *See* *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring) (noting act of production doctrine as currently interpreted "may be inconsistent with the original meaning of the Fifth Amendment[]," indicating willingness to reconsider scope and meaning of doctrine under Fifth Amendment); *Carpenter v. United States*, 138 S. Ct. 2206, 2271 (2018) (Gorsuch, J., dissenting) (expressing view that, as "originally understood," privilege was meant to protect a person from being compelled to disclose potentially incriminating evidence, and thus current doctrine, which protects only compelled testimony, may be inconsistent with original intent of Framers).

⁴⁷¹ *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

⁴⁷² *Id.* at 75.

⁴⁷³ *Wilson*, 221 U.S. at 380.

the privilege by taking a job. To be sure, courts prior to *Wilson* did rule that one could waive a constitutional right, including the privilege.⁴⁷⁴ But none found an implicit waiver upon the formation of an employer-employee relationship. Thirty-three years later, and without providing any additional legal support, *White* extended *Wilson*'s implied waiver rule to all persons who work for or join a collective entity.⁴⁷⁵

Think about the impact of *Wilson* and *White* for a moment. Subpoenas can be served on "secretaries, clerks, tellers, cashiers, and other employees or members who do not expect to assume personally the entity's responsibility for producing its records."⁴⁷⁶ Hence, all employees or members of a collective entity—not just CEOs—have no Fifth Amendment protection when served with a subpoena.⁴⁷⁷

As a legal theory, *Wilson*'s implied waiver rule had no more support in theory than it did in legal precedent. First, *Wilson* never waived the Fifth when he became president of United Wireless Telegraph Company; rather, the Court later decreed that he waived his right when he took the job. As Justice Alito has noted,

⁴⁷⁴ The classic example of waiver of the Fifth is when a defendant takes the stand to testify in his own criminal trial. *See, e.g., Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900); WIGMORE, *supra* note 49, § 2276. *But cf. BERGER, supra* note 91, at 94 (noting defendant's choice to testify obviously constitutes waiver of Fifth Amendment right not to take stand, "[b]ut it is far less clear whether the defendant's decision to testify is also a waiver of his Fifth Amendment right not to respond to specific self-incriminatory questions"). Prior to *Wilson*, two additional legal propositions seemed settled regarding waiver of constitutional rights. First, courts ruled that the privilege against self-incrimination must be asserted, otherwise it was deemed waived. *See, e.g., In re Knickerbocker Steamboat Co.*, 139 F. 713, 716 (S.D.N.Y. 1905). Related to this first rule, the Court in *Brown* noted in dicta that "if the witness himself elects to waive his privilege, . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." 161 U.S. 591, 597 (1896). Second, courts found that a course of conduct might be enough to demonstrate an intentional waiver of a constitutional right. *See, e.g., Shepard v. Barron*, 194 U.S. 553, 568 (1904).

Shortly after *Wilson* was decided, the *Harvard Law Review* endorsed *Wilson*'s waiver theory by noting that "one who keeps public or quasi-public records required by law waives his privilege against self-incrimination to such an extent that he may not lawfully refuse to produce them." *Recent Cases*, 25 HARV. L. REV. 81, 96 (1911-1912). The subpoenaed records in *Wilson* were not "public or quasi-public records." And *Wilson*'s discussion of "public records and official documents," 221 U.S. at 380, was offered to rebut *Wilson*'s claim that his physical custody of the incriminating records bolstered his Fifth Amendment defense. The *Wilson* Court never intimated that the subpoenaed records were public documents.

⁴⁷⁵ *United States v. White*, 322 U.S. 694, 699 (1944).

⁴⁷⁶ *King, supra* note 52, at 1577 n.179.

⁴⁷⁷ *See* Kevin D. Cramer, *Back from the Brink: Boyd's Private Papers Protection and the Sole Proprietor's Business Records*, 21 AM. BUS. L.J. 367, 373 n.37 (1984) ("Given the ever increasing number of persons employed by corporations and other forms of organized business entities, the [collective entity doctrine] significantly curtails the fifth amendment rights of a large portion of the populace. Moreover, the impact of the [doctrine] on the lives of these people is quite pervasive because business affairs constitute the bulk of their daily activities.").

“there is no actual waiver but merely an obligation imposed by law.”⁴⁷⁸ Indeed, the so-called “waiver” was imposed by the judiciary retroactively “to aid in the prosecution of individuals involved in an adversarial—not a regulatory—system.”⁴⁷⁹ What then-Judge Scalia wrote about a similar waiver argument is apropos here: “What occur[red in *Wilson*] is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court’s decree that the act entails the consequence—a decree that remains to be justified.”⁴⁸⁰ Congress’s authority to regulate interstate commerce, which was the basis for prosecuting *Wilson*, does not include the power to demand relinquishment of an individual’s Fifth Amendment right in order to hold a job.⁴⁸¹ That’s why we have the Bill of Rights.

