REEXAMINING THE COLLECTIVE ENTITY DOCTRINE IN THE NEW ERA OF LIMITED LIABILITY ENTITIES—SHOULD BUSINESS ENTITIES HAVE A FIFTH AMENDMENT PRIVILEGE?

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I. INTRODUCTION

One of the most significant developments in United States law at the end of the twentieth century has been the remarkable proliferation of new forms of business entities.[1]

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[1] The most widely adopted of these new forms of business entities is the "limited liability company" or "LLC." *See, e.g.*, Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1475-78 (1998); Park McGinty, *Eighth Annual Corporate Law Symposium: Limited Liability Companies: The Limited Liability Company: Opportunity For Selective Securities Law Deregulation*, 64 U. CIN. L. REV. 369, 370 (1996); Mark A. Sargent, *Blue Sky Law: Will Limited Liability Companies Punch a Hole in the Blue Sky?*, 21 SEC. REG. L.J. 429, 429-30 (1994). Other new forms include the "limited liability partnership" or "LLP" and the "limited liability limited partnership" or "LLLP." These new forms of state-chartered business entities have joined the much older state-chartered limited partnership and corporation forms as options for the formation of a new business or the conversion of an existing business to a new form. Other options are the traditional business forms that do not require any filing with the state, the sole proprietorship and the general partnership (and the general partnership's close relative, the joint venture). For a brief overview of these business forms, see LARRY E. RIBSTEIN & PETER V. LETSOU, BUSINESS ASSOCIATIONS, at § 1.03 (4th ed. 2003). Other options also exist for special purpose business ventures, such as the business trust and the joint stock company. For an overview of the latter two forms, see WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP, at §§ 288-298 (business trusts) and §§ 282-287 (joint stock companies) (3d ed. 2001). *See also* Robert C. Art, *Conversion and Merger of Disparate Business Entities*, 76 WASH. L. REV. 349, 360-68 (2001); Andrew J. Glendon, *Review Of Selected 1996 California Legislation: Business Associations and Professions: California's Limited Liability Company Act Gets a Facelift*, 28 PAC. L.J. 635, 636-37 (1997); McGinty, *supra*, at 375-77. This proliferation of new forms of business entities has caused concern among academics and practitioners. *See generally* Symposium, *Entity Rationalization: What Can or Should Be Done About the Proliferation of Business Organizations?*, 58 BUS. LAW. 1003 (May 2003). As the Reporter for the Revised Uniform Partnership Act (1994) has observed:

> Over the last decade, the law of unincorporated firms has been atomized in three ways. First, new forms have been introduced, particularly limited liability partnerships (LLPs) and LLCs. Second, as to each business form, statutory uniformity among the states has broken down.

This "limited liability entity revolution" marked the end of a century of relative stability in the law of business organizations[2] and provided the first meaningful new choice of business form since the widespread adoption of the corporate form at the end of the nineteenth century.[3] All fifty states and the District of Columbia now provide for the creation of both LLCs and LLPs.[4]

> Third, we have permitted broader contractual modification of noneconomic statutory provisions.

Donald J. Weidner, *Symposium on the Future of the Unincorporated Firm: Foreword to Freedom of Contract and Fiduciary Duty: Organizing the Internal Relations of the Unincorporated Firm*, 54 WASH. & LEE L. REV. 389, 395 (1997).

[2] Hamill, *supra* note 1, at 1460-61; Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369, 404 (1995) [hereinafter Ribstein, *Statutory Forms*]. *Cf.* Robert W. Hillman, *Limited Liability in Historical Perspective*, 54 WASH. & LEE L. REV. 615, 615 (1997) ("The sudden emergence of new limited liability vehicles—notably limited liability companies (LLCs) and limited liability partnerships (LLPs)—suggests a revolution in the law of limited liability. When placed in historical perspective, however, the developments of the last decade can be seen as more evolutionary than revolutionary.").

[3] Hamill, *supra* note 1, at 1460-61, 1484-1511; *cf.* Larry E. Ribstein, *Making Sense of Entity Rationalization*, 58 BUS. LAW. 1023, 1023 (2003) [hereinafter Ribstein, *Making Sense*] ("The world was once a simpler place in which to form a business. One could choose between corporation and partnership."). One exception, and to some extent a precursor to the "limited liability entity revolution" of the late twentieth century, was the development of the "professional service corporation" or "PSC" in the latter half of the twentieth century, although the importance of that new form of business entity was of course limited to professional service firms, and its primary purpose and effect was with respect to the tax treatment of those firms. *See generally* Thomas E. Rutledge, *The Place (If Any) of the Professional Structure in Entity Rationalization*, 58 BUS. LAW. 1413, 1413-19 (2003) (summarizing "The History and Structural Requirements of the PSC").

[4] *See* William H. Clark, Jr., *Rationalizing Entity Laws,* 58 BUS. LAW. 1005, 1005 (2003); *see also* Bruce D. Ely & Joseph K. Beach, *The LLC Scoreboard*, 97 TAX NOTES 1463 (2002); Hamill, *supra* note 1, at 1460; Rebecca J. Huss, *Revamping Veil Piercing For All Limited Liability Entities: Forcing The Common Law Doctrine Into The Statutory Age*, 70 U. CIN. L. REV. 95, 111 (2001); Fallany O. Stover & Susan Pace Hamill, *The LLC Versus LLP Conundrum: Advice for Businesses Contemplating the*

The advantages of these new business forms are now well-known.[5] The LLC essentially combines the best characteristics of the corporate form (limited liability for members/owners)[6] and the traditional general partnership ("pass through" tax treatment for members/owners if they so

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Choice, 50 ALA. L. REV. 813, 815-16 (1999). Mr. Clark states that "[t]he adoption of LLC and LLP laws in all fifty states during the 1990s was the direct result of a nation-wide legislative effort by the very large accounting firms" in an effort to protect their individual members from personal liability arising out of "a significant increase in the number of securities law claims against accounting firms." Clark, *supra*, at 1006. Professor Ribstein states that "[t]he initial Wyoming LLC statute was passed to deal with the specific problems of [a particular oil company]," while the "LLP statutes were instigated as a protective measure by Texas law firms against liability in connection with the collapse of savings and loan institutions." Ribstein, *Making Sense*, *supra* note 3, at 1023 (citations omitted). For a more detailed discussion of the origin of the LLC form, see William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855 (1995). For a more detailed discussion of the origins of the LLP form, see Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065 (1995).

[5] *See, e.g.*, Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387, 1393 (2003). Hillman notes that:

> [d]eveloped as a hybrid form of association, the limited liability company (LLC) offers some of the advantages of a corporation (most importantly, limited liability, unlimited life, and centralized management) without certain of its disadvantages (especially double taxation). It also offers some of the advantages of a partnership (most importantly, avoidance of double taxation) without certain of its disadvantages (notably, unlimited liability).

Id. (citing LARRY E. RIBSTEIN & ROBERT R. KEATING, RIBSTEIN & KEATING ON LIMITED LIABILITY COMPANIES (West Group 1992).

[6] *See* McGinty, *supra* note 1; Ribstein, *Statutory Forms*, *supra* note 2, at 407-10 (1995); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991). *See also* Susan Pace Hamill, *The Limited Liability Company: A Possible Choice For Doing Business?*, 41 FLA. L. REV. 721, 735-36 (1989) (discussing limited liability advantage in business organizations with emphasis on Wyoming and Florida LLC statutes).

desire),[7] while providing flexibility as to organizational structure and operating rules through a member-drafted (or, one hopes more accurately in most cases, members' attorneys-drafted) "operating agreement."[8] The LLP provides benefits similar[9] to those of an LLC while retaining the partnership form and most of the so-called "default rules" applicable to general partnerships under state partnership law statutes.[10]

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[7] Hamill, *supra* note 1, at 1501-13; McGinty, *supra* note 1; Ribstein, *Statutory Forms*, *supra* note 2, at 384-85.

[8] *See generally* Mitchel Hampton Boles & Susan Pace Hamill, *Agency Powers and Fiduciary Duties Under the Alabama Limited Liability Company Act: Suggestions for Future Reform*, 48 ALA. L. REV. 143, 152-53 (1996) (discussing specifically the Alabama LLC act); Wayne M. Gazur & Neil M. Goff, *Assessing the Limited Liability Company*, 41 CASE W. RES. L. REV. 387, 408-09 (1991) (discussing the operating agreement provision of early LLC statutory schemes).

[9] With respect to LLPs, the key issue is the extent of protection afforded by the LLP statute—is it "full shield" or "partial shield" protection? *See generally* Clark, *supra* note 4, at nn.31-40 and accompanying text (discussing the difference between full and partial liability shields); *see also* Bruce A. McGovern, *Liabilities of the Firm, Member Guaranties, and the At Risk Rules: Some Practical and Policy Considerations*, 7 J. SMALL & EMERGING BUS. L. 63, 104-06 (2003); Carter G. Bishop, *Unincorporated Limited Liability Business Organizations: Limited Liability Companies and Partnerships*, 29 SUFFOLK U. L. REV. 985, 1020-21 (1995).

[10] Pennsylvania's LLP law, for instance, provides:

> Effect of Registration. As long as the registration under this subchapter is in effect, the partnership shall be governed by the provisions of this subchapter and, to the extent not inconsistent with this subchapter, Chapter 83 (relating to general partnerships) and, if a limited partnership, in addition, Chapter 85 (relating to limited partnerships).

15 PA. CONS. STAT. ANN. § 8201(c) (West 2002). *See generally* David M. Hastings, Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R. 5th 689, 698 (2004) (noting that states' LLC acts are usually a hybrid of the partnership acts and business corporation laws and in some instances the separate statutes are identical); THOMAS A. HUMPHREYS, LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS § 1.02 (L. J. Press 2003); Larry E. Ribstein, *Eighth Annual*

The LLC form, in particular, is fast becoming the business form of choice for small start-up businesses.[11] Small businesses that twenty or even ten years ago might have opted to incorporate are now choosing to do business as LLCs. More important for purposes of this article, as the advantages of the LLC form are becoming better known, many individuals who in the past would have simply carried on their business affairs as sole proprietorships are now forming LLCs.[12] This is particularly true in states with LLC statutes that provide for single-member LLCs.[13] Even in states that do not provide for single-member LLCs, it is relatively easy for a sole proprietor to satisfy the statutory requirements by having a family member or other trusted person serve as an additional member of the LLC.[14] This trend is important because formation of an LLC may have an unintended consequence that business owners (and even their counsel) do not foresee at the time of formation—loss of the sole proprietor's ability to assert a Fifth Amendment privilege against self-incrimination when responding to a

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Corporate Law Symposium: Limited Liability Companies: Possible Futures For Unincorporated Firms, 64 U. CIN. L. REV. 319, 323-27 (1996) (discussing the LLP form generally).

[11] *See* Daniel S. Goldberg, *Choice of Entity For A Venture Capital Start-Up: The Myth Of Incorporation*, 55 TAX LAW. 923 (2002) (arguing that the LLC is the most desirable start-up structure and is advisable by most tax professionals); Stuart Levine, *LLCs—The Swiss Army Knife of Business Organizations*, *in* ALI-ABA COURSE OF STUDY MATERIALS: PARTNERSHIPS, LLCS, AND LLPS (SJ029), April-May 2004, at §§ 1.1 & 2.3.1.1–2.3.1.2; Stover & Hamill, *supra* note 4, at 838-40.

[12] *See* Levine, *supra* note 11, at § 3 (discussing the tax consequences of converting a sole-member LLC into a partnership and vice versa); Hastings, *supra* note 10, at 705 (discussing a court's interpretation of the rights and obligations of a sole proprietorship during conversion to a LLC); HUMPHREYS, *supra* note 10, at § 3.03(1).

[13] *See, e.g.*, 15 PA. CONS. STAT. ANN. § 8912 (West 2002) ("One or more persons may organize a limited liability company under the provisions of this chapter."); *see also* Bruce D. Ely & Beach, *supra* note 4, (noting which jurisdictions do not provide for single-member LLCs); Ribstein, *Statutory Forms*, *supra* note 2, at 414-15 (1995) (discussing number of members required to form a LLC).

[14] *See* HUMPHREYS, *supra* note 10, at § 3.03(1).

grand jury subpoena or other compulsory process seeking his or her business records.[15] Appreciation of this point requires consideration of the "collective entity doctrine" that the Supreme Court has developed when applying the Fifth Amendment to business entities.

As is discussed in more detail below,[16] in a series of cases spanning the greater part of the twentieth century,[17] the Supreme Court has held that corporations[18] and other "collective entities," such as partnerships[19] and unincorporated labor unions,[20] are not entitled to invoke the Fifth Amendment privilege against self-incrimination. The Court also has held that a sole shareholder of a corporation may not assert the privilege against self-incrimination in response to a subpoena for the production of documents of the corporation,[21] even when he is named in the subpoena and he, not the corporate entity, is the target of the criminal investigation.[22] Thus, as Chief Justice Rehnquist acknowledged in *Braswell*,[23] the choice not to conduct one's

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[15] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[16] *See infra* Part III.

[17] For an overview of the Supreme Court's collective entity doctrine cases, see 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, 133-39 (2002) [hereinafter Cole, *New Protection*].

[18] *See* Hale v. Henkel, 201 U.S. 43 (1906).

[19] *See* Bellis v. United States, 417 U.S. 85 (1974).

[20] *See* United States v. White, 322 U.S. 694 (1944).

[21] Braswell v. United States, 487 U.S. 99 (1988).

[22] *See id.* Justice Kennedy, in a dissenting opinion joined by Justices Brennan, Marshall, and Scalia, emphasized this aspect of the Court's holding in *Braswell*: "The Court holds that a corporate agent must incriminate himself even when he is named in the subpoena and is a target of the investigation, and even when it is conceded that compliance requires compelled, personal, testimonial, incriminating assertions." *Id.* at 120.

[23] Chief Justice Rehnquist wrote that:

> [h]ad petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the

business as a sole proprietorship also is, in practical effect, a choice to waive any Fifth Amendment protection that might otherwise apply to one's business records.[24] For this reason, the collective entity doctrine, and especially its application to business entities that are owned and controlled by a single individual, takes on heightened significance in the new era of limited liability entities, many of which have supplanted sole proprietorships and are owned and controlled by a single individual.

One other point regarding the collective entity doctrine should be noted at the outset of this Article. Notwithstanding the "No person. . ." language of the Fifth Amendment, the Self-Incrimination Clause of the Fifth Amendment is the only provision of the Bill of Rights that the Supreme Court has held to be completely unavailable to corporations and other business entities.[25] Even the First

> opportunity to show that his act of production would entail testimonial self-incrimination. But petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.

Id. at 104.

[24] *See id.* at 130 (Kennedy, J., dissenting) ("Braswell was the sole stockholder of the corporation and ran it himself. Perhaps that is why the Court suggests he waived his Fifth Amendment self-incrimination rights by using the corporate form."). *Cf.* United States v. Hubbell, 530 U.S. 27 (2000) (applying the Fifth Amendment "act of production" doctrine to a subpoena for the records of a business conducted as a sole proprietorship—Webster Hubbell's consulting business). For an in-depth analysis of the *Hubbell* case, see Cole, *New Protection*, *supra* note 17.

[25] Professor Peter J. Henning has written an excellent article on the Supreme Court's failure to develop a consistent approach to assertions of constitutional rights by corporations in criminal proceedings. *See* 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 (1996) [hereinafter Henning, *Corporate Constitutional Rights*]. Professor Henning acknowledges that the "seemingly *ad hoc* approach" the Court has taken in corporate constitutional rights cases is contrary to the language of the Constitution in that the Fifth Amendment, which the Court has said does not grant a

Amendment, which by its terms[26] seems better suited to an application limited to individuals, has not been held to be completely unavailable to business entities.[27] Moreover, the Court has repeatedly held that the protections of the Fourth Amendment are available to corporations,[28] even though it is

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privilege against self-incrimination to corporations, grants rights to any "person" while the Fourth Amendment, which the Court has said does apply to corporations, protects the rights of "the people." *See id.* at 796. Professor Henning believes that this seeming inconsistency with the text of the amendments "makes sense in light of the purposes of the two constitutional protections and their relation to the government's need to prosecute economic crimes by corporate, as opposed to individual, actors." *See id.* at 797. He asserts that interpreting these two key constitutional provisions in a manner that is inconsistent with their language is acceptable because a corporate privilege against self-incrimination "could completely frustrate the criminal prosecution of corporate wrongdoing" while granting corporations Fourth Amendment protection from unreasonable searches and seizures does "not insulate a corporation from enforcement of the criminal law." *See id.* While Professor Henning's argument no doubt accurately identifies the assumptions underlying the Supreme Court's reasons for denying corporations a privilege against self-incrimination, this Article challenges the validity of those assumptions under a post-*Kastigar* and post-*Fisher* conception of the Fifth Amendment. *See infra* Parts III.B and III.C.

[26] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[27] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (holding that the First Amendment's guarantee of free speech applies even to corporate "persons"); *see also* Henning, *Corporate Constitutional Rights*, *supra* note 25, at 798 n.19 (discussing the "purely personal" analysis used by the Court in the *Bellotti* case). *See generally* JAMES D. COX ET AL., CORPORATIONS § 1.4 (2nd ed. 2002); Daniel A. Klein, Annotation, *Federal Constitution's First Amendment Guarantee of Freedom of Speech and Press as Protecting Private Right to Refuse to Foster, Repeat, Advertise, or Disseminate View, Message, or Statement Divergent from One's Own—Supreme Court Cases*, 132 L. Ed. 2d 961, 974-78 (1999).

[28] *See* Hale v. Henkel, 201 U.S. 43 (1906); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186 (1946); Mancusi v. DeForte, 392 U.S. 364 (1968); G. M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977); Dow Chem. Co.

the protections of that amendment that are most similar to the protection provided by the Fifth Amendment privilege against self-incrimination.[29] For these reasons, and as discussed in greater detail below,[30] the collective entity doctrine is an anomaly of constitutional criminal law. The exploding use of new forms of limited liability business entities, and the application of the collective entity doctrine to those new entities, necessitates a re-examination of the collective entity doctrine.

This Article analyzes the application of the collective entity doctrine to the new forms of limited liability entities. Part II of the Article reviews the development of the collective entity doctrine. Part III reviews recent significant developments in Fifth Amendment law on production of documents and grants of immunity that are particularly relevant to the collective entity doctrine. Part IV reexamines the collective entity doctrine in light of changes in the law of business entity criminal liability since the doctrine was developed. Part V analyzes the application of the collective entity doctrine to the new forms of limited liability entities. Part VI concludes with a critical assessment of the collective

v. United States, 476 U.S. 227 (1986). For an in-depth analysis of the Court's opinions applying the Fourth Amendment to corporations, see Henning, *Corporate Constitutional Rights, supra* note 25, at 826-41.

[29] Professor Henning has also noted the anti-textual aspects of the Court's application of the Fourth and Fifth Amendment to corporations. *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 796 ("The Fourth Amendment provides that 'the right of the *people* to be secure in their persons, houses, papers, and effects' shall not be violated, while the Fifth Amendment grants certain rights to any *'person.'* Therefore, no textual basis explains *Hale v. Henkel*'s discordant treatment of the corporation in criminal proceedings.") (citations omitted). Interestingly, when the Court first addressed the application of the Constitution to a subpoena for business records, it treated the Fourth and Fifth Amendment protections as overlapping. *See* Boyd v. United States, 116 U.S. 616 (1886). For further analysis of this aspect of the *Boyd* holding, see Cole, *New Protection, supra* note 17, at 131-33. For an in-depth analysis of the Fourth and Fifth Amendment underpinnings of the *Boyd* decision, see Richard A. Nagareda, *Compulsion "To Be A Witness" and The Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575 (1999).

[30] *See infra* Part II.

entity doctrine and its continued viability in the new era of limited liability entities.

II. THE DUBIOUS ORIGINS AND UNPRINCIPLED EXPANSION OF THE COLLECTIVE ENTITY DOCTRINE

A. Historical Origins: *Boyd* and *Hale*

The Supreme Court first addressed the protections provided by the Fifth Amendment's Self-Incrimination Clause[31] in the 1886 case of *Boyd v. United States*.[32] In *Boyd* the Court took an expansive view of the protection provided by the Self-Incrimination Clause, asserting that "any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."[33] *Boyd* relied upon both the Fourth and Fifth Amendments to hold that the Constitution does not permit a person to be compelled to produce documents that will be used against him in a criminal case.[34] As commentators have noted, the breadth of

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[31] The Self-Incrimination Clause of the Fifth Amendment had little practical effect for most of the nineteenth century, because under the common law "party witness" rule of evidence a defendant was not permitted to testify at his own criminal trial, even if he wished to do so. *See generally* Cole, *New Protection*, *supra* note 17, at 131 nn.28-29.

[32] 116 U.S. 616 (1886).

[33] *Id.* at 631-32. For an analysis of the broad scope of *Boyd*'s holding and how the Court has subsequently "whittled away the availability of the Fifth Amendment privilege," see 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, 44-49 (1998) [hereinafter Henning, *Finding What Was Lost*] (analyzing how *Hale v. Henkel* and *Fisher v. United States* affected the scope of the holding in *Boyd*).

[34] 116 U.S. at 630. Boyd's dual reliance on both the Fourth and Fifth Amendments has been the subject of scholarly criticism. *See* Cole, *New Protection*, *supra* note 17, at 123 n.40. *See also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: the Self-Incrimination*

the holding in *Boyd* threatened to undermine the ability of the government to obtain documentary evidence in criminal investigations of both individuals and corporations.[35] Recognizing the dramatic effect of such a rule on the criminal justice system, the Court soon retreated[36] from the full promise of *Boyd*'s expansive interpretation of the Self-Incrimination Clause.

1. *Hale*'s Retreat from *Boyd*

The Court's first line of retreat from *Boyd* was to distinguish between natural persons and corporations with respect to the application of the Fifth Amendment privilege against self-incrimination. *Hale v. Henkel*[37] involved an antitrust investigation of a corporation chartered under New Jersey law.[38] The secretary and treasurer of the company

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Clause, 93 MICH. L. REV. 857, 916 (1995) (stating that Boyd's "Fourth and Fifth Amendment mishmash has now been emphatically rejected.").

[35] *See* Henning, *Finding What Was Lost*, *supra* note 33, at 45 ("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."); 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, 416 (1993) [hereinafter Henning, *Testing the Limits*] ("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.").

[36] A number of commentators have analyzed the Court's subsequent decisions limiting the scope of the holding in *Boyd*. *See, e.g.*, Nagareda, *supra* note 29, at 1575; Henning, *Finding What Was Lost*, *supra* note 33, at 44-49 (outlining the demise of the protection afforded in *Boyd* through subsequent rulings); Henning, *Testing the Limits*, *supra* note 35, at 415-26 (describing the evolution of corporate Fifth Amendment law from *Boyd* to *Braswell*); Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 51-59 (1987) (tracing the doctrinal development from *Boyd* to *Fisher*); Robert Heidt, *The Fifth Amendment Privilege and Documents—Cutting* Fisher's *Tangled Line*, 49 MO. L. REV. 439, 444-70 (1984) (describing case law from *Boyd* to *Fisher*).

[37] 201 U.S. 43 (1906).

[38] *Id.* at 75.

was subpoenaed by a federal grand jury in New York to appear before the grand jury and produce correspondence and other records of the corporation.[39] The official appeared but declined to produce the subpoenaed records, asserting his privilege against self-incrimination.[40]

In considering the corporate officer's assertion of privilege, the *Hale* Court established two important principles of Fifth Amendment law that have survived to the present time. First, the Court made clear that the privilege against self-incrimination is a personal privilege that cannot be asserted by a witness to protect a third party from prosecution, whether the third party is another individual or a corporation and whether or not the witness is an agent of the third party.[41] The Court has consistently followed this principle since it was announced in *Hale*.[42] Although the *Hale* Court cited no authority in support of its reasoning,[43] the conception of the privilege against self-incrimination as a right that cannot be asserted to protect others is consistent

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[39] *Id.* at 45-46.

[40] *Id.* at 70.

[41] *Id.* at 69-70. In declining to adopt a rule permitting a witness to assert the privilege against self-incrimination to protect a third party, the Court observed that "[a] privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation." *Id.* at 70.

[42] As Justice Holmes said a few years after *Hale* was decided, "A party is privileged from producing the evidence but not from its production." Holt v. United States, 228 U.S. 457, 458 (1913). *See also* Couch v. United States, 409 U.S. 322, 328 (1973) (citing the opinions of Justice Holmes in Johnson and Holt v. United States, 218 U.S. 245, 252-53 (1910)). *Cf.* Fisher v. United States, 425 U.S. 391, 411-14 (1976) (discussing the personal nature of the privilege and the fact that it cannot be asserted by a taxpayer to block production by an accountant of the accountant's workpapers for preparation of the taxpayer's tax return); Rogers v. United States, 340 U.S. 367, 371 (1951) (holding that the privilege against self-incrimination cannot be asserted by a Communist Party treasurer as grounds for refusing to answer grand jury questions regarding to whom she turned over the party's financial books, thereby seeking to protect the holder of the books).

[43] *See Hale*, 201 U.S. at 69-70.

with both the language of the Fifth Amendment[44] and the Court's interpretation of other provisions of the Constitution.[45] Unfortunately, the same cannot be said of the other general principle of Fifth Amendment law announced by the Court in *Hale*.

After ruling that the privilege against self-incrimination could not be asserted to protect third parties, the Court turned its attention to the constitutional issues presented by the compelled production of documentary evidence that might be used against the corporation in a criminal prosecution. The Court obviously recognized, even though it did not explicitly acknowledge the point, that *Boyd* would preclude compelling the corporation to produce the documents if the holding of that case was not modified.[46] The Court first noted that its cases decided subsequent to *Boyd* "treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions."[47] Focusing on the Fourth Amendment, the opinion concludes that the search and seizure clause of that amendment should not interfere with the power of the courts to compel, through issuance of a subpoena *duces tecum*, production of documentary evidence for use in a trial.[48] *Hale*

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[44] The Court had previously recognized this point in a different context in another Fifth Amendment case. *See* Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) ("The object 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.") (emphasis added). The *Hale* Court, however, did not cite *Counselman*.

[45] *See* N. Jeremi Duru, *A Claim for Third Party Standing in America's Prisons*, 20 BUFF. PUB. INT. L.J. 101, 110-30 (2002) (discussing the history of third party standing); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Robert Allen Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CAL. L. REV. 1308 (1982) (arguing, through case analysis, against any application of constitutional rights by a third party).

[46] *See Hale*, 201 U.S. at 70-71.

[47] *Id.* at 72.

[48] *Id.* at 73. The opinion asserts that if the courts did not have this power it would be "utterly impossible to carry on the administration of

thus marks the first step in the post-*Boyd* decoupling of the Fourth and Fifth Amendments in the context of compelled production of documentary and other tangible evidence, a process that would occupy the Court for much of the twentieth century.[49] For purposes of this Article, however, the important aspect of the Court's analysis in *Hale* is the principle the Court announced after it resolved to analyze the Fourth and Fifth Amendments separately—the principle that natural persons and corporations should be treated differently under the Fifth Amendment Self-Incrimination Clause.[50]

The *Hale* Court's treatment of this issue is remarkable, both for the almost off-handed manner in which it announced a new constitutional principle and for the lack of depth of the analysis the Court offered to support the new principle.[51]

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justice." *Id.* (citing Summers v. Moseley, 2 CR. & M. 477). As is discussed in more detail below, this concern with facilitating the administration of justice also seems to have been the primary inspiration for the collective entity doctrine, both as originally announced in *Hale* and as expanded by the Court over the century following *Hale*.

[49] For analysis of this aspect of this point, see Nagareda, *supra* note 29, at 1592-95 (discussing how the holding in *Fisher* decoupled the Fourth and Fifth Amendments in relation to the production of documents); Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986) (arguing there is no clear standard for regulating document subpoenas due to the *Boyd* Court's misunderstanding and confusion of the Fourth and Fifth Amendments and the subsequent legal rulings that have exposed the unsound reasoning of *Boyd*); Mosteller, *supra* note 36, at 4-11 (discussing how *Fisher* fundamentally altered Fifth Amendment jurisprudence with respect to documentary subpoenas) and 51-59 (discussing documentary subpoena doctrinal development from *Boyd* to *Fisher*); Robert S. Gerstein, *The Demise of* Boyd: *Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343 (1979) (tracing the shift away from the *Boyd* precedent by analyzing majority and dissenting opinions of subsequent Supreme Court holdings).

[50] *See Hale*, 201 U.S. at 74-75.

[51] Professor Stuntz has aptly described *Hale's* response to the corporate Fifth Amendment privilege claim as having been "rejected in a single result-oriented paragraph." *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 429 (1995) [hereinafter Stuntz, *Substantive Origins*]. One possible explanation for the Court's

The Court cited no precedent for depriving corporations of the privilege against self-incrimination, and appeared to base its decision on practical expediency rather than a principled rationale.[52] The primary concern motivating the Court seemed to be that permitting a corporate representative to assert the privilege against self-incrimination as grounds for refusing to produce corporate records "would result in the failure of a large number of cases where the illegal combination[53] was determinable only upon the examination of such papers."[54]

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apparent lack of attention to the corporate Fifth Amendment claim is the relative rarity of corporate criminal prosecutions at that time and the fact that the Court would not even definitively resolve the issue of whether a corporation could be held criminally liable for the acts of its agents until three years later in the *New York Cent. & Hudson River R.R. Co. v. United States* case. *See infra* Part IV.A discussing *New York Central* and the expansion of corporate criminal liability subsequent to the Court's decision in that case. Professor Henning has noted that the *Hale* Court "was unwilling to allow the assertion of the Fifth Amendment to nullify congressional enactments regulating broad areas of the economy by criminal authorities." *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 801 (citing *Hale*, 201 U.S. at 70, and William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1941 (1993)). Professor Henning acknowledges, however, that the opinion in *Hale* "failed to explain why corporations should be treated differently under the Fourth and Fifth Amendments. *Id.* at 820.

[52] *See infra* note 69. Professor Henning has identified *Hale* as the starting point of the Court's consistent refusal to permit corporations to assert the privilege against self-incrimination. *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 801 ("Since that decision, the Court has rejected corporate claims to the privilege against self-incrimination. This has been mainly because permitting assertion of the right would have a deleterious effect on the enforcement of regulatory provisions, which were designed to curb corporate misconduct.").

[53] The specific concern with cases involving an "illegal combination" reflects the fact that *Hale* involved a grand jury antitrust investigation.