Second, the waiver theory proves too much. If the waiver theory works for compelled production of documents, it also works for compelled oral testimony.⁴⁸² So argued the government in *Curcio*.⁴⁸³ As described above, the *Curcio* Court rejected the government’s argument.⁴⁸⁴ *Curcio* made a distinction

⁴⁷⁸ Alito, *supra* note 47, at 66 n.174. Others share Justice Alito’s view. See Foster, *supra* note 54, at 1630 (“[T]he idea that one voluntarily has assumed a duty overriding her constitutional privilege states a conclusion without providing a reason. The only reason a person waives the right by taking on duties to a collective entity is because the Supreme Court has so held in the representative capacity cases.” (footnote omitted)); Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 61 (stating that “the waiver argument is nothing more than a rhetorical device used to justify denying the privilege to individuals who hold positions of responsibility in collective entities on the basis of public necessity”). One commentator, however, defends the waiver theory. See Arthur Y.D. Ong, Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe*, 54 *FORDHAM L. REV.* 935, 950-59 (1986) (arguing implied waiver rule reflects balance of competing interests and is correct and necessary to regulate corporate conduct and to promote effective law enforcement). I agree with another commentator’s conclusion that this “reasoning” is not how the Court analyzes a waiver of the privilege in a criminal context. See Foster, *supra* note 54, at 1630 n.199 (arguing that creating exception based on balancing competing interests is not the same as recognizing knowing or intentional waiver of privilege).

⁴⁷⁹ Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 61 n.199.

⁴⁸⁰ *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc). Then-Judge Scalia’s statement was made in a case where a defendant objected to the rule that he submit to a mental examination by a government psychiatrist as a precondition to raising an insanity defense. See *id.* at 1109. Responding to the government’s argument that the defendant had “waived” his Fifth Amendment right against self-incrimination by introducing expert testimony on his mental sanity, Scalia stated that it was “at best a fiction” to conclude that the defendant had waived the Fifth. *Id.* at 1113.

⁴⁸¹ See Heier, *supra* note 14, at 100 (noting Congress lacks power “to demand a waiver of the privilege in return for the right to earn a living. Any attempt to impose such a condition would appear to be unconstitutional”); see also *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one.”).

⁴⁸² See Alito, *supra* note 47, at 66 n.174 (“[T]he waiver that is deemed to occur might just as logically be extended to oral testimony as well as production of documents.”).

⁴⁸³ *Curcio v. United States*, 354 U.S. 118, 123 (1957).

⁴⁸⁴ See *id.* at 124.

between a custodian's compelled oral testimony and compelled testimony from that same custodian pursuant to the act of producing documents. The former is protected, while the latter is not because the custodian has impliedly waived the Fifth by accepting a job. Of course, the text of the Fifth Amendment, which commands no person shall "be a witness against himself,"⁴⁸⁵ recognizes no such distinction between different types of compelled testimony. Indeed, the words of the text prohibit compelling more than oral testimony.⁴⁸⁶ While a lack of textual support did not bother the Justices in 1957 when *Curcio* was decided, *Braswell* made no effort to explain why this arbitrary, judge-made distinction is permitted under the Fifth Amendment.⁴⁸⁷ "Testimony" should mean the same thing for all persons under the Fifth Amendment. Astonishingly, on the same day that *Braswell* was decided, eight Justices, including the Chief Justice, "squarely contradicted" the same distinction embraced in *Braswell*.⁴⁸⁸

Worse still, the waiver rule adopted in *Wilson* (and reaffirmed in *Braswell*) cannot be reconciled with the Court's subsequent precedents on waiver of the privilege and its rulings that one's employment status does not diminish the protection provided by the Fifth Amendment or the ability to invoke it.

⁴⁸⁵ U.S. CONST. amend. V.

⁴⁸⁶ See Pickholz & Murphy, *supra* note 54, at 365 (noting right not to "be a witness against himself" is "broader than mere oral statements").

⁴⁸⁷ See Brief for Petitioner Randy Braswell at 37, *Braswell v. United States*, 487 U.S. 99 (1988) (No. 87-3) ("If a custodian does not waive his right not to condemn himself by giving testimony regarding records, *Curcio*, how can that custodian logically be compelled to testify by producing them, and thus condemn himself in that same fashion."). Nor does *Braswell*'s "agency rationale," see 487 U.S. at 109-10, explain this dichotomy between different types of compelled testimony. The *Harvard Law Review* has written that *Braswell*'s agency rationale "is potentially a highly significant innovation" and "a new and much more powerful rationale." *Leading Cases*, *supra* note 22, at 176-77. According to the *Harvard Law Review*, *Braswell* "departs markedly in the significance" it gives to the custodian's relationship to the corporation:

In previous collective entity cases, the "agency theory" was simply the recognition that an individual who held records in his capacity as corporate custodian had no privacy interest in them. In *Braswell*, the "agency theory" is the fiction that an individual's production of records held in his capacity as corporate custodian is an act by the corporation rather than by the individual.