[54] 201 U.S. at 74. Professor Henning argues that the Court's decision in *Hale* to permit corporations to claim the protections of the Fourth Amendment but deprive them of the privilege against self-incrimination in the Fifth Amendment "makes sense in light of the purposes of the two constitutional protections and their relation to the government's need to

As this quote suggests, the real reason the Court determined in *Hale* to deprive corporations of a Fifth Amendment privilege against self-incrimination is that under the *Boyd* view of the scope of the privilege, which prevailed at the time,[55] holding otherwise would have made it difficult for prosecutors to obtain evidence to support

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prosecute economic crimes by corporate, as opposed to individual, actors." *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 797.

[55] As discussed further in Part III.A *infra*, the Court also may have been influenced by the state of the law at that time with respect to immunity grants, which are the usual means by which prosecutors compel production of evidence when a witness asserts the Fifth Amendment privilege against self-incrimination. Although not cited in the portion of the *Hale* opinion addressing the application of the privilege against self-incrimination to corporations, the Court's holding a few years earlier in Counselman v. Hitchcock, 142 U.S. 547 (1892), which held that only full transactional immunity is sufficient to overcome the privilege, is discussed in some detail elsewhere in the *Hale* opinion. *See* 201 U.S. at 67-69. An unstated corollary to the Court's concern about "the failure of a large number of cases" if the privilege could be asserted by a corporate representative on behalf of the corporate entity is that under *Counselman* the corporation would have to be granted complete immunity from prosecution if the government wished to compel the production of the evidence that was being withheld. For a more detailed analysis of the *Counselman* case and the Court's subsequent approval of "use and derivative use" immunity in Kastigar v. United States, 406 U.S. 441 (1972), see Amar & Lettow, *supra* note 34, at 874-80 (discussing evolution of federal immunity case law); Henning, *Testing the Limits*, *supra* note 35, at 442-49 (discussing the scope of immunity under the *Kastigar* and *Braswell* with respect to Fifth Amendment protections). *See generally* Karen E. King & Matthew B. Kilby, *Thirty-First Annual Review Of Criminal Procedure: III. Trial: Fifth Amendment at Trial*, 90 GEO. L.J. 1690, 1702-06 (2002) (discussing use and derivative use immunity and listing cases); Ryan McLennan, *Supreme Court Review: Does Immunity Granted Really Equal Immunity Received?*, 91 J. CRIM. L. & CRIMINOLOGY 469 (2001) (discussing the Fifth Amendment and immunity in the Court's decision of *Hubbell*); Leonard N. Sosnov, *Separation Of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMPLE L. REV. 171 (2000); Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress's Power to Immunize Witnesses*, 78 N.C.L. REV. 153 (1999).

criminal cases against corporations.[56] The analysis in the Court's opinion that follows the recognition of this concern describes the distinctions between natural persons and corporations under the law at that time, but it provides little explanation as to why those distinctions justify concluding that a corporation is not a "person" entitled to the protections afforded by the Self-Incrimination Clause of the Fifth Amendment.[57] Moreover, much of what the Court said about

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[56] As discussed in note 51 *supra*, *Hale* was decided at a time when the application of federal criminal law to corporations was first being addressed by the Court and was a matter of widespread public concern and attention. *See generally* Stuntz, *Substantive Origins, supra* note 51, at 421-22 (discussing the Supreme Court's view of the Fourth and Fifth Amendments in the late nineteenth- and early twentieth-century period and the importance of federal efforts at economic regulation to the development of constitutional criminal law in that period); Henning, *Corporate Constitutional Rights, supra* note 25, at 807-12 (discussing late nineteenth-century developments in the law of corporate criminal liability). In fact, it was only three years after *Hale* that the Court definitively addressed the constitutionality of criminal prosecutions of corporate entities, concluding that such prosecutions were constitutionally permissible. *See* New York Cent. & Hudson R.R. v. United States, 212 U.S. 481 (1909) (rejecting the argument that "owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime" as to which criminal intent is an element); *see also* Henning, *Corporate Constitutional Rights, supra* note 25, at 822-26 (describing "The Expansive View of Corporate Criminal Liability in *New York Central*"); Henning, *Finding What Was Lost*, *supra* note 33, at 45; Henning, *Testing the Limits*, *supra* note 35, at 405. Thus, at the time *Hale* was decided the range of corporate exposure to criminal prosecution was relatively narrow, making the Court's Self-Incrimination Clause holding less important (and perhaps to some degree explaining the somewhat casual manner in which the *Hale* Court reached its conclusion on that issue). It is probably safe to assume that the *Hale* Court would have devoted more attention to the issue had it been able to foresee the tremendous breadth of potential corporate criminal liability at the end of the twentieth century—a body of law of such broad coverage and complexity that it likely would have been simply unimaginable, even for Supreme Court Justices, at the beginning of the twentieth century. This expansion of entity criminal liability and its importance to examination of the collective entity doctrine is discussed *infra*, Part IV.

[57] For an insightful analysis of the shortcomings of the Supreme Court's "purely personal" test for determining whether constitutional

the distinctions between corporations and natural persons reflect now-outmoded nineteenth-century conceptions as to the rights, privileges, and obligations of both natural persons and corporations vis-à-vis the regulatory state. These shortcomings in the *Hale* Court's analysis are discussed below.

2. The Visitatorial Powers Rationale

The primary rationale advanced by the *Hale* Court to support what the majority opinion candidly described as an "opinion that there is a clear distinction in this particular between an individual and a corporation"[58] was the Court's conception of the special relationship between the corporation and the state.[59] Although the Court would later abandon this rationale as support for the collective entity doctrine,[60] it is important to examine the original rationale and recognize its limitations and shortcomings. This examination suggests that the original foundation for the doctrine was weak and shallow, so it perhaps is unsurprising that the Court soon had to shore it up with analytical reinforcements. The *Hale* Court distinguished corporations from natural persons on the ground that "the corporation is a creature of the State"[61] and subject to "a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers."[62] This retained "visitatorial power"[63] of the state over the corporation was the linchpin of

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rights are available to corporations and other organizations, see Henning, *Corporate Constitutional Rights, supra* note 25, at 798 n.19 (analyzing First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)).

[58] 201 U.S. at 74.

[59] *See id.* at 74-75.

[60] *See infra*, Part II.B.

[61] 201 U.S. at 74.

[62] *Id.* at 75.

[63] The term "visitatorial power" refers to "the policy that a corporation is a creature of the state and is subject to greater, if not complete, scrutiny by the state as part of the price of its existence." Norman M. Garland, *The Unavailability to Corporations of the Privilege Against Self-Incrimination: A Comparative Examination Based on* EPA v. Caltex, *High Court of*

criminal cases against corporations.[56] The analysis in the Court's opinion that follows the recognition of this concern describes the distinctions between natural persons and corporations under the law at that time, but it provides little explanation as to why those distinctions justify concluding that a corporation is not a "person" entitled to the protections afforded by the Self-Incrimination Clause of the Fifth Amendment.[57] Moreover, much of what the Court said about

[56] As discussed in note 51 *supra*, *Hale* was decided at a time when the application of federal criminal law to corporations was first being addressed by the Court and was a matter of widespread public concern and attention. *See generally* Stuntz, *Substantive Origins, supra* note 51, at 421-22 (discussing the Supreme Court's view of the Fourth and Fifth Amendments in the late nineteenth- and early twentieth-century period and the importance of federal efforts at economic regulation to the development of constitutional criminal law in that period); Henning, *Corporate Constitutional Rights, supra* note 25, at 807-12 (discussing late nineteenth-century developments in the law of corporate criminal liability). In fact, it was only three years after *Hale* that the Court definitively addressed the constitutionality of criminal prosecutions of corporate entities, concluding that such prosecutions were constitutionally permissible. *See* New York Cent. & Hudson R.R. v. United States, 212 U.S. 481 (1909) (rejecting the argument that "owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime" as to which criminal intent is an element); *see also* Henning, *Corporate Constitutional Rights, supra* note 25, at 822-26 (describing "The Expansive View of Corporate Criminal Liability in *New York Central*"); Henning, *Finding What Was Lost*, *supra* note 33, at 45; Henning, *Testing the Limits*, *supra* note 35, at 405. Thus, at the time *Hale* was decided the range of corporate exposure to criminal prosecution was relatively narrow, making the Court's Self-Incrimination Clause holding less important (and perhaps to some degree explaining the somewhat casual manner in which the *Hale* Court reached its conclusion on that issue). It is probably safe to assume that the *Hale* Court would have devoted more attention to the issue had it been able to foresee the tremendous breadth of potential corporate criminal liability at the end of the twentieth century—a body of law of such broad coverage and complexity that it likely would have been simply unimaginable, even for Supreme Court Justices, at the beginning of the twentieth century. This expansion of entity criminal liability and its importance to examination of the collective entity doctrine is discussed *infra*, Part IV.

[57] For an insightful analysis of the shortcomings of the Supreme Court's "purely personal" test for determining whether constitutional

Court's interpretation of the equal protection clause of the Fourteenth Amendment,[67] and even the then-established scope of the state's visitatorial power[68] did not support the distinction adopted by the majority.[69] The majority opinion is

DEL. J. CORP. L. 513 (1998); Henning, *Corporate Constitutional Rights, supra* note 25, at 826-41; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (discussing the relatively recent advent of bestowing Bill of Rights protections on corporations); Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 291-315 (1990) (discussing corporate personality and application of Constitutional provisions to corporations).

[67] 201 U.S. at 84 (noting that the Court had previously refused to hear argument on "the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws" applies to corporations, because the Court was "all of opinion that it does") (citing Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394, 396 (1886)). *See generally* Wood & Scharffs, *supra* note 66, at 552; Henning, *Corporate Constitutional Rights, supra* note 25, at 804-06 (discussing the case progression that led to the applicability of the equal protection clause to corporations); Blumberg, *supra* note 66, at 291-315 (discussing corporate personality and application of Constitutional provisions to corporations).

[68] As Justice Brewer's dissenting opinion observed,

> The right of visitation is for the purpose of control and to see that a corporation keeps within the limits of its powers. . . . The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments.

201 U.S. at 87-88.

[69] Although only two justices dissented, it is noteworthy that the dissenting opinion cited numerous authorities in support of the proposition that the state visitatorial power rationale did not justify depriving corporations of the Fifth Amendment privilege against self-incrimination, *see* 201 U.S. at 83-89, while the relevant portion of the majority opinion cites no authorities to support distinguishing between corporations and natural persons for purposes of the Fifth Amendment privilege against self-incrimination, *see* 201 U.S. at 74-75. The lack of authority cited by the majority, as well as its failure to address the substantial body of

rooted in a nineteenth-century conception of broad individual freedom of contract and freedom from government regulation,[70] which the opinion contrasts with a narrowly constrained and circumscribed conception of the corporate entity and its ability to engage in economic activities.[71]

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authorities cited by the dissent, further supports the conclusion that the majority's decision is based more on practical expediency—concern about the effect of a contrary ruling on law enforcement and the ability of the government to investigate corporate wrongdoing—than on a principled legal rationale.

[70] *See* 201 U.S. at 74 ("The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. *His power to contract is unlimited.*") (emphasis added). For a detailed analysis of the nineteenth-century conception of individual rights and the changes that accompanied the twentieth-century rise of the modern regulatory state, see Alfredo Garcia, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. TOL. L. REV. 209, 211-38 (1998) (discussing historical origins of the Bill of Rights and the Fifth Amendment); Mayer, *supra* note 66, at 579-620 (discussing the changing political and regulatory systems between the nineteenth and twentieth centuries in context with corporate personality under the Bill of Rights).

[71] In the words of Justice Brown,

> [The corporation] is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. *It can make no contract not authorized by its charter.* Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation.

201 U.S. at 74-75 (emphasis added). For a detailed analysis of the shift from nineteenth-century limited purpose, specially chartered corporations constrained by the *ultra vires* doctrine to twentieth-century general incorporation statutes and "purpose clauses" that permit corporations to engage in "any lawful purpose," see Allen D. Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1043-56 (1986) (discussing incorporation shifts from the nineteenth century and judicial responses to each shift); David Millon, *Frontiers of Legal Thought I: Theories of the Corporation*, 1990 DUKE L.J. 201 (1990); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1662-72 (1988) (discussing *ultra vires* and its changing nature throughout the nineteenth and twentieth centuries). As two of the leading authorities in the field have observed, in

Neither of these nineteenth-century conceptions survived long in the twentieth century, as individuals' freedom of contract and freedom from government regulation fell victim to the New Deal and the rise of the modern regulatory state,[72] while at the same time modern business corporations took advantage of general incorporation statutes and shed the constraints imposed by special purpose charters and *ultra vires* doctrine limitations on the scope of their activities.[73] These important changes in the legal concepts employed by the *Hale* Court to justify the collective entity doctrine demonstrate that the doctrine was originally based upon a rationale that was anachronistic even at the time it was announced by the Court.

Had the Court continued to rely upon the visitatorial powers rationale for the collective entity doctrine, it would have been important to analyze whether the twentieth-century changes to the law in this area had deprived the doctrine of its conceptual underpinnings. It is not necessary to do so, however, because the Court subsequently abandoned its original rationale for the collective entity doctrine—not because it recognized that the rationale had lost its vitality, but rather because the original rationale proved inadequate to support the doctrine in the new, non-corporate law enforcement contexts that the Court had to

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the "earlier day" prior to the development of the modern business corporation, "corporate status was a privilege jealously guarded by the state and the courts so that the inherent powers of corporations were narrowly authorized and recognized." JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS, § 4.02 (2d ed. 2003).

[72] *See generally* Henning, *Corporate Constitutional Rights, supra* note 25 (arguing that the Supreme Court should directly address the issue of corporate criminal rights and in doing make a concrete determination of what constitutional protections should apply to corporations); Mayer, *supra* note 66, at 577.

[73] *See generally* Gregory A. Mark, *The Court and The Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403 (1997) (discussing the evolution of American corporations); Mayer, *supra* note 66, at 579-620 (discussing the changing political and regulatory systems between the nineteenth and twentieth centuries in context with corporate personality under the Bill of Rights); Hovenkamp, *supra* note 71, at 1593.

confront. Those new contexts, and the Court's reconceptualization of the collective entity doctrine to extend beyond business corporations, are discussed below.

B. Evolution of the Doctrine: Abandonment of the Original Visitatorial Powers Rationale and Employment of Result-Oriented Legal Analysis

The Supreme Court returned to the collective entity doctrine announced in its *Hale* decision five years later when it decided *Wilson v. United States*.[74] In *Wilson*, the president of a corporation that had been served with a federal grand jury subpoena *duces tecum* refused to produce corporate documents[75] sought by the grand jury in an investigation[76] of the officers[77] of the corporation for possible criminal offenses.[78] As grounds for refusing to produce the subpoenaed corporate documents,[79] Wilson asserted that he was using them to prepare his defense and that their contents would tend to incriminate him.[80] In rejecting Wilson's arguments[81] the Court held that a corporate officer

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[74] 221 U.S. 361 (1911).

[75] The subpoena called for the production of any of the corporation's letter press copy books that contained copies of correspondence signed by, or purporting to be signed by, the president of the corporation during the months of May and June, 1909. *Id.* at 368.

[76] *Id.* at 367-68.

[77] Indictments had been filed against the president, as well as certain other officers, directors, and stockholders of the corporation. *Id.* at 367.

[78] The indictments charged the targets with one count of mail fraud and one count of conspiracy to commit mail fraud. *Id.*

[79] Wilson claimed that, in addition to business correspondence, the documents contained copies of his personal and other correspondence; that the documents were in his possession, custody, and control as against other officers of the corporation; and that the documents contained information that would tend to incriminate him. *Id.* at 368-69.