Id. at 177-78. Neither the implied waiver doctrine nor the agency rationale explain why a custodian can be forced to produce documents that constitute incriminating testimony but cannot be forced to provide oral testimony.

⁴⁸⁸ See Grogan, *supra* note 54, at 732-33 (discussing *Doe II*, 487 U.S. 201, 210 n.8 (1988)). In *Doe II*, the Court stated that

the Fifth Amendment comes into play "only when the accused is compelled to make a *testimonial* communication that is incriminating." These principles were articulated in general terms, not as confined to acts. Petitioner has articulated no cogent argument as to why the "testimonial" requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements.

Doe II, 487 U.S. at 210 n.8 (citations omitted) (quoting *Fisher v. United States*, 425 U.S. 391, 408 (1976)).

Johnson v. Zerbst,⁴⁸⁹ decided in 1938, required the government to show the “intentional relinquishment or abandonment of a known right or privilege” to prove a defendant had waived his Sixth Amendment right to counsel.⁴⁹⁰ Since then, “the requirement of a knowing and intelligent waiver has been” consistently applied “to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.”⁴⁹¹ Certainly, the Fifth Amendment is intended, inter alia, to preserve a fair trial.⁴⁹² More importantly, the Court has said that “[t]he privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made.”⁴⁹³ But the privilege cannot be proven on “a silent record,”⁴⁹⁴ which is exactly what the *Wilson* Court confronted.

The implied waiver-agency rationale embraced in *Wilson* and *Braswell* does not come close to meeting the knowing and voluntary waiver test.⁴⁹⁵ Indeed, the Court has never suggested, let alone held, that the implied waiver-agency rationale of *Wilson* and *Braswell* satisfies that test.

D. *Precedents: The Collective Entity Rule Contradicts a Long Line of Cases Holding That One’s Occupation Does Not Undermine the Right to Take the Fifth*

Furthermore, the Court has also ruled in a string of cases that one’s work status does not diminish a person’s right to invoke the Fifth. Although not decided as a Fifth Amendment case, *Slochower v. Board of Higher Education of New York City*,⁴⁹⁶ built the constitutional framework for future rulings involving the privilege.⁴⁹⁷ Harry Slochower, a tenured professor at Brooklyn College, was summarily discharged after he took the Fifth when questioned about his past

⁴⁸⁹ 304 U.S. 458 (1938).

⁴⁹⁰ *Id.* at 464.

⁴⁹¹ *Schneekloth v. Bustamonte*, 412 U.S. 218, 237 (1973).

⁴⁹² *See, e.g.,* *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964); *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (stating that Court has applied *Zerbst* test to waiver of one’s rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)).

⁴⁹³ *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).

⁴⁹⁴ *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

⁴⁹⁵ *Cf. Lawrence Rosenthal, Compulsion*, 19 U. PA. J. CONST. L. 889, 956 (2017) (“Under traditional principles of waiver, to knowingly and intelligently waive the right to be free from compelled self-incrimination, an individual must be told only of the existence of the right to be waived—a right to remain silent—and the consequences of a waiver—that anything the individual says if he chooses to speak can be used to incriminate.”); Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1765 (1979) (noting generally, advance waiver requires knowledge of waiver and freedom from compulsion, “while contemporaneous waiver may not require knowledge” and “[s]ome rights, however, may not be relinquished by advance agreement, and others require knowledge that the right is being waived even for a contemporaneous waiver” (footnote omitted)).

⁴⁹⁶ 350 U.S. 551 (1956).

⁴⁹⁷ *Id.* at 557 (reasoning the privilege would be meaningless if it could be taken as equivalent to confession of guilt or presumption of perjury).

membership in the Communist Party during a Senate Subcommittee inquiry on subversive influences in the American education system.⁴⁹⁸ Section 903 of the Charter of the City of New York authorized termination of a city employee's job whenever the employee invoked the Fifth to avoid answering questions related to his official conduct.⁴⁹⁹ New York's highest court upheld Slochower's termination by the Board of Education because the law merely imposed a condition on public employment.⁵⁰⁰ The Court disagreed and ruled that, under the facts, "summary dismissal of [Slochower] violate[d] due process of law."⁵⁰¹

Slochower explained that the practical effect of Section 903 is "to discharge every city employee who invokes the Fifth Amendment."⁵⁰² In Slochower's case, the Board of Education did not undertake an individualized inquiry as to the reasons for Slochower's invocation or show why his taking the Fifth interfered with the legitimate interests of the Board.⁵⁰³ Under these circumstances, automatic dismissal was arbitrary and a violation of due process.