[80] *Id.* at 369.

[81] In addition to arguing that compelling him to turn over the documents violated his Fifth Amendment privilege against self-incrimination, Wilson argued that it violated the Sixth Amendment witness confrontation privilege and the Fourth Amendment prohibition against unreasonable search and seizure. *Id.* at 375-76.

cannot refuse to produce corporate documents under that officer's control to a grand jury, even if the target of the grand jury investigation is the officer and not the corporation.[82] The Court reaffirmed its holding in *Hale* that a corporation has no privilege against self-incrimination,[83] and concluded that it would be an "unjustifiable extension" of personal rights to permit Wilson to assert the Fifth Amendment privilege against self-incrimination as grounds for refusing to produce corporate documents when the corporation itself could assert no such right as to the documents.[84]

1. The Primacy of Protecting Law Enforcement Interests Emerges as the Court's Motivating Objective

Although the *Wilson* holding was significant for corporate officers and employees seeking to oppose production of corporate records because those records might incriminate them personally,[85] its importance for purposes of this Article is the Court's analysis of the Fifth Amendment's application to corporations. In this regard, the Court first stated its agreement with the *Boyd* premise that the Fifth Amendment protects an individual from compulsory production of any

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[82] *Id.* at 384-85.

[83] *Id.* at 383-84 (quoting Hale v. Henkel, 201 U.S. 43, 74-75 (1906)).

[84] *Id.* at 385.

[85] The dubious validity of the Court's reasoning in *Wilson* is illustrated in a wonderfully understated critique offered by Professor Stephen J. Schulhofer:

> For example, Smith, the treasurer of XYZ Corporation, can be compelled to produce corporate documents that incriminate her. Technically the documents belong to the corporation, so that in effect one party (XYZ) is being compelled (through its treasurer) to incriminate an entirely different party (Smith). If you can't see the difference between Smith and the treasurer, then you just aren't thinking like a lawyer.

Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 315 (1991) (citing *Wilson*).

"private books and papers" that might be incriminatory.[86] The Court then addressed whether an individual's personal privilege against self-incrimination should "extend to the corporate books?"[87] Dictum in its analysis of this question reveals just how broadly the Court at that time, applying the *Boyd* conception of the Fifth Amendment, interpreted the privilege against self-incrimination's application to an individual's personal documents: "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person."[88] This remarkable assertion,[89] although dictum to the *Wilson* holding, is important because it illustrates the consequences that would have followed if the Court, under the *Boyd* conception of the Fifth Amendment privilege in effect at the time, had permitted corporate entities to assert the privilege against self-incrimination in response to law enforcement subpoenas and document requests. As the quoted statement suggests, all potentially incriminating documents in the possession and control of the corporation, no matter who authored them or for what purpose, could have been withheld from production. It is therefore not surprising that in both *Hale* in 1906, as discussed above, and in *Wilson* in 1911, as discussed below, the Court stretched for a way to avoid that result. This is in stark contrast to the state of the law today, under the post-*Fisher* "testimonial communications" conception of the privilege and the act of production doctrine that would apply if corporations and

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[86] *Wilson*, 221 U.S. 261 at 377 ("Undoubtedly it also protected him against the compulsory production of his private books and papers."). *See also id.* at 380 (noting that "in the *Boyd Case* . . . the fact that the papers involved were the *private* papers of the claimant was constantly emphasized") (emphasis in original).

[87] *Id.*

[88] *Id.* at 378.

[89] This assertion is, of course, totally contrary to the modern conception of the Fifth Amendment privilege against self-incrimination that was announced by the Court in 1976 in *Fisher v. United States*, 425 U.S. 391 (1976). The *Fisher* decision is discussed *infra*, Part III.B.1.

other business entities were permitted to assert the Fifth Amendment privilege against self-incrimination.[90]

In 1911, however, the Court was unwilling to consider the consequences of permitting a corporation to assert the Fifth Amendment privilege against self-incrimination. The *Wilson* Court even drew upon the "required records" exception[91] to the Fifth Amendment privilege against self-incrimination in its analysis of the application of the privilege to corporations.[92] After discussing cases involving various kinds of records that were required by law to be kept and open to inspection by governmental authorities,[93] the Court acknowledged that the records of a private business corporation are not public records that must be open to general inspection.[94] After this brief foray into the required records exception, the Court retreated to the distinction announced in *Hale*—that "the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books."[95] Beyond a citation to its recently announced decision in *Hale*,[96] however, the Court offered no authority or analysis to support its conclusion that this "reservation of the visitatorial power of the State"[97] should justify depriving corporations of a constitutional right. Ironically, the only legal analysis undertaken by the Court, its examination of the required records exception, would seem to have better supported the contrary conclusion.

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[90] *See infra* Part III.B.

[91] For analysis of the historical development of the required records exception, *see* Henning, *Finding What Was Lost*, *supra* note 33, at 34 n.51; Amar & Lettow, *supra* note 34, at 869-73; Henning, *Testing the Limits*, *supra* note 35, at 439-41; Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6 (1986).

[92] *See* Wilson, 221 U.S. at 380-82.

[93] *See id.*

[94] *See id.* at 382.

[95] *Id.*

[96] *Id.* at 383.

[97] *Id.*

As was the case with *Hale*, the Court's real reason for resisting any corporate assertion of the privilege against self-incrimination was reluctance to interfere with law enforcement. The Court's primary concern was that "[t]he reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of records and papers of the corporation."[98] *Wilson* thus extends the result-oriented reasoning of *Hale*, essentially giving law enforcement officials carte blanche to compel production of all manner of corporate records in investigations of both a corporate entity and of the individual agents serving a corporation. Although this result gave law enforcement authorities extraordinarily broad power to demand production of evidence,[99] it nonetheless proved insufficient to meet the needs of law enforcement authorities. This failure to meet law enforcement needs ultimately led to the abandonment of the visitatorial powers rationale and the adoption of a new, even more permissive test for depriving subjects of an investigation of the Fifth Amendment privilege against self-incrimination.

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[98] *Id.* at 384-85.

[99] As Justice McKenna pointed out in his dissent in *Wilson*, this result was inconsistent with the English case law addressing this issue. *See id.* at 388-90. The majority declined even to consider the English precedent, however, stating that those cases "cannot be deemed controlling" and declaring that "[t]he corporate duty, and the relation of the appellant as the officer of the corporation to its discharge, are to be determined by our laws." *Id.* at 386. It also should be noted that the net result of *Hale* and *Wilson* was to give law enforcement authorities power to compel corporations to produce voluntarily documents and other evidence that the Fourth Amendment would prevent the authorities from obtaining if they lacked probable cause and particularity requirements. *Cf.* Cole, *New Protection*, *supra* note 17, at 170-90 (comparing and contrasting the ability of law enforcement authorities to obtain evidence by search warrant under the Fourth Amendment and by subpoena under the Fifth Amendment).

2. The Visitatorial Powers Rationale Proves Inadequate to Protect Law Enforcement Interests

The inherent limitations of the visitatorial powers rationale were exposed in 1944, in *United States v. White*,[100] a case involving a federal grand jury subpoena *duces tecum* issued to an unincorporated labor union.[101] The president of the union, who had possession of the subpoenaed union records, refused to comply with the subpoena, asserting that doing so might incriminate the union, himself as an officer of the union, or himself individually.[102] The district court held him in contempt for his refusal to produce the subpoenaed records, but the court of appeals reversed, by a divided vote, holding that the records of an unincorporated union were the property of the union members, and as a union member he could refuse to produce the union records if they would incriminate him as an individual.[103]

The holding of the court of appeals forced the Supreme Court to confront the limitations of its previous holdings in this area, because the corporate entity/visitatorial powers arguments obviously could not be brought to bear upon an unincorporated organization with no charter or license from the state. The Court responded with the two lines of reasoning that mark all of its opinions in this area. The first is a categorical assertion, without analytical support, that the Fifth Amendment privilege against self-incrimination is a "personal" and "individual" privilege, and therefore it "cannot be utilized by or on behalf of any organization, such

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[100] 322 U.S. 694 (1944).

[101] *Id.* at 695-96. The subpoena was directed to "Local No. 542, International Union of Operating Engineers" in an federal grand jury investigation of "alleged irregularities in the construction of the Mechanicsburg Naval Supply Depot" in Mechanicsburg, Pennsylvania. *Id.* at 695.

[102] *Id.* at 696.

[103] *Id.* at 696-97.

as a corporation."[104] The second is a thinly veiled acknowledgement that permitting a business entity to assert the Fifth Amendment privilege against self-incrimination, as it was then understood to apply to documentary evidence,[105] would be too great an impediment to the investigation and prosecution of business crime.[106] The *White* Court was more candid than its predecessors[107] in acknowledging this point,

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[104] *Id.* at 698-99 (citing *Hale* and *Wilson*). *See supra* note 69 for discussion of the *Hale* Court's failure to provide any precedent or authority to support depriving corporations of the privilege against self-incrimination, and see *supra* text accompanying notes 97 & 98 for discussion of the Court's failure to offer any authority or analysis to support its conclusion in *Wilson* that the "reservation of the visitatorial power of the State" should justify depriving corporations of a constitutional right.

[105] *See infra* Part III for a discussion of the recent changes in the Court's conception of the application of the Fifth Amendment privilege against self-incrimination to documentary evidence.

[106] In the words of the *White* Court:

> The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of 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. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, 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.

322 U.S. at 700 (citations omitted).

[107] *Compare White*, 322 U.S. at 700 (acknowledging that if business entities were permitted to assert the privilege against self-incrimination "effective enforcement of many federal and state laws would be

perhaps out of necessity because it was forced to abandon the visitatorial power rationale[108] and perhaps out of boldness as a result of almost a half-century of acceptance of the rule announced in *Hale*.

The Court went on to hold that an unincorporated labor union could not assert the privilege against self-incrimination.[109] In abandoning the visitatorial power rationale, the Court announced a new test for when an organization would not be permitted to assert the Fifth Amendment privilege against self-incrimination. The test articulated by the Court was "whether one can fairly say under all the circumstances that 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 interest of its constituents, but rather to embody their common or group interests only."[110] The Court relied upon[111] this new test to

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impossible") *with* Hale v. Henkel, 201 U.S. 43, 74 (1906) (warning of "the failure of a large number of cases" if corporations were permitted to assert a Fifth Amendment privilege against self-incrimination).

[108] The *White* Court characterized the visitatorial power rationale as merely "a convenient vehicle for justification of governmental investigation of corporate books and records," 322 U.S. at 700, informing the careful reader that the visitatorial powers doctrine had never been more than a convenient doctrinal means of reaching the desired result, which the *White* Court acknowledged was "effective enforcement of many state and federal laws." *Id.*

[109] *Id.* at 700-01. The Court subsequently characterized the rationale of *Wilson* as the "visitorial powers doctrine." *See* Bellis v. United States, 417 U.S. 85, 92 (1974). In *Bellis* the Court recast the visitatorial powers doctrine as "a recognition that corporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach." *Id.* This recharacterization reflects the inadequacy of the visitatorial powers doctrine to justify withholding the privilege from collective entities that are not chartered by the State. Ultimately even the "privacy or confidentiality" rationale fell by the wayside, when the *Fisher* decision shifted the focus of Fifth Amendment analysis from privacy to the compulsion of "testimonial" communications. *See infra* Part II.B.1.

[110] 322 U.S. 701. Ironically, the Court would later dismiss this test as essentially worthless as it continued its result-oriented efforts to limit the application of the Fifth Amendment privilege against self-incrimination to

conclude that a labor union could not assert a Fifth Amendment privilege, and therefore a union official[112] could not refuse to produce union documents[113] even though they might incriminate him.[114]

White is a particularly significant step in the evolution of the collective entity doctrine, because the Court both abandoned the prior rationale for the doctrine and acknowledged that the doctrine was in reality nothing more than a means to accomplish a law enforcement end that the Court concluded had to be facilitated. Even the broad, elastic new test that the Court articulated, while perhaps intended to resolve the issue for future cases, ultimately proved inadequate to satisfy the needs of law enforcement for access to the documents and records of business entities.

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even small business entities so as to avoid interfering with law enforcement investigations and prosecutions of such entities. *See Bellis*, 417 U.S. at 100 (applying the collective entity doctrine to a three-person law partnership and noting that the *White* test was "is not particularly helpful in the broad range of cases" and that the *White* Court "after stating its test, did not really apply it, nor has any of the subsequent decisions of this Court").

[111] As indicated *supra*, note 110, the Court subsequently acknowledged in *Bellis* that the *White* Court "did not really apply" its test to the facts of that case, an implicit acknowledgment of the shallow, result-oriented analysis that this Article asserts has been consistently employed by the Court in its collective entity cases since the doctrine was first announced in *Hale*. *See* Bellis, 417 U.S. at 100.

[112] White described himself as an "assistant supervisor" of the union. 322 U.S. at 695.

[113] Although White possessed the requested union documents, he was not the authorized custodian of the requested documents. *Id.*

[114] The *White* Court cited *Hale* and *Wilson* as establishing that the privilege against self-incrimination is not available to corporations and therefore corporate officials cannot assert the privilege against self-incrimination when responding to a subpoena duces tecum for corporate documents even though the corporate documents might incriminate the officials personally. *Id.* at 699-700.

3. *Bellis* and the Personal Privacy and Representative Capacity Rationales

The needs of law enforcement led the Court to stretch the collective entity doctrine even further in 1974,[115] when it explored what it described as "the outer limits of the analysis of the Court in *White*" in the case of *Bellis v. United States.*[116] In *Bellis*, the Court concluded that a former partner of a dissolved three-person law partnership, who had retained custody of the dissolved partnership's business records,[117] could not invoke the privilege against self-incrimination in response to a grand jury subpoena *duces tecum* for those records issued in "a tax investigation directed against Bellis personally."[118]

Writing for the majority, Justice Marshall reasoned that a partnership is not a natural person[119] and that a partner in a

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[115] Ironically, only two years later, the Court would decide *Fisher v. United States*, 425 U.S. 391 (1976), the case that would re-define Fifth Amendment self-incrimination law and render moot the concerns that the Court had struggled to accommodate since the turn of the century as it relentlessly expanded the reach of the collective entity doctrine. The impact of *Fisher* and the reasons why it obviated the law enforcement needs that gave birth to and sustained the collective entity doctrine are discussed *infra*, Part III.B.1.

[116] 417 U.S. at 94.

[117] The three-person Pennsylvania law partnership had dissolved almost four years earlier, when Bellis had left the firm, but was still "winding up its affairs" when the subpoena was served. *Id.* at 86. Under the applicable Pennsylvania law, a partnership was not terminated "until the winding up of the partnership affairs [was] completed." *Id.* (citing PA. STAT. ANN., tit. 59, § 92 (1964)).

[118] Justice Douglas stressed this aspect of the case, that Bellis personally, and not the dissolved law partnership, was the target of the investigation. *See* 417 U.S. at 101.