While the Fifth Amendment was not the basis for *Slochower's* holding, it loomed large in the Court's reasoning.⁵⁰⁴ The Court strongly objected to "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment."⁵⁰⁵ Slochower's summary dismissal was arbitrary because the Board used his invocation of the privilege as "a conclusive presumption of guilt."⁵⁰⁶ Because the record did not support such a finding, and because the Board could not claim that it was seeking information relevant to Slochower's qualifications to be a professor, "the discharge falls of its own weight as wholly without support."⁵⁰⁷ Finally, the Court remarked that Section 903 affects all city employees "who exercise their

⁴⁹⁸ *Id.* at 553.

⁴⁹⁹ *Id.* at 552.

⁵⁰⁰ *Id.* at 557.

⁵⁰¹ *Id.* at 559. For an informative study of the anti-communist purges of the mid-twentieth century and the Court's role in protecting (and sometimes not protecting) the constitutional rights of teachers and professors, see generally MARJORIE HEINS, *PRIESTS OF OUR DEMOCRACY: THE SUPREME COURT, ACADEMIC FREEDOM AND THE ANTI-COMMUNIST PURGE* (2013).

⁵⁰² *Slochower*, 350 U.S. at 558.

⁵⁰³ *Id.* ("No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege.").

⁵⁰⁴ In *Garrity v. New Jersey*, Justice Douglas mischaracterized *Slochower's* holding when he wrote: "We held in *Slochower v. Board of Education*, 350 U.S. 551, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee . . ." 385 U.S. 493, 499 (1967).

⁵⁰⁵ *Slochower*, 350 U.S. at 557.

⁵⁰⁶ *Id.* at 559.

⁵⁰⁷ *Id.*

constitutional privilege, the full enjoyment of which every person is entitled to receive.”⁵⁰⁸

Though *Slochower* did not discuss waiver of the privilege, it did demonstrate that a person does not lose Fifth Amendment protection by taking a governmental job. The logic of *Slochower* was extended to lawyers eleven years later, but only after the Court overruled *Cohen v. Hurley*,⁵⁰⁹ which had embraced reasoning similar to *Wilson* and its progeny. Albert Martin Cohen, a New York lawyer, relying on the privilege,⁵¹⁰ refused to answer questions during a state judicial inquiry on “ambulance chasing” and professional misconduct.⁵¹¹ Because he refused to testify, Cohen was disbarred.⁵¹² New York’s highest court upheld Cohen’s disbarment.⁵¹³ Replying to Cohen’s claim that disbarment for invoking the privilege denied lawyers a right that is enjoyed by all other citizens, the New York court explained that Cohen’s status as a lawyer put him in “another quite different capacity” before the judicial inquiry.⁵¹⁴ In his “capacity” as a lawyer, Cohen could not invoke the rights enjoyed by other citizens.⁵¹⁵ When his case reached the Court, Cohen insisted that New York had adopted a “pernicious doctrine” that deprived lawyers of the right to invoke the privilege that is given to all other persons.⁵¹⁶

In a five-four decision, the Court ruled that Cohen’s disbarment, under the circumstances, did not violate the Fourteenth Amendment.⁵¹⁷ Justice Harlan’s majority opinion found that New York’s disbarment of an attorney for invoking the privilege during a legitimate inquiry authorized by the State’s supervisory powers over attorneys was constitutionally permissible.⁵¹⁸ Justice Harlan denied that the Court’s result deprived lawyers of “constitutional rights assured to others.”⁵¹⁹ Instead, the Court was only deciding “*what* process is constitutionally due them in such circumstances.”⁵²⁰

While Justice Harlan claimed that his ruling was limited, affirming the result below was taking a page from *Wilson*’s waiver theory. Like Congress’s power

⁵⁰⁸ *Id.* at 558.

⁵⁰⁹ 366 U.S. 117 (1961).

⁵¹⁰ Cohen relied on his state privilege against self-incrimination in the New York state courts. *Id.* at 118. Interestingly, Cohen also initially claimed a federal privilege not to testify but in later proceedings relied solely on “the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under . . . the New York State Constitution.” *Id.* at 118 n.1.

⁵¹¹ *Id.* at 119-20.

⁵¹² *Id.* at 122.

⁵¹³ *In re Cohen*, 166 N.E. 2d 672, 677 (N.Y. 1960).

⁵¹⁴ *Id.* at 675.

⁵¹⁵ *See id.*

⁵¹⁶ *Cohen*, 366 U.S. at 129.

⁵¹⁷ *Id.* at 129-31.

⁵¹⁸ *See id.*

⁵¹⁹ *Id.* at 129-30.

⁵²⁰ *Id.* at 129.

to regulate interstate commerce, New York had a plenary power to regulate lawyers. And just as the “reserved power of visitation would be seriously embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation,”⁵²¹ so too

where illegal or shady practices on the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigator and prosecutorial processes.⁵²²

This reasoning paralleled *Wilson*’s waiver theory. Wilson was denied the right to invoke the privilege because he was president of the corporation and held corporate documents in that “capacity.”⁵²³ By assuming that role, he “voluntarily assumed a duty which overrides his claim of privilege.”⁵²⁴ Likewise, Cohen was denied the privilege in his “capacity” as a member of the bar. Admission to the bar constituted an implied waiver of a lawyer’s Fifth Amendment right—at least in professional disciplinary hearings.

Although his dissent never cited *Wilson* or its implied waiver theory, Justice Black argued that “the theory adopted by the court below and reaffirmed by the majority here is that lawyers may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups.”⁵²⁵ Justice Black insisted that the Court had endorsed “a practice based upon the artificial notion that rights and privileges can be stripped from a man in his capacity as a lawyer without affecting the rights and privileges of that man as a man.”⁵²⁶ And Justice Douglas’s dissent, after referencing examples where Presidents Andrew Jackson and Ulysses Grant invoked the Fifth in response to Congressional inquiries, asserted that “[t]here is no exception in the Fifth Amendment for lawyers any more than there is for professors, Presidents or other office holders.”⁵²⁷

Six years later, and after the Fifth Amendment had been formally applied to the States,⁵²⁸ the dissenters in *Cohen* spoke for a plurality of the Court in *Spevack v. Klein*,⁵²⁹ a case that was “practically on all fours with” *Cohen*.⁵³⁰ Samuel Spevack, a New York lawyer, was disbarred after he invoked the privilege and

⁵²¹ *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

⁵²² *Cohen*, 366 U.S. at 127.

⁵²³ *Wilson*, 221 U.S. at 380.

⁵²⁴ *Id.*

⁵²⁵ *Cohen*, 366 U.S. at 136 (Black, J., dissenting).

⁵²⁶ *Id.* at 145.

⁵²⁷ *Id.* at 153 (Douglas, J., dissenting).

⁵²⁸ See *Griffin v. California*, 380 U.S. 609, 615 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

⁵²⁹ 385 U.S. 511 (1967).

⁵³⁰ *Id.* at 513.

refused to honor a subpoena requiring him to produce his financial documents and testify at an inquiry on professional misconduct.⁵³¹ Justice Douglas's plurality opinion found that New York had utilized impermissible compulsion when it threatened Spevack with disbarment for invoking the privilege, and overruled *Cohen v. Hurley*.⁵³² Justice Douglas pointedly noted: "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others."⁵³³ He also noted that "[l]awyers are not excepted from the words" of the Fifth Amendment, "and we can imply no exception."⁵³⁴

Spevack was a companion case to *Garrity v. New Jersey*.⁵³⁵ In *Garrity*, police officers in two New Jersey boroughs were investigated for fixing traffic tickets.⁵³⁶ Before being questioned at a judicial hearing, the officers were warned that anything they said could be used against them in a subsequent criminal prosecution and that they had a right to refuse to answer incriminating questions, but if they refused to answer, they would be removed from their jobs.⁵³⁷ The officers answered the questions, and their statements were later used against them in criminal prosecutions.⁵³⁸ *Garrity* held that the Fourteenth Amendment bars "use in subsequent criminal proceedings of statements obtained under threat of removal from office."⁵³⁹ Confirming what he said for the *Spevack* plurality, Justice Douglas's majority opinion in *Garrity* stated, "[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."⁵⁴⁰ Justice Harlan's dissent, employing a balancing analysis, took the position that an officer's right to invoke the Fifth had to be weighed against "the protection of other important values" asserted by the state.⁵⁴¹ Without saying so directly, the dissent took the position that a state could condition the job of a police officer upon the waiver of Fifth Amendment rights.⁵⁴²

⁵³¹ *Id.* at 512.

⁵³² *Id.* at 516. Justice Fortas provided the fifth vote for overruling *Cohen*. *Id.* at 519-20 (Fortas, J., concurring).

⁵³³ *Id.* at 516 (majority opinion).

⁵³⁴ *Id.*

⁵³⁵ 385 U.S. 493 (1967).

⁵³⁶ *Id.* at 494.

⁵³⁷ *Id.*

⁵³⁸ *Id.* at 495.

⁵³⁹ *Id.* at 500.