[119] Justice Marshall cited to previous Supreme Court decisions that had uniformly held that the privilege against compulsory self-incrimination protects "only the natural individual from compulsory incrimination through his own testimony or personal records." *Id.* at 89-90 (quoting *White*, 322 U.S. at 701). The Court's focus on the rights of individuals was accompanied by a concern regarding law enforcement against large collective entities. As Justice Marshall observed, "[t]he

partnership had no expectation of privacy with respect to the financial records of an organized entity such as his partnership.[120] Justice Marshall's opinion in *Bellis* marks the first time, post-*Boyd*, that the Court relied explicitly upon personal privacy or confidentiality as a policy interest protected by the Fifth Amendment privilege against self-incrimination. His majority opinion even cites the Court's most controversial privacy opinion,[121] *Griswold v. Connecticut*,[122] as supporting recognition of a privacy rationale for application of the Fifth Amendment privilege against self-incrimination.[123] He went on to conclude that "[p]rotection of individual privacy was the major theme running through the Court's decision in *Boyd*"[124] and that "it was on this basis that the Court in *Wilson* distinguished the corporate records involved in that case from the private

framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, 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." 417 U.S. at 91 (quoting *White*, 322 U.S. at 700).

[120] 417 U.S. at 90-91.

[121] *See generally* Samuel J. Levine, *Unenumerated Constitutional Rights And Unenumerated Biblical Obligations: A Preliminary Study In Comparative Hermeneutics*, 15 CONST. COMMENT. 511, 519-20 (1998) (discussing the controversy of *Griswold* and the subsequent line of right to privacy cases); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519 (1994); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-22 (1974) (questioning reliance on penumbra of Bill of Rights to find a privacy right); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971) (criticizing *Griswold* as unprincipled).

[122] 381 U.S. 479 (1965).

[123] *Bellis*, 417 U.S. at 91 (the Court, citing *Griswold*, 381 U.S. at 484, and Couch v. United States, 409 U.S. 322, 327 (1973), concluded that "the Fifth Amendment 'respects a private inner sanctum of individual feeling and thought'" from "state intrusion to extract self-condemnation") (quoting *Couch*, 409 U.S. at 327)).

[124] *Bellis*, 417 U.S. at 91 (citing Boyd v. United States, 116 U.S. 616, 630 (1886)).

papers at issue in *Boyd*."[125] The latter assertion borders on disingenuous when one considers that the papers at issue in *Boyd*—invoices for plate glass purchases[126]—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.[127] The underlying hint of result-oriented legal reasoning is reinforced if one also considers that what Justice Marshall called "the private papers at issue in *Boyd*"[128] were actually the business records of a partnership[129]—the same kind of documents the government was seeking in *Bellis*. Nonetheless, Justice

[125] *Bellis*, 417 U.S. at 91-92 (citing Wilson v. United States, 221 U.S. 361, 377, 380 (1911)).

[126] *Boyd*, 116 U.S. at 619 (identifying the documents at issue as "the invoice from the Union Plate Glass Company or its agents, covering the twenty-nine cases of plate glass marked G.H.B., imported from Liverpool, England, into the port of New York in the vessel Baltic, and entered by E. A. Boyd & Sons at the office of the collector of customs of the port and collection district").

[127] *See Wilson*, 221 U.S. at 368 (quoting the grand jury subpoena at issue in that case).

[128] *Bellis*, 417 U.S. at 92.

[129] Justice Marshall does acknowledge this similarity between the *Boyd* and *Bellis* cases at a later point in his *Bellis* opinion, where a footnote concedes that although E.A. Boyd & Sons was a partnership, "at this early stage in our Fifth Amendment jurisprudence, the potential significance of this fact was not observed by either the parties or the Court. The parties treated the invoice at issue as a private business record, and the contention that it might be a partnership record held in a representative capacity, and thus not within the scope of the privilege, was not raised." *Id.* at 95 n.2. Relying upon the undeveloped state of Fifth Amendment privilege against self-incrimination law when *Boyd* was decided, he asserts "We do not believe that the Court in *Boyd* can be said to have decided the issue presented today." *Id.* (citation omitted). He goes on to note that the *Boyd* Court "did not inquire into the nature of the Boyd & Sons partnership or the capacity in which the invoice was acquired or held" and concludes "Absent such an inquiry, we are unable to determine how our decision today would affect the result of *Boyd* on the facts of that case." *Id.* (citation omitted). In this manner the *Bellis* Court was essentially able to overrule *Boyd* and reject its Fifth Amendment holding without explicitly acknowledging that it had done so.

Marshall used the privacy rationale as a means to avoid abandoning *Boyd* while at the same time expanding the reach of the collective entity doctrine to encompass even small partnerships.

After identifying personal privacy as a policy interest protected by the Fifth Amendment Self-Incrimination Clause, Justice Marshall employed a clever bit of juridical sleight-of-hand to link the new privacy rationale to the original state visitatorial power rationale of the collective entity doctrine. He described the visitatorial power doctrine as having "modern-day relevance" because it "can easily be understood as a recognition that corporate records do not contain the requisite element of privacy or confidentiality essential for the [Fifth Amendment] privilege to attach."[130] He adopted this new interpretation of the visitatorial power rationale despite the fact that there is nothing in the earlier cases applying that rationale which would suggest that it was based upon personal privacy or confidentiality considerations.

Viewing the visitatorial powers rationale through the prism of personal privacy also permitted Justice Marshall to link that doctrine to the *White* test,[131] which the Court had adopted when the visitatorial powers rationale proved inadequate to address the law enforcement needs that subsequent cases presented to the Court.[132] Justice Marshall did so by treating the state's right of access to corporate books and records under the visitatorial powers rationale as the equivalent of the right of access to partnership records by

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[130] *Id.* at 92.

[131] *See supra* note 110 (quoting the *White* test articulated in *United States v. White*, 322 U.S. 694, 701 (1944), as whether one can fairly say under all the circumstances that "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 interest of its constituents, but rather to embody their common or group interests only.").

[132] *See supra* notes 100-14 (discussing the adoption of the *White* test and the abandonment of the visitatorial power rationale for the collective entity doctrine).

other partners in a partnership.[133] In both instances, he reasoned, the privacy interest of any individual member or partner is insufficient to support invocation of the privilege against self-incrimination, so long as the group or partnership is "an organization which is recognized as an independent entity apart from its individual members."[134] Applying the *White* test in this manner, it was easy to conclude that "large, impersonal, highly structured enterprises of essentially perpetual duration,"[135] such as "Wall Street law firms and stock brokerage firms,"[136] did not qualify for the protection of the privilege against self-incrimination.[137] As in its prior opinions, however, the real reason for the Court's reluctance to allow invocation of the privilege against self-incrimination crept through—the concern that any other outcome would impede to an unacceptable degree law enforcement efforts directed at business entities.[138]

The remaining challenge facing Justice Marshall was the potential distinction between "large, impersonal, highly structured" partnerships and the small, three-person law partnership before the Court in the *Bellis* case. As noted above, the opinion acknowledges that the facts of the case required the Court "to explore the outer limits of the analysis of the Court in *White*."[139] Despite the small size of the *Bellis* partnership, the Court concluded that its formality, its

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[133] *See* 417 U.S. at 92-94.

[134] *Id.* at 92.

[135] *Id.* at 93-94.

[136] *Id.* at 93.

[137] *Id.* at 94.

[138] *See id.* ("It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from SEC scrutiny solely because it operates as a partnership rather than in the corporate form."). *See also supra* notes 41-42 (discussing the law enforcement rationale underlying the *Hale* case), notes 98-99 (discussing the law enforcement rationale underlying the *Wilson* case), and notes 106-10 (discussing the law enforcement rationale underlying the *White* case).

[139] *See* 417 U.S. at 94.

relatively long life (fifteen years), and the organizational structure imposed upon it by state law[140] supported the conclusion that it had "an established institutional identity independent of its individual partners."[141] The Court found these considerations sufficient to support the conclusion that the partnership entity could not assert a Fifth Amendment privilege against self-incrimination, even though it did not meet the *White* test of "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."[142] The *White* test was essentially dismissed by the Court as "not particularly helpful in the broad range of cases,"[143] and a more flexible case-by-case approach[144] was adopted. The net result was

[140] In his dissenting opinion, Justice Douglas exposed a weakness in the majority's reliance on state partnership law—the law of Pennsylvania, which governed the *Bellis* partnership, explicitly provided that a general partnership of the kind at issue in the case "is treated as an aggregate of individuals and not as a separate entity." 417 U.S. at 103 (Douglas, J., dissenting, quoting Tax Review Board v. Shapiro Co., 409 Pa. 253, 260, 185 A.2d 529, 533 (1962)). The response to this point appears to be in footnote 7 of the *Bellis* majority opinion, where after acknowledging that "state and federal law do not treat partnerships as distinct entities for all purposes," the Court indulges in a bit of circular reasoning and cites the *White* opinion to support the conclusion that "[t]he fact that partnerships are not viewed solely as entities is immaterial for this purpose." 417 U.S. at 97 n.7 (citing United States v. White, 322 U.S. 694, 697 (1944)). For further discussion of *Bellis* and the "aggregate vs. entity" theories of partnership law, as well as those theories' relevance to the collective entity doctrine, see *infra* Part V.C.2 at notes 322-336 and accompanying text.

[141] 417 U.S. at 95.

[142] *See id.* at 100 (citing *White*, 322 U.S. at 701). The Court did leave itself a small measure of latitude for deciding future cases, noting in the concluding paragraph of the majority opinion that a different result might be appropriate in a case involving a "small family partnership or . . . some other pre-existing relationship of confidentiality among the partners." *See id.* at 101.

[143] *Id.* at 100.

[144] The majority's movement toward a case-by-case approach, rather than a defined test of general application as articulated by the prior *White*

abandonment by the Court of both the *White* test and the visitatorial powers rationale that had preceded the *White* test. The resulting lack of a principled basis for determining when the Fifth Amendment privilege could be asserted laid the groundwork for an even more dramatic curtailment of the availability of the Fifth Amendment privilege against self-incrimination.

C. The Ultimate Expansion of the Collective Entity Doctrine: *Braswell* and the Application of the Doctrine to a Wholly Owned Firm

The *Bellis* Court's application of the collective entity doctrine to a three-person law partnership made clear that neither an organization's small size nor its members' expectations of confidentiality with respect to the organization's records precluded compelled production of those records in response to a government subpoena. That lesson was reinforced a little over a decade later, when the Court relied upon *Bellis* to apply the collective entity doctrine to a wholly owned corporation. In *Braswell v. United States*[145] a federal grand jury issued a subpoena to Randy Braswell for production of the books and records of two corporations.[146] Braswell was the owner and sole shareholder of the two corporations.[147] Before forming the corporations, he had operated his business as a sole proprietorship.[148] The other two directors of the corporations were Braswell's wife and his mother, but neither of them had any authority over the business of the corporations.[149] Despite these factors, a narrow five-four majority of the

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opinion, is evidenced by the final paragraph of the majority opinion, discussed *supra* note 142 in which a case-by-case analysis for the future is endorsed. *See id.* at 101.

[145] 487 U.S. 99 (1988).

[146] *Id.* at 101.

[147] *Id.*

[148] *Id.*

[149] *Id.*

Court[150] concluded that the collective entity doctrine precluded Braswell from asserting a Fifth Amendment privilege against self-incrimination in response to the subpoena for the corporate records, even though he was named personally as the recipient of the subpoena.[151]

1. The Implied Waiver Aspect of *Braswell*

Braswell did not attempt to challenge the application of the collective entity doctrine to his wholly owned firm.[152] Instead, he argued that his compelled production of the subpoenaed corporate documents "would incriminate him

[150] In 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. The four dissenters in *Braswell* were Justices Kennedy (who wrote the dissenting opinion), Brennan, Marshall, and Scalia—four Justices who did not often see eye-to-eye on issues before the Court. Their joining together in a particularly strong condemnation of Chief Justice Rehnquist's majority opinion, *see* 487 U.S. at 130 (describing the majority's holding as "factually unsound, unnecessary for legitimate regulation, and a violation of the Self-Incrimination Clause of the Fifth Amendment of the Constitution"), demonstrate that the case presented unusually challenging constitutional issues.

[151] The *Braswell* majority opinion seems to recognize some significance in the fact that Braswell was named personally in the grand jury subpoena and required to appear and produce the subpoenaed documents. The majority interpreted the *Fisher* act of production doctrine, see *infra* Part III.B, as requiring that the government make no evidentiary use of the individual's act of production. *See* 487 U.S. at 117-18. *See generally* Cole, *New Protection*, *supra* note 17 (analyzing the current state of the law under the act of production doctrine). The dissenters, in contrast, seized upon this concession as evidence that the majority's decision impinged upon rights protected by the Fifth Amendment privilege against self-incrimination—the only available grounds for limiting admissibility of the individual's act of producing the subpoenaed documents. *See* 487 U.S. at 128. The significance of this difference in view as to the protection afforded by the act of production doctrine and the Court's new, post-*Fisher* interpretation of the Self-Incrimination Clause is discussed in more detail *infra* at Part III.

[152] 487 U.S. at 102 ("[P]etitioner asserts no self-incrimination claim on behalf of the corporations; it is well established that such artificial entities are not protected by the Fifth Amendment.").

individually."[153] Although the focus of the Court's opinion therefore was on whether or not Braswell could assert an individual self-incrimination claim in response to the corporate subpoenas, Chief Justice Rehnquist nonetheless began his analysis with a spirited defense of the collective entity doctrine. He observed at the outset that "[h]ad [Braswell] conducted his business as a sole proprietorship," he would have been able to assert the privilege against self-incrimination in response to the subpoenas for his business records.[154]

2. Law Enforcement Interests Again Trump Protection of Constitutional Rights

Chief Justice Rehnquist went on to defend the collective entity doctrine as having a "lengthy and distinguished pedigree"[155] and to caution that curtailment of the doctrine 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."[156] All of these assertions, including the implicit assumption that a choice of the business form by which one conducts his or her business can effectively waive a constitutional right,[157] are open to challenge.

As the discussion above demonstrates, the 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

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[153] *Id.* at 103. The act of production doctrine upon which Braswell was relying is discussed *infra* at Part III.

[154] *Id.* at 104. Under post-*Fisher* self-incrimination doctrine, the privilege would only apply if Braswell could "show that his act of production [of the subpoenaed business records] would entail testimonial self-incrimination." *See infra* at Part III.B for detailed discussion of the act of production doctrine. *See generally* Cole, *New Protection*, *supra* note 17 (analyzing the current state of the law under the act of production doctrine).

[155] 487 U.S. at 104.

[156] *Id.* at 115 (citation omitted).

[157] *See infra* Part IV.D.

underpinnings, and blatantly result-oriented analysis, largely prompted by the Court's concerns about interfering unduly with law enforcement efforts if it applied a *Boyd*-based, pre-*Fisher* conception of the privilege against self-incrimination to business records.[158] In *Braswell* a narrow, five-four majority of the Court chose to cling to a poorly conceived and now outmoded legal doctrine that unnecessarily compromises the constitutional rights of American business people, and in so doing missed the opportunity to rationalize Fifth Amendment law while at the same time bringing it into step with modern business practice.[159] Understanding the nature and magnitude of this missed opportunity requires examination of three separate areas of law that have been subject to significant new developments over the past quarter of a century: (1) the new theory of Fifth Amendment privilege against self-incrimination law that the Court adopted in its 1976 opinion in *Fisher v. United States* and has since reaffirmed in

[158] Professor Henning has aptly summarized the Court's collective entity cases as follows: "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." Henning, *Corporate Constitutional Rights, supra* note 25, at 861.