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 508 (Harlan, J., dissenting).

⁵⁴² *See id.* at 509 n.3 ("[T]hey had a constitutional right to refuse to answer under the circumstances, but . . . they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them." (second alteration in original) (quoting *United States v. Field*, 193 F.2d 92, 106 (2d Cir. 1951) (Frank, J., concurring))); *see* Peter Westen, *Answer Self-Incriminating Questions or Be Fired*, 37 AM. J. CRIM. L. 97, 103 (2010) (describing Justice Harlan's dissent as "asserting with considerable force that employment as

Spevack and *Garrity* were the start of the so-called “penalty cases” where the Court upheld Fifth Amendment claims of persons licensed by the State like lawyers and architects, government employees, and political office holders who were threatened with loss of employment and other government benefits for invoking the privilege.⁵⁴³ By 1977, Justice White, who had dissented in *Spevack*, spoke for the Court in *Lefkowitz v. Turley* and explained: “The object of the [Fifth] Amendment ‘was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.’”⁵⁴⁴ This principle “reflected the settled view” of the Court.⁵⁴⁵ Accordingly, there was “no room for urging that the Fifth Amendment privilege is inapplicable simply because the issue arises . . . in the context of official inquiries into the job performance of a public contractor.”⁵⁴⁶

Starting with *Slochower* and continuing through the “penalty cases,” the Court’s Fifth Amendment doctrine outside of the collective entity rule has unmistakably established that one’s occupational status does not diminish the protection provided by the Fifth Amendment or the ability to invoke it. But the collective entity rule says just the opposite: a person can be denied Fifth Amendment protection because he works for or is a member of an artificial entity.⁵⁴⁷ What Justice White said about the Fifth Amendment in *Turley* is

a police officer may lawfully be conditioned upon an officer’s foregoing his Fifth Amendment rights”).

⁵⁴³ *Garrity*, 385 U.S. at 496-98 (police officers); *Spevack v. Klein*, 385 U.S. 511, 512-20 (1967) (attorneys); *Gardner v. Broderick*, 392 U.S. 273, 276-79 (1968) (police officers); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280, 280-85 (1968) (sanitation workers); *Lefkowitz v. Turley*, 414 U.S. 70, 79-84 (1973) (public contractors); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (officers of political parties). While the current Court has not signaled disagreement with *Garrity* and its progeny, the cases have not escaped academic criticism. *See* Westen, *supra* note 542, at 138-45 (arguing cases are internally inconsistent, at odds with subsequent Court rulings, and *Garrity* has been silently overruled by later rulings); Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1381-82 (2001) (criticizing reasoning of *Garrity*, but not calling for it to be overruled); Amar & Lettow, *supra* note 49, at 868-69, 905-06 (1995) (urging that *Garrity* be overruled); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 68 (1981) (calling *Garrity* and its progeny “wrong in their conception of the nature of the privilege”); Friendly, *supra* note 49, at 706-07 (stating after *Garrity*, *Spevack*, *Gardner*, and *Uniformed Sanitation Men*, “[i]t is impossible to derive any unifying principle from them; the Court seems to acting *ad hoc*”); Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 200 (describing *Garrity* and *Spevack* as “the most illuminating and, at the same time, the most inscrutable of the recent cases dealing with the privilege against self-incrimination”).

⁵⁴⁴ *Turley*, 414 U.S. at 77 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

⁵⁴⁵ *Id.*

⁵⁴⁶ *Id.* at 78.

⁵⁴⁷ *See* Foster, *supra* note 54, at 1632 (“The representative capacity doctrine is inconsistent with the principle that the government may not impose economic sanctions for exercising fifth

equally true for a custodian of a collective entity: if there is “no room for urging that the Fifth Amendment privilege is inapplicable”⁵⁴⁸ for professors, lawyers, police officers, architects, and political office holders “in the context of official inquiries into [their] job performance,”⁵⁴⁹ then the Fifth should also apply to custodians of collective entities in that context. Put simply, “[t]here is no exception in the Fifth Amendment for [custodians of collective entities] any more than there is for professors, Presidents, or other office holders.”⁵⁵⁰

CONCLUSION

There is no doubt that Randy Braswell and Webster Hubbell are “person[s]” within the meaning of the Fifth Amendment. Both were targets of criminal investigations and received subpoenas calling for the production of their business records. Under current Fifth Amendment doctrine, Randy Braswell was denied constitutional protection “because he chose to operate his business as a wholly owned corporation while Webster Hubbell retains his privilege (and avoids prosecution) because he operated his business as a sole proprietor.”⁵⁵¹

amendment rights. Its effect is to hold that merely by taking a job with a collective entity, a person waives her privilege with respect to any implied testimonial communications in the act of producing documents. In order to avoid losing the privilege, a person would have to refuse any employment or other association with a collective entity.”); Price, *supra* note 54, at 381 (noting Randy Braswell’s inability to invoke the Fifth “is directly attributable to his status as custodian of the corporations’ records” so “Braswell’s status as custodian of corporate records overrode his fifth amendment privilege against self-incrimination”).