[159] Professor Henning views the holding in *Braswell* differently. Focusing on the limitations the *Braswell* court imposed upon any effort by the prosecution to make evidentiary use of an individual custodian's act of production on behalf of the corporation in a subsequent prosecution of the individual custodian, *see* 487 U.S. at 118, Professor Henning concludes that "[b]y providing explicit protection to the individual, the [*Braswell*] Court negated some of the effect of denying the privilege to corporations without having to reconsider the balance it struck in *Hale v. Henkel* in barring a corporation from refusing to produce documents." *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 829. Professor Henning concedes, however, that "[t]he Court did not explain the constitutional basis for this restriction on the government." *Id.* at 829 n.159. While this aspect of the *Braswell* holding may well mitigate the extent to which it denies a constitutional right to targets of criminal prosecution, it also underscores the unprincipled and result-oriented character of the Court's analytical approach in the collective entity cases.

subsequent cases; (2) the major changes that have taken place in the law of organizational criminal liability in the last quarter of the twentieth century; and (3) the rapid proliferation and broad adoption of new forms of business organizations that have transformed the legal landscape of the business sector. Each of those areas of significant developments in the law is discussed below.

III. RECENT DEVELOPMENTS IN FIFTH AMENDMENT JURISPRUDENCE AND THEIR RELEVANCE TO THE COLLECTIVE ENTITY DOCTRINE

A. Nineteenth-Century Antecedents: Foundations of a Flawed Doctrine

As discussed in Part II above,[160] at the time the Supreme Court decided the *Hale v. Henkel*[161] case and first embraced the concept that corporations and natural persons should be treated differently for Fifth Amendment privilege against self-incrimination purposes, applying the then-governing conceptions of the protections provided by the Fifth Amendment privilege to corporations arguably would have posed a serious threat to law enforcement interests. First, and probably most significant to the Court's reasoning in *Hale*, if the *contents*[162] of business records were subject to Fifth Amendment protection and the production of those records therefore could not be compelled by subpoena or other judicial process absent a grant of *transactional*[163] immunity, as the *Boyd* case at the time dictated, then in many cases law enforcement officials would have found it

[160] *See supra* notes 85-99 and accompanying text.

[161] 201 U.S. 43 (1906).

[162] *See infra* Part III.B, discussing *Fisher v. United States*, 425 U.S. 391 (1976), and the distinction between the contents of pre-existing documents and the act of production of those documents.

[163] *See infra* Part III.B.2, discussing *Kastigar v. United States*, 406 U.S. 441 (1972), and the distinction between transactional and use immunity.

difficult to collect evidence necessary to investigate and prosecute corporate crime.[164] This concern appears to have been a motivating factor for the *Hale* decision and has since emerged as the driving force behind the development of the collective entity doctrine,[165] as evidenced by then-Justice Rehnquist's somewhat histrionic assertion in *Braswell* that permitting corporations to assert a privilege against self-incrimination would make effective enforcement of many laws "impossible."[166] While such an assertion may have had some validity at the beginning of the twentieth century when *Hale* was decided, for reasons that are described below it clearly was no longer well-founded at the time *Braswell* was decided. Before exploring why that is the case, it is worthwhile to consider a second, less explicitly recognized concern that may have influenced the Court to deny corporations a right against self-incrimination.

Another then-governing but since-abandoned[167] constitutional law doctrine—the conception that full

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[164] *See supra* notes 55-57 and accompanying text.

[165] *See supra* notes 99-100 and accompanying text. *See also* Scott A. Trainor, Note, *A Comparative Analysis Of A Corporation's Right Against Self-Incrimination*, 18 FORDHAM INT'L L.J. 2139, 2170 & n.247 (1995) ("The Court has also placed increased reliance on the adverse effect that allowing a corporate right against self-incrimination would have on the state's police powers."). *Cf.* Amar & Lettow, *supra* note 34, at 884 (noting that "*Boyd* and its immediate progeny involved corporate crime and breaches of regulatory requirements").

[166] *See* Braswell v. United States, 487 U.S. 99, 115 (1988) ("The greater portion of the evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible."). *Cf. generally* Stuntz, *Substantive Origins*, *supra* note 51, at 421-22 ("Through *Boyd* and subsequent decisions [in the late nineteenth and early twentieth centuries], the Supreme Court adopted a view of the Fourth and Fifth Amendments that might have made a great deal of economic regulation constitutionally impossible at the federal level.").

[167] *See, e.g.*, Amar & Lettow, *supra* note 34, at 858 (noting that in 1972 *Kastigar v. United States*, 406 U.S. 441 (1972), "in effect overruled" the transactional immunity rule of *Counselman v. United States*, 142 U.S. 547

"transactional" immunity was necessary to overcome the protections of the privilege against self-incrimination—may have contributed to the *Hale* Court's refusal to permit corporations to assert a privilege against self-incrimination. A few years before its 1906 decision in *Hale*, the Supreme Court had held in *Counselman v. United States*[168] that only a grant of complete "transactional" immunity was constitutionally sufficient to overcome an assertion of the privilege against self-incrimination and compel a witness to testify.[169] Coupled with the *Boyd* rule that the privilege applied to the contents of pre-existing business records, *Counselman* would have presented a huge obstacle to prosecuting a corporation in any case, such as the antitrust investigation in *Hale*, in which the business records of the target corporation were essential to the prosecution.[170] Such a result obviously militated strongly against applying the Fifth Amendment privilege against self-incrimination to corporations,[171] and makes the Court's ruling in *Hale*, and in

(1892), and "established a new, narrower rule of 'use plus use-fruits immunity'").

[168] 142 U.S. 547 (1892).

[169] *Id.* *See also* Amar & Lettow, *supra* note 34.

[170] *Cf. id.* at 870-71 (positing that the *Counselman* rule of "complete immunity from prosecution for the crime" that was in effect at the time may have influenced the Supreme Court's adoption of the "required records" exception in *Shapiro v. United States*, 335 U.S. 1 (1948)).

[171] Other commentators have recognized this point. *See, e.g.*, Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 43-44 (1997) (stating transaction immunity would produce "windfall protections" if offered as an incentive for greater corporate internal compliance programs (citing *Kastigar*)); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1052 (1995) [hereinafter Stuntz, *Privacy's Problem*] ("Government regulation required lots of information, and *Boyd* came dangerously close to giving regulated actors a blanket entitlement to nondisclosure. It is hard to see how modern health, safety, environmental, or economic regulation would be possible in such a regime."); Stuntz, *Substantive Origins, supra* note 51, at 427-28 (observing that if the *Boyd* conception of the Fifth Amendment privilege against self-incrimination had been applied to corporations "the modern regulatory state would have been dead almost before it was born"); Mitchell Lewis

particular the *Hale* majority's grasping for the visitatorial power rationale,[172] understandable when viewed in historical context.[173]

B. Late Twentieth-Century Developments: Erosion of the Foundations of the Collective Entity Doctrine

In the late twentieth century the Supreme Court redefined the meaning of the Fifth Amendment in two major ways that, taken together, largely obliterated the conceptual foundation upon which the collective entity doctrine had been built. The most fundamental of these was the Court's 1976 bombshell[174] announcement in *Fisher v. United States*[175] of a new conception of the manner in which the Fifth Amendment applies to documents. *Fisher* held 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.[176] Although *Fisher* retained Self-

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Rothman, *Life After* Doe*? Self-Incrimination And Business Documents*, 56 U. CIN. L. REV. 387, 402-03 (1987) (discussing Congress' reaction to the *Counselman* ruling and stating that corporate criminal prosecutions would be hindered due to Fifth Amendment claims).

[172] *See supra* notes 51-57 and accompanying text.

[173] *See infra* Part III.B.2 for further discussion of the influence of *Counselman* on the collective entity doctrine. *See also* Neville S. Hedley, Comment, *Who Will Produce Corporate Documents? Case Comment of* In re *John Doe Grand Jury Investigation*, 30 NEW ENG. L. REV. 141, 142-61 (1995) (discussing the evolution of the collective entity doctrine); Henning, *Finding What Was Lost*, *supra* note 33, at 415-19 (outlining the development of the collective entity doctrine).

[174] For analysis of the significance of the *Fisher* decision see Cole, *New Protection*, *supra* note 17, at 123 n.1 (2002) (describing *Fisher* as a "bombshell" dropped on the Fifth Amendment privilege against self-incrimination and collecting authorities on the significance of the *Fisher* decision).

[175] 425 U.S. 391 (1976).

[176] *See* Cole, *New Protection*, *supra* note 17, at 126. *See also* Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487,

Incrimination Clause protection for the act of production of documents when the act of production has communicative aspects separate and apart from the contents of documents,[177] its practical effect was to make the Self-Incrimination Clause inapplicable to most document productions.[178]

1. The Implications of *Fisher* for the Collective Entity Doctrine

By confining the application of the Fifth Amendment privilege against self-incrimination to the act of production, rather than the contents, of documents subject to subpoena, *Fisher* as a practical matter eliminated the underlying rationale of *Hale v. Henkel* and the collective entity cases—that permitting corporations and other collective entities to assert a privilege against self-incrimination would unduly interfere with law enforcement by making essential documents and business records unavailable to investigators and prosecutors.[179] The significance of this conceptual change becomes apparent when one considers the limited manner in which the Fifth Amendment would now apply to business entities had the Supreme Court not developed the collective entity doctrine to preclude its application to such entities. By definition an inanimate collective entity—

504 (2001) (citing *Fisher* for the proposition that "[u]nder the modern Supreme Court's understanding of the Fifth Amendment, prosecutorial use of documents that were prepared voluntarily does not itself violate the Constitution"); Nagareda, *supra* note 29, at 1590-1603 (criticizing *Fisher's* decoupling the contents of documents from the act of production of documents).

[177] *See Fisher*, 425 U.S. at 410. *See also* Cole, *New Protection*, *supra* note 17, at 146-47; Nagareda, *supra* note 29, at 1590-94.

[178] *See* Cole, *New Protection*, *supra* note 17, at 126-31. *See also* Henning, *Testing the Limits*, *supra* note 35, at 421 (discussing the practical limitations on the application of the act of production doctrine to most document subpoenas).

[179] *Cf.* Alito, *supra* note 49, at 69 (noting that "[t]he net effect of *Fisher* and *Doe* was to destroy part of the foundations of the old rules regarding subpoenas for institutional records, while leaving the remainder of their foundations intact").

whether a corporation, a partnership, a labor union, or a limited liability company—cannot itself provide oral testimony subject to a privilege against self-incrimination claim; the privilege's only potential application to such entities is through the production of documents and records. If the contents of those documents and records are not subject to a Fifth Amendment claim, as has been the case since *Fisher* rewrote the rules by which the Fifth Amendment is applied to documents,[180] then the primary rationale for the collective entity doctrine no longer exists.[181] While the act of production doctrine continues to provide some narrow—and probably largely theoretical[182]—basis for application of the Fifth Amendment to collective entities, it is far from clear that it provides an adequate foundation to support retaining the collective entity doctrine.[183] Moreover, even that limited foundation has been largely blasted away by the Court's other major late twentieth-century reconceptualization of Fifth Amendment privilege against self-incrimination law—*Kastigar v. United States*[184] and the acceptance of use and derivative use immunity as adequate

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[180] Justice Kennedy recognized this point in his dissenting opinion in *Braswell v. United States*, 487 U.S. 99, 125 (1988) (noting that "no one may claim a [Fifth Amendment] privilege with respect to the contents of business records not created by compulsion").

[181] A variation on this argument was presented to the Supreme Court in *Braswell*, of course, and the Court declined to reexamine the continued vitality of the collective entity doctrine in light of *Fisher*. *See Braswell*, 487 U.S. at 113 (concluding that "the lesson of *Fisher* is clear: A custodian may not resist a subpoena for corporate records on Fifth Amendment grounds"). *See also supra* notes 156-160 (summarizing the collective entity analysis in *Braswell*) and *infra* notes 284-307 (arguing that subsequent developments in business entity law justify revisiting *Braswell*'s holding).

[182] *See infra* Part V for further discussion of the application of the act of production doctrine to business entities.

[183] *See generally* Robert Bouvilier Foster, Comment, *The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine*, 80 NW. U. L. REV. 1605, 1635 (1986) (discussing the use of act of production immunity to obtain documents from a collective entity).

[184] 406 U.S. 441 (1972).

to overcome an assertion of the Fifth Amendment privilege against self-incrimination.[185]

2. The Implications of *Kastigar* for the Collective Entity Doctrine

When *Hale v. Henkel* was decided and throughout the subsequent decades in which the collective entity doctrine was developing,[186] the grant of immunity necessary to overcome an assertion of the Fifth Amendment privilege against self-incrimination was full immunity from prosecution for any of the matters about which testimony was provided—full "transactional" or "true" immunity.[187] That conception of the protection against self-incrimination provided by the Fifth Amendment had been firmly ensconced in constitutional law since the Supreme Court's 1892 decision in *Counselman v. Hitchcock*.[188] *Counselman* held that an immunity statute that provided only "use" immunity was insufficient to overcome a Fifth Amendment self-incrimination claim and that only a statute "afford[ing] an absolute immunity against future prosecution for the offence to which the question relates" would pass constitutional muster.[189] For almost eighty years after the *Counselman*

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[185] As one of the most thoughtful commentators on Fifth Amendment self-incrimination law has observed, "[W]hile legal rules are often complicated, the application of the Fifth Amendment and use immunity to the act of producing documents . . . is particularly esoteric." Mosteller, *supra* note 176, at 489. The discussion of use immunity that follows was not intended to prove this point, although that may well be its unintended consequence.

[186] *See supra* Parts II.A and B.

[187] *See* H. Richard Uviller, Foreword: *Fisher Goes on the Quintessential Fishing Expedition and Hubbell is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311, 327 (2001) (discussing the distinction between "old-fashioned 'transactional,' or 'true,' immunity" and "so-called 'use immunity'").

[188] 142 U.S. 547 (1892).

[189] *Id.* at 585-86. *See generally* Amar & Lettow, *supra* note 34, at 875-76 (describing the "extraordinarily sweeping form of immunity" required

decision, federal[190] immunity statutes provided for full, transactional immunity.[191]

This transactional immunity requirement was an implicit foundational underpinning of the collective entity doctrine during its development in the early- and mid-twentieth century.[192] So long as a grant of full, transactional immunity would be required in the federal criminal justice system[193] to overcome an assertion of privilege by a business entity, the Court was forced to find ways[194] to avoid permitting business entities to assert the privilege in order to avoid stymieing their successful prosecution in federal courts. If documents or records essential to a successful prosecution were in the custody and control of a business entity, and if that business entity could assert a Fifth Amendment privilege with respect to those documents or records, and if a grant of transactional immunity to the entity was the only means of overcoming its assertion of privilege, then as a practical matter it would be impossible to prosecute the entity.[195] Under that legal

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by *Counselman*); Kenneth J. Melilli, *Act of Production Immunity*, 52 OHIO ST. L.J. 223, 225-26 (1991) (analyzing *Counselman*).

[190] *Counselman*'s holding applied only to federal prosecutions, of course, because at that time the Fifth Amendment had yet to be applied to the states through incorporation via the Fourteenth Amendment. *See generally* Amar & Lettow, *supra* note 34, at 876 (discussing incorporation).

[191] Melilli, *supra* note 189, at 225 n.20 (collecting authorities).

[192] *See supra* notes 163-167.

[193] *See supra* note 55 for a discussion of *Counselman's* application to federal cases prior to the Court's "incorporation" of the Fifth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

[194] *See supra* Part II.B for a critique of the ways in which the Court strained to find rationales to perpetuate and expand the collective entity doctrine.

[195] *Cf.* Goldsmith & King, *supra* note 171, at 43-44 (stating that offering transactional immunity as an incentive for greater corporate internal compliance programs would produce "windfall protections" (citing Kastigar v. United States, 406 U.S. 441, 448-53 (1972)); Rothman, *supra* note 171, at 402-03 (discussing Congress' reaction to the *Counselman* ruling and stating corporate criminal prosecutions would be hindered due to Fifth Amendment claims); Stuntz, *Privacy's Problem*, *supra* note 171, at 1052 ("Government regulation required lots of information, and Boyd came dangerously close to giving regulated actors a blanket entitlement to

regime, development of the collective entity was a practical necessity, no matter how unprincipled it may have been as a matter of constitutional theory.[196]

The Supreme Court's 1972 decision in *Kastigar v. United States* removed this practical necessity. *Kastigar* held that a grant of use and derivative use immunity[197] was sufficient to overcome an assertion of the Fifth Amendment privilege against self-incrimination—full transactional immunity was no longer required.[198] In the enormously important area of immunity law, *Kastigar* was every bit as revolutionary a holding as *Fisher*. It fundamentally changed the options available to the government when confronted with an assertion of a Fifth Amendment privilege against self-incrimination. More important for purposes of the collective

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nondisclosure. It is hard to see how modern health, safety, environmental, or economic regulation would be possible in such a regime."); Stuntz, *Substantive Origins*, *supra* note 51, at 427-28 (observing that if the Boyd conception of the Fifth Amendment privilege against self-incrimination had been applied to corporations, "the modern regulatory state would have been dead almost before it was born").

[196] *See supra* notes 161-167 and accompanying text. *See also* Foster, *supra* note 183, at 1633 (observing that "[t]he law enforcement rationale is inherently suspect" because "[c]onsistently acceding to the needs of law enforcement would destroy the privilege against self-incrimination entirely").

[197] Some courts and commentators prefer the term "use plus use-fruits immunity" immunity because it is "more graphic" and therefore arguably better provides a shorthand explanation of the scope of the immunity. *See* Amar & Lettow, *supra* note 34, at 877-78 n.82 (describing this distinction and collecting authorities).

[198] *Kastigar*, 406 U.S. at 453-55. For a detailed analysis of immunity law and the Supreme Court's *Counselman* and *Kastigar* decisions, see Melilli, *supra* note 189, at 223-34. In endorsing use and derivative use immunity as sufficient to overcome an assertion of the privilege against self-incrimination, the *Kastigar* Court went so far as to say that the transactional immunity required by *Counselman* grants a witness "considerably broader protection than does the Fifth Amendment privilege." 406 U.S. at 453. This observation is telling because it explains why the Court, in developing and expanding the collective entity doctrine, was forced to find ways to circumvent *Counselman*'s broad conception of the protection provided by the Fifth Amendment privilege against self-incrimination.

entity doctrine, it makes it possible for investigators and prosecutors to compel a business entity to produce documents and records without granting full transactional immunity to the entity, thus leaving open the option of subsequently prosecuting that entity.[199]

3. The Combined Effect of *Fisher* and *Kastigar*

With respect to the conceptual underpinnings of the collective entity doctrine, the combined effect of the *Fisher* and *Kastigar* holdings is dramatic.[200] Put simply, if the contents of preexisting entity documents are never privileged, and if the entity's act of production can be immunized without necessarily precluding a subsequent prosecution of the entity using the contents of those documents, then the underlying concerns that motivated the Court in its pre-*Braswell* collective entity cases have been substantially ameliorated, and the doctrine is therefore ripe for re-examination.

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[199] The following issues attendant to such prosecutions remain unsettled even after *Fisher* and *Kastigar*: (1) when can an act of production privilege be asserted as to documents and records such that use and derivative use immunity must be granted to overcome that assertion of privilege; and (2) once use and derivative use immunity has been granted for the act of producing documents and records, what derivative use can be made of those documents and records and their contents in a subsequent prosecution. *See infra* Part V for a discussion of these two extraordinarily difficult issues in light of the Supreme Court's decision in *United States v. Hubbell*, 530 U.S. 27 (2000).

[200] For an analysis of the relationship between the act of production doctrine and grants of immunity from prosecution, see Melilli, *supra* note 189, at 265 (concluding that "[t]he intersection of the doctrines of use/derivative use immunity and the act-of-production privilege produces an uneasy synthesis, especially in defining the scope of derivative use"). It should be noted that Professor Melilli's article was written before the Supreme Court addressed the derivative use issue in *United States v. Hubbell*, 530 U.S. 27 (2000), discussed *infra* Part III.C.

C. The Collective Entity Doctrine in the Twenty-First Century: An Unsupported and Unnecessary Edifice

As two influential commentators observed some ten years ago, "[t]he Supreme Court's interpretation of the Fifth Amendment is currently in a jumbled transitional phase."[201] If anything, the intervening years have added to the jumbled and confused state of the law in this area.[202] The Court's 2000 decision in *United States v. Hubbell*[203] raises as many questions as it answers,[204] and the rapid proliferation of new business entities in the last ten years,[205] combined with the explosion of corporate criminal prosecutions,[206] has both raised the stakes and muddied the waters in this already complex and confused area of law.

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[201] Amar & Lettow, *supra* note 34, at 858 (proposing a new paradigm for application of the Fifth Amendment in which testimony can always be compelled from a witness but the fruits of compelled testimony cannot be used to prosecute the witness). Amar and Lettow also note that with respect to the difficult question of what it means to be a "witness" against oneself for Fifth Amendment purposes, "the courts have been all over the map." *Id.* at 883.

[202] *See generally* Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 244 (2004) (observing that "the theoretical foundations of the Fifth Amendment are conventionally thought to be in disarray); Mosteller, *supra* note 176, at 503 (describing the *Fisher* act of production doctrine as "arcane and complicated"). *See also* United States v. Hubbell, 167 F.3d 552, 570 (D.C. Cir. 1999) (describing the application of the Fifth Amendment to documentary evidence as an "admittedly abstract and under-determined area of the law").

[203] 530 U.S. 27 (2000).

[204] *See generally* Cole, *New Protection*, *supra* note 17. *See also* Allen & Mace, *supra* note 202 (analyzing the ambiguities created by *Hubbell* and predicting how act of production law may evolve in the future); Mosteller, *supra* note 176, at 519-47 (analyzing the implications of *Hubbell*); Uviller, *supra* note 187 (criticizing the holding of *Hubbell*).

[205] *See generally* Robert W. Hamilton, *Closely-Held Business Symposium: The Uniform Limited Partnership Act: Entity Proliferation*, 37 SUFFOLK U. L. REV. 859 (2004).

[206] *See infra* part IV.C.

1. The *Hubbell* Decision Complicates Matters Further

Prior to the Supreme Court's decision in *Hubbell*, one could have argued with some force and conviction—as did the Office of Independent Counsel and the Department of Justice in that case[207]—that the Fifth Amendment no longer applied to voluntarily created "ordinary business records." After *Hubbell*, the law is more complicated because the act of production doctrine as applied by the Supreme Court in that case is broader and encompasses more testimonial components than most had previously believed.[208] Although

[207] *See* Brief for OIC at 33-34, United States v. Hubbell, 530 U.S. 27 (2000) (No. 99-166) (arguing that because the subpoena in Hubbell, like the subpoena in *Fisher*, "called only for specified categories of ordinary business records, the decision in *Fisher* calls for the same conclusion here: The subpoena compelled respondent to make no communication that rises to the level of testimony within the protection of the Fifth Amendment"). The Department of Justice brief argued that:

> *Fisher's* 'foregone conclusion' test focuses on broader categories of documents, and not on the individual documents that may fall within the specifications of a subpoena. As applied to an individual who is or was engaged in business, the test would therefore defeat any effort to invoke the Fifth Amendment to resist compliance with a subpoena for ordinary business records, such as ledgers, bank records, invoices, receipts, and bills. Such documents are kept by every business, and conceding their existence therefore "adds little or nothing to the sum total of the Government's information."

Brief for DOJ at 29-30, United States v. Hubbell, 530 U.S. 27 (2000) (No. 99-166) (internal footnote and citation omitted). *See also* Mosteller, *supra* note 176, at 511 (noting that *Hubbell* rejected the government's argument that it "needed only to know that typically businessmen have documents in certain broad classes, such as general business and tax records").

[208] *See* Cole, *New Protection*, *supra* note 17, at 190-91 (analyzing the effect of *Hubbell*). *See also* Allen & Mace, *supra* note 202, at 248 ("In *Hubbell*, by inflating derivative use immunity to previously unseen proportions, the Court expanded the scope of protection."); Mosteller, *supra* note 176, at 492-93 ("[T]he Hubbell case may have completely reformulated the law of subpoenaing and using items from targets."); Uviller, *supra* note 187, at 312 ("What drew my attention to the *Hubbell*

the level of influence *Hubbell* will ultimately prove to have on Fifth Amendment privilege against self-incrimination law is an important and fascinating inquiry, it is not the focus of this Article.[209] Instead, this Article focuses on the collective entity doctrine, and *Hubbell*'s influence on this more discrete area of Fifth Amendment law is considerably easier to analyze and predict. In this regard, it is important to recognize two critical aspects of the factual situation presented to the Court in *Hubbell*.[210]

2. The Limits of *Hubbell's* Effect on the Collective Entity Doctrine

First, Webster Hubbell was operating his consulting business as a sole proprietorship,[211] and therefore the collective entity doctrine had no direct application to his case. Second, *Hubbell* was an exceptional case even by white collar criminal prosecution standards because in pursuing

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decision was the fact that my clear understanding of the *Fisher* doctrine is exactly what was rejected by the Supreme Court, and by the nearly unanimous vote of 8-1."). Professor Mosteller provides an insightful analysis of the tactical missteps and questionable prosecutorial judgments by the Office of Independent Counsel in the *Hubbell* case which resulted in a Supreme Court decision that "badly damaged the value to prosecutors of use immunity for documentary subpoenas, likely altered the environment in the lower courts as to documentary subpoenas for years to come, and prompted the Court to condemn these inquisitorial excesses through language that broadly paints the Fifth Amendment protection . . . [and] did substantial immediate and long-term damage to prosecutorial interests." Mosteller, *supra* note 176, at 503.

[209] For this author's answer to that question, see Cole, *New Protection*, *supra* note 17, at 191. For the answers of other commentators, see Allen & Mace, *supra* note 202; Mosteller, *supra* note 176, at 519-47; Uviller, *supra* note 187.

[210] It is also important to recognize that the Supreme Court's cases in this area "repeatedly have included statements that categorical answers are inappropriate," *see* Mosteller, *supra* note 176, at 489, and therefore it is difficult to predict their application to subsequent cases involving different fact patterns.

[211] *See generally* United States v. Hubbell, 167 F.3d 552, 563 (1999), *aff'd* 530 U.S. 27 (2000) (describing Hubbell's production of responsive documents pursuant to a grant of use and derivative use immunity).

Mr. Hubbell the Office of Independent Counsel had embarked upon a "fishing expedition"[212] to try to confirm a suspicion about Mr. Hubbell in what many believe was a politically motivated investigation.[213] In more typical business crime investigations[214] the prosecutors are likely to have more information about specific criminal conduct that they have reason to believe has occurred[215] and are likely to have access to a good deal of information about that conduct (from business associates, employees, counterparties to transactions—some of whom typically will have been immunized and provided extensive grand jury testimony—as well as public records and filings, etc.), which will make it

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[212] *See* United States v. Hubbell, 530 U.S. at 42 (2000) ("What the District Court characterized as a 'fishing expedition' did produce a fish, but not the one that the Independent Counsel expected to hook."). *See also* United States v. Hubbell, 11 F. Supp. 2d 25, 37 (D.D.C. 1998) ("The subpoena served on Mr. Hubbell was the quintessential fishing expedition."), *rev'd, vacated by* 167 F.3d 552 (1999), *aff'd* 530 U.S. 27 (2000).

[213] *See, e.g.*, Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639 (1999). *Cf.* Mosteller, *supra* note 176, at 492 (discussing Starr's "OIC's recklessness in its myopic pursuit of the President and First Lady and the negative impact on long-term prosecutorial interests"). Professor Mosteller aptly summarized the Independent Counsel's actions as follows: "Without particular knowledge of any crime, the OIC had subpoenaed from Hubbell virtually all of his business related documents under a grant of use immunity. The OIC sorted through those documents, discovered a crime, and then prosecuted Hubbell based on evidence it obtained from the documents secured through a grant of immunity." Mosteller, *supra* note 176, at 523.

[214] For a more detailed analysis of the unusual circumstances of the OIC's actions in the *Hubbell* case, *see* Mosteller, *supra* note 176, at 498 & n.49 (2001) (discussing the "unprecedented" nature of the OIC's decision to prosecute Hubbell after granting him immunity at the outset of its investigation").

[215] And, in fact, prosecutors will seldom have either the inclination or the resources to engage in "fishing expeditions" without substantial evidence of specific criminal conduct. *Cf. id.* at 501 ("Hubbell was being prosecuted for crimes of which the government had no knowledge or even concrete suspicions until Hubbell himself provided his personal business records.").

much easier for them to demonstrate the level of knowledge required after *Hubbell* (whatever that may be) to overcome the *Fisher* "foregone conclusion" test.[216] For these reasons, *Hubbell* is not likely to have a significant impact on most cases involving prosecution of a collective business entity.

Because Webster Hubbell was operating his business as a sole proprietorship, the Supreme Court could decide the *Hubbell* case without revisiting its closely divided decision in *Braswell v. United States*[217] and could thereby continue to uphold the collective entity doctrine. This is unfortunate, because had the Court revisited the collective entity doctrine in the context of its *Hubbell* decision, it might have recognized the extent to which the always weak conceptual underpinnings of *Braswell* had been further eroded since that case was decided. The five-Justice *Braswell* majority[218] was concerned that permitting custodians of corporate records to assert a Fifth Amendment privilege "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."[219] For the reasons that are discussed above,[220] this concern is no longer well-founded and clearly does not rise to the level of importance that the overheated rhetoric of Chief Justice Rehnquist's majority opinion in *Braswell* suggests. The consequences of the *Braswell* majority's stubborn adherence to the collective

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[216] *See id.* at 498 (noting that "if enough information existed to establish that existence and possession were 'foregone conclusions,' Hubbell's Fifth Amendment claim would have been eliminated") (citations omitted).

[217] 487 U.S. 99 (1988).

[218] *Braswell* was a five-four decision that did not break down between the usual "conservative" and "liberal" wings of the Court with respect to members of the majority (Rehnquist, White, Blackmun, Stevens, and O'Connor) and the dissenters (Brennan, Marshall, Scalia, and Kennedy). The unusual ideological bedfellows in those two groups may be an indicator of the difficulty of the issues before the Court and the resistance of those issues to easy resolution along typical ideological lines.

[219] 487 U.S. at 115 (citation reference omitted).

[220] *See supra* Part III.

entity doctrine,[221] in contrast, have increased dramatically since that case was decided due to recent developments in the law of business entity criminal liability. Those developments, and their relevance to the collective entity doctrine, are discussed in the next Part of this Article.