⁵⁴⁸ *Turley*, 414 U.S. at 78.

⁵⁴⁹ *Id.*

⁵⁵⁰ See *Cohen v. Hurley*, 366 U.S. 117, 153 (1961) (Douglas, J., dissenting). Moreover, as Professor Mosteller has already documented, *Wilson’s* waiver theory is also inconsistent with *Marchetti v. United States*, 390 U.S. 39 (1968). Mosteller, *Simplifying Subpoena Law*, *supra* note 18, at 60-61 (describing how *Marchetti* refused to accept government’s waiver argument). The defendant in *Marchetti* raised a Fifth Amendment objection to a federal law that required gamblers to register with the federal government and pay an annual occupation tax. *Marchetti*, 390 at 40-41. An earlier case, *Lewis v. United States*, 348 U.S. 419 (1955), had rejected a Fifth Amendment challenge to the registration and tax requirements on the theory that a gambler has a choice not to gamble and by choosing to do so, presumably, waives his privilege not to incriminate himself. *Id.* at 423. *Marchetti* found this reasoning “no longer persuasive”:

[I]f such an inference of antecedent choice were alone enough to abrogate the privilege’s protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. To give credence to such “waivers” without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through “ingeniously drawn legislation.”

Marchetti, 390 U.S. at 51-52 (citations omitted) (quoting E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 37 (1949)).

⁵⁵¹ *Cole*, *Limited Liability Entities*, *supra* note 20, at 107.

Professor Cole was dead-on when he described this result as “untenable,” especially because “those who form limited liability entities neither know nor intend that their actions constitute a waiver of a fundamental constitutional right.”⁵⁵² But the collective entity doctrine is bad constitutional law for other reasons as well. Custodians of collective entities are “person[s]” under Fifth Amendment, yet they are denied constitutional protection because of their job status. That result cannot be squared with the text of the amendment which makes no exceptions for the “person[s]” it protects—and certainly makes no exceptions based on one’s occupation.

The collective entity doctrine is also inconsistent with the common law protection afforded custodians and representatives of artificial entities. There is no dispute among legal commentators and judges that the common law understanding of the privilege permitted custodians to invoke the privilege when summoned to produce entity records that were incriminating.

Denying custodians their Fifth Amendment rights has also been justified because they impliedly waive their right upon assuming the job, but the waiver theory only goes so far. Custodians waive the privilege for incriminating testimony derived from the act of producing records, but not when compelled to provide oral testimony. This is legal gobbledygook. As Justice Kennedy states in his dissenting opinion in *Braswell*, “There is no basis in the text or history of the Fifth Amendment for such a distinction. The Self-Incrimination Clause speaks of compelled ‘testimony,’ and has always been understood to apply to testimony in all its forms.”⁵⁵³

Most recently, the Court has stripped custodians of their privilege because they are not really incriminating themselves when they respond to a subpoena and communicate incriminating information about the existence, custody, and authenticity of entity documents. Rather it is the corporate entity that is communicating the incriminating testimony. Like the implied waiver theory, this is a legal fiction, which L.L. Fuller famously described as “either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”⁵⁵⁴ The utility here is removing obstacles in order to prosecute white-collar crime. This type of reasoning should play no part in the interpretation of a fundamental right.

Finally, the collective entity doctrine contradicts a line of cases originating in the 1950s that unequivocally hold that one’s employment or occupational status does not diminish the protection provided by the Fifth Amendment or the ability to invoke it. Under the collective entity rule, however, a person can be denied Fifth Amendment protection simply because they work for or are a member of an artificial entity.⁵⁵⁵

⁵⁵² *Id.*

⁵⁵³ *Braswell v. United States*, 487 U.S. 99, 126 (1988) (Kennedy, J., dissenting).

⁵⁵⁴ L.L. Fuller, *Legal Fictions*, 25 U. ILL. L. REV. 363, 369 (1930).

⁵⁵⁵ The Department of Justice defends this result, in part, because folks like Randy

Professor Cole has urged litigants to challenge the collective entity rule “at each and every opportunity in any case involving a fact pattern that is not indisputably governed by controlling precedent.”⁵⁵⁶ I agree. And the Court should reconsider and repeal the rule for the reasons described above. Indeed, the Court may soon have an opportunity to do so. The federal circuit courts are split on *Braswell*’s applicability to former employees of artificial entities.⁵⁵⁷ Also, *Braswell* left open whether its reasoning “supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records.”⁵⁵⁸ Of course, in light of the facts in *Braswell*, it is fair to ask if Randy Braswell “did not qualify for this [potential] exception, who could?”⁵⁵⁹

Braswell had “notice that incorporating his business constituted an implied waiver of the right to protect business documents from disclosure” as a result of “decades of settled precedent from th[e] Court.” Brief for the United States, *supra* note 415, at 33 n.22. If the government’s position were sound, then the results in *Slochower* and the other “penalty cases” were wrong because the challengers in those cases also had statutory notice that invoking the Fifth would result in termination from government employment or other government benefits. Worse still, under the government’s view of the Fifth Amendment, jurisdictions nationwide are encouraged to enact laws similar to the law invalidated in *Slochower* providing that when federal, state, or local employees invoke the Fifth when questioned about conduct relating to their official duties, their employment shall be terminated. Although a person “has no constitutional right to be a policeman,” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892), the Court has rejected—except in the collective entity doctrine—the view that the Fifth Amendment permits exceptions to its scope based on job status.

⁵⁵⁶ Cole, *Limited Liability Entities*, *supra* note 20, at 108.

⁵⁵⁷ The Second, Third, and Ninth Circuits have held or stated that *Braswell*’s collective entity theory is not applicable to former employees, while the Eleventh and D.C. Circuits have held the opposite. *Compare In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983*, 722 F.2d 981, 986-87 (2d Cir. 1983) (finding collective entity theory does not apply to former employee because “once the officer leaves the company’s employ . . . he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records”), *United States v. McLaughlin*, 126 F.3d 130, 133 n.2 (3d Cir. 1997) (“[A] former employee . . . who produces purloined corporate documents is obviously not within the scope of the *Braswell* rule.”), and *In re Grand Jury Proc.*, 71 F.3d 723, 724 (9th Cir. 1995) (“[This court] follows the Second Circuit[] . . . and holds that the collective entity rule does not apply to a former employee of a collective entity who is no longer acting on behalf of the collective entity.”), with *In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d 807, 812 (11th Cir. 1992) (“We hold that a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated. It is the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity.”), and *In re Sealed Case (Gov’t Recs.)*, 950 F.2d 736, 739-41 (D.C. Cir. 1991) (holding that whether collective entity theory applies “turns less on the ownership of the [document] than on its use”).

⁵⁵⁸ *Braswell*, 487 U.S. at 118 n.11.

⁵⁵⁹ Lathrop, *supra* note 47, at 578. The fact that *Braswell* expressly left open whether the collective entity rule would apply to a custodian who is the sole employee and officer of the

In sum, the Court should dispatch the collective entity rule.⁵⁶⁰ Custodians and representatives of artificial entities should be able to invoke the Fifth when compelled to disclose entity records “pursuant to a subpoena [that] causes [them] to make testimonial admissions that are incriminating”⁵⁶¹—just like other individuals would do. The Court’s frequently repeated claim that without the collective entity rule law enforcement would suffer is constitutionally irrelevant. The Fifth Amendment “is not concerned with the substantive results of trials—that is, whether or not guilt is established. Hence, the fact that a broadening of the privilege might make prosecution more difficult should be of little, if any relevance.”⁵⁶² By jettisoning the collective entity rule, the Court would restore to custodians the same right that all other persons possess under the Fifth Amendment.

company places form over substance and indicates that “the Court was willing to determine the availability of a custodian’s fifth amendment privilege based on whether the custodian had a secretary, or had appointed two figure-head co-officers.” Grogan, *supra* note 54, at 727.

Moreover, “[t]he reasoning of *Braswell* is also potentially applicable to single-member LLCs, and some courts have already applied it to such LLCs. Whether or not *Braswell*’s reasoning should be applied to a single-member LLC is by no means an open-and-shut case, however.” Cole, *Limited Liability Entities*, *supra* note 20, at 85 (footnote omitted).

Finally, another potential issue concerns *Braswell*’s requirement that the government “make no evidentiary use of the ‘individual’s act’ [of production] against the individual. *Braswell*, 487 U.S. at 118. Does this judge-made rule “proscribe derivative as well as direct evidentiary use of the act of production?” Lathrop, *supra* note 47, at 578.

⁵⁶⁰ See Cole, *Limited Liability Entities*, *supra* note 20, at 107-08 (noting that “[t]he world of business entity formation has changed dramatically” since *Braswell* was decided, and the way “business entities are subjected to the criminal justice system has been transformed” as well—for these reasons and others, “the collective entity doctrine should be abandoned”).

⁵⁶¹ King, *supra* note 52, at 1546 (footnote omitted).

⁵⁶² *Organizational Papers*, *supra* note 52, at 652.