IV. RECENT DEVELOPMENTS IN THE LAW OF BUSINESS ENTITY CRIMINAL LIABILITY AND THEIR RELEVANCE TO THE COLLECTIVE ENTITY DOCTRINE

A. Historical Background: Early Twentieth-Century Developments

The criminal law applicable to business entities has changed dramatically since the collective entity doctrine was first announced by the Supreme Court. The extent of this change is apparent when one considers that at the beginning of the twentieth century the United States Supreme Court actually gave serious consideration to the issue of whether a corporation could be held criminally liable for the acts of its employees.[222] In *New York Central & Hudson River Railroad*

[221] *See Braswell*, 487 U.S. at 109-10 (acknowledging that "the holding in *Fisher*—later reaffirmed in *Doe*—embarked upon a new course of Fifth Amendment analysis," but declining to hold that "it rendered the collective entity rule obsolete" or to recognize "a claim of privilege by the corporation—which of course possesses no such privilege").

[222] *See* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481 (1909). Professor Baker has written that:

> corporations can do none of the actions required of a virtuous citizen because, as abstract entities, they lack the mind and will necessary to make the voluntary choices which distinguish virtue from vice and criminal conduct from noncriminal. For that reason, corporations could not be guilty of crimes at common law. When the Supreme Court departed from the common law rule in *New York Central & Hudson River Railroad Company v. United States*, it upheld a misdemeanor conviction of a corporation and allowed punishment by a fine, which was long assumed to be the only way courts could punish a corporation.

Company v. United States, the Court acknowledged that the old common law rule, reported in Blackstone's Commentaries, was that a corporation could not commit a crime, but then went on to hold that corporations can be held criminally liable based on the acts of their agents.[223]

The Court's decision in *New York Central*, coupled with the development of the collective entity doctrine, paved the way for a steady expansion of business entity criminal liability throughout the remainder of the twentieth century.[224] Application of the collective entity doctrine to corporations subsequent to the *New York Central* case is particularly ironic in light of the fact that "[o]ne premise of *New York Central* was that the law should not treat corporations differently from individuals."[225] With respect to

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John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 318 (2004) (internal citations omitted).

[223] *New York Central*, 212 U.S. at 494. Professor Henning has noted that the agency theory employed by the Court in *New York Central* is consistent with the Fifth Amendment agency analysis of *Hale v. Henkel* because "[a]ccording a separate existence to the corporation for proof of every element of a crime could raise the organization to the level of a 'person' under the Self-Incrimination Clause, thereby foiling the careful balancing the Court undertook in *Hale v. Henkel*." *See* Henning, *Corporate Constitutional Rights*, *supra* note 25, at 824.

[224] *See, e.g.*, Gilbert Geis & Joseph F.C. DiMento, *Empirical Evidence and the Legal Doctrine of Corporate Criminal Liability*, 29 AM. J. CRIM. L. 341 (2002) (discussing the *New York Central* decision and its role in the creation of a federal body of law on the subject of corporate criminal liability); Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285, 289-91 (1985) (discussing the *New York Central* decision and its progeny in American law). *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996). For a succinct analysis of the historical development of English and American doctrines of corporate criminal liability, see Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393 (1982).

[225] Baker, *supra* note 222, at 318 (citing *New York Central*, 212 U.S. at 496-97). With regard to the issue of whether corporations should be treated differently from individuals for purposes of federal criminal law enforcement, it is noteworthy that the Department of Justice's official

the Fifth Amendment protection against self-incrimination, however, the Supreme Court did make such a distinction in *New York Central* when it let stand its holding three years earlier in *Hale v. Henkel* establishing the collective entity doctrine.[226] One might have expected the Court to reexamine its then three-year-old decision to deprive corporations of a Fifth Amendment privilege against self-incrimination after the *New York Central* decision provided for greatly expanded criminal liability of corporations, but it did not do so. For reasons that are discussed below, the implications of that doctrinal disconnect continued to grow throughout the remainder of the twentieth century.[227]

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policy on prosecution of organizations (in both the Clinton and subsequent Bush administrations) begins with the statement that "[C]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment." *See id.* at 319 n.65 (citing the "Holder Memorandum" of the Clinton/Reno Justice Department and the "Thompson Memorandum" of the Bush/Ashcroft Justice Department). Professor Baker points out that "the fact that corporations cannot be jailed means that some differences in punishment are necessary," but questions whether that necessity justifies "treat[ing] corporations so differently from individuals" under the sentencing guidelines. *Id.* at 323-24.

[226] *See supra* notes 37-73 (discussing *Hale v. Henkel* and the genesis of the collective entity doctrine). Professor Henning argues that *New York Central*'s adoption of respondeat superior principles for corporate criminal liability was "consistent with *Hale v. Henkel*'s treatment of corporate criminal rights because that theory gave the Court flexibility to determine the scope of protection for corporate defendants under the Constitution without simply equating corporations to individuals." *See* Henning, *Corporate Constitutional Rights, supra* note 25, at 797. As noted above, *see supra*, note 25, this Article takes a different analytical approach, and rejects the premise that it is appropriate for the Supreme Court to define the scope of Bill of Rights protections based upon law enforcement interests, even when the person seeking their protection is a corporation or other business entity.

[227] Professor Baker has summarized the early twentieth-century developments as follows:

> The regulatory and the police powers came together in, and expanded from, *Champion v. Ames (Lottery Case)* in 1903. Six years later in *New York Central & Hudson River Railroad Co. v. United States*, the Supreme Court departed from the common law view to permit prosecutions of

B. Mid-Century Developments: Dramatically Expanded Corporate Criminal Liability

During the same time period in which the collective entity doctrine was being refined and applied to new kinds of entities by the Supreme Court,[228] developments in the substantive criminal law were making it easier for prosecutors to impose criminal liability on business entities.[229] By the middle of the twentieth century, corporations and other business entities were being held criminally liable even for unauthorized actions by corporate employees and agents, so long as those actions in some way benefited the corporation.[230] All the courts required was some incidental benefit to the corporation; liability could be imposed on the corporation when agents were acting

> corporations. Taken together, these decisions established the basis for the federal government's regulation and criminal punishment of corporations. Due to the constitutional structure of federalism and the continuing influence of *mens rea* in criminal law, it was many decades before the full potential of exerting regulatory control over private corporations would be realized under the rubric of "white collar crime."

Baker, *supra* note 222, at 341 (citations omitted).

[228] *See supra* Part II.A.2.

[229] *See generally* Baker, *supra* note 222, at 313 (observing that "Congress's habit of drafting broad statutes, leaving much interpretation to the Justice Department and federal courts has given federal criminal law an uncertain and expansive character") (citation omitted); Brickey, *supra* note 224 (summarizing history of American and British corporate criminal liability); Lederman, *supra* note 224, at 288-93 (describing the Anglo-American approach); Khanna, *supra* note 224.

[230] *See* Std. Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962) (corporate criminal liability). *Cf.* SEC v. H.L. Rodger & Bro., 444 F.2d 1077 (7th Cir. 1971) (imputing the knowledge of an agent acting within the scope of his authority to the partnership). *See generally* Lederman, *supra* note 224, at 289-91 (collecting cases and observing that "the imputation of criminal liability on the corporation has reached its extreme in American law").

primarily to benefit themselves and only secondarily to benefit the corporation.[231]

The courts soon expanded these principles by holding that corporations should be held criminally liable even for unauthorized acts of agents and employees that were contrary to express company policy or even contrary to specific instructions.[232] All that the courts required was some showing that the agent or employee had been acting within the scope of his or her authority.[233] Thus by mid-century two separate judicial trends—expansion of the collective entity doctrine[234] and acceptance of agency theories of entity

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[231] *See* Steere Tank Lines, Inc. v. United States, 330 F.2d 719 (5th Cir. 1964). *See generally* Lederman, *supra* note 224, at 290 n.17 (collecting cases and observing that "[c]ourts also have found the corporate body liable under a respondeat superior theory even though the corporation's agents were acquitted of the same offense").

[232] The leading case is United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See also* United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979). *Cf.* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989). *See generally* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121-64 (1991); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1231 (1979). *See generally* Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605 (1995).

[233] *See, e.g.*, United States v. Hilton Hotels Corp., 467 F.2d at 1004; United States v. Basic Constr. Co., 711 F.2d 570, 572-73 (4th Cir. 1983) (holding a corporation criminally liable for the act of an agent even though the act was contrary to stated corporate policy). While "[t]his type of vicarious corporate criminal liability for the acts of agents has been seen as inconsistent with traditional criminal culpability requirements by a number of commentators," it is now well established. Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 407 n.3 (1994) (collecting authorities). *See also* Barry W. Rashkover, *Reforming Corporations Through Prosecution: Perspectives From An SEC Enforcement Lawyer*, 89 CORNELL L. REV. 535, 546-47 (2004) (making reference to "a century of case law upholding corporate criminal liability").

[234] *See supra* Part II.B (discussing development and expansion of the collective entity doctrine).

criminal liability—had aligned, with the result that business entities faced much greater exposure to criminal prosecution than had been the case when the collective entity doctrine was first announced by the Supreme Court at the beginning of the century.[235]

C. Turn of the Century Developments: Regulation of Business Entities by Criminal Prosecution[236]

As the twentieth century drew to a close it became progressively easier to use criminal prosecution as a means of regulating the conduct of business entities. As Professor John S. Baker, Jr. has noted, "Congress has used the

[235] *See generally* Baker, *supra* note 222, at 341-43 (describing the origins of "white collar crime," criticizing the analysis employed by Professor Edwin Sutherland in inventing the term, and concluding that "[m]any federal offenses prosecuted under the label of 'white collar crime' are regulatory or public welfare offenses, rather than true crimes.") (citations omitted).

[236] Commentators began to focus on the concept of regulation of corporate entities by criminal prosecution in the late twentieth century. *See, e.g., Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction*, 92 HARV. L. REV. 1231 (1979); Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1 (1984) (discussing how criminal law is used to achieve an acceptable level of corporate control). Professor Roberta Karmel used the term "Regulation by Prosecution" in the title of her 1982 book, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VERSUS CORPORATE AMERICA (1982). The author is using Professor Karmel's apt terminology to describe the broader trend of aggressive policing of corporate conduct through criminal prosecution that has continued, and gained considerable momentum, after the publication of Professor Karmel's book in 1982. Others have also explored this issue, from a variety of perspectives. *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 238 (1991) (noting that regulators "get a bigger bang for the buck" when they initiate criminal prosecutions); Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287 (1990). For a recent, strong critique of the trend toward regulation of business entities by criminal prosecution, see Baker, *supra* note 222. For a defense of the practice, see Rashkover, *supra* note 233.

Commerce Clause to vastly increase the number of federal crimes."[237] The proliferation of new federal crimes has been accompanied by sustained efforts to apply the many new substantive criminal law provisions to corporations and other collective business entities. In the late twentieth century, prosecutors also sought to develop innovative new theories of criminal liability that would support prosecution of business entities in situations where application of traditional theories would not.[238] An example is the "collective knowledge" theory by which the actions and knowledge of a number of employees is aggregated and imputed to the corporation to support criminal liability.[239] Other examples of legal developments in the late twentieth century that expanded business entity criminal liability include the "public welfare doctrine" of strict criminal

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[237] *See* Baker, *supra* note 222, at 311 (citation omitted). Professor Baker also notes that "merely invoking interstate commerce is not necessarily constitutionally sufficient to justify every federal crime," because "[o]therwise the federal government would be exercising a general police power, which the Constitution withholds." *Id.* at 312 (citations omitted). *Cf.* Frank O. Bowman, III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 382 (2004) (noting that "[t]here are literally hundreds of federal economic crimes").

[238] *See generally* Baker, *supra* note 222; Bucy, *supra* note 232; Rashkover, *supra* note 233.

[239] *See, e.g.*, United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987). *See also* United States v. One Parcel of Land, 965 F.2d 311, 317 (7th Cir. 1992) (interpreting *Bank of New England* as holding that only knowledge of corporate agents acting within the scope of their employment will support "collective intent" conviction of the corporation). *See generally* V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999). *See also* Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 24 ARIZ. L. REV. 743, 757-64 (1992) (discussing the concept of corporate culpability and concluding that the *Bank of New England* "collective knowledge" approach "only makes sense if employees are viewed as aspects of a corporate entity which is distinct from each of them, and the crime is understood not as the act of an individual, but as the act of the corporate entity as such").

liability for corporations that commit public welfare offenses[240] and the corporate sentencing provisions of the Federal Sentencing Guidelines for Organizations,[241] which took effect in 1991.[242]

These new theories of business entity criminal liability laid the groundwork for a late twentieth century "golden age" of prosecutorial activism[243] as federal prosecutors confronted

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[240] *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619, 623 n.7 (1st Cir. 1974) (explaining imposition of strict criminal liability under the public welfare doctrine). *See also* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419-22 (1993) (describing the policy reasons supporting strict liability for public welfare offenses.) Professor Baker has stated that "[m]any federal offenses prosecuted under the label of 'white-collar crime' are regulatory or public welfare offenses, rather than true crimes." Baker, *supra* note 222, at 343.

[241] *See* U.S. SENTENCING GUIDELINES MANUAL § 8. For a critique of the organizational guidelines' "carrot and stick" approach to fostering corporate compliance with criminal law, see Baker, *supra* note 222, at 316-36. For an analysis of "The Impact of the Guidelines on Corporate Criminal Liability," see Gruner, *supra* note 233, at 428 ("The guidelines will influence the activities of prosecutors, potential corporate defendants, and individual corporate employees. They will affect the number, character, and resolution of corporate criminal prosecutions by increasing the attractiveness of each prosecution to authorities and the powers of federal prosecutors in resolving corporate charges.").

[242] For a summary of the history of the organizational sentencing guidelines, see Ilene H. Nagel & Winthrop M. Swensen, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205 (1993). For an analysis of some of the current issues under the guidelines, see Julie R. O'Sullivan, *Some Thoughts on Proposed Revisions to the Organizational Guidelines*, 1 OHIO ST. J. CRIM. L. 487 (2004). Section 905 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), directed the United States Sentencing Commission to review and amend the federal sentencing guidelines and related policy statements to implement the corporate compliance and accountability provisions of that Act. For an analysis of the criminal provisions of the Sarbanes-Oxley Act and the amendments to the organizational sentencing guidelines that were required by the Act, see Bowman, *supra* note 237.

[243] *See generally* Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash With Donaldson Over Turf, the Choice of Civil*

two distinct "waves" of major corporate scandals—the Wall Street insider trading securities fraud cases of the 1980s[244] and the savings and loan scandal cases of the late 1980s and early 1990s.[245] Each of these waves of financial scandals resulted in significant changes to the legal regime governing the prosecution of business entity crimes.

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or Criminal Actions, and the Tough Tactic of Coerced Cooperation, 1 OHIO ST. J. CRIM. L. 443 (2004) [hereinafter Oesterle, *Early Observations*]. A classic example of late twentieth century prosecutorial activism is then-United States Attorney for the Southern District of New York Rudolf Giuliani and his tactic of having Wall Street traders at Kidder Peabody arrested and led off the trading floor in handcuffs (even though the charges against some of those arrested were later dropped). *See* Michael Powell, *Giuliani, Forever With His Dukes and Dander Up*, WASH. POST, June 30, 1999, at C1 ("If he lodged some scanty charges, walked a few stockbrokers out of their offices in handcuffs only to have judges throw out the charges, hey . . . as he explained, sometimes a prosecutor's just got to scare people."). *See also* Kyle J. Kaiser, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment*, 88 IOWA L. REV. 1207 n.2 (2003) (describing Giuliani incident as the "first print usage" of the term "perp walk").

[244] *See generally* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 471 n.1 (2003) (collecting authorities). *See also* Lawrence A. Cunningham, *Sharing Accounting's Burden: Business Lawyers in Enron's Dark Shadows*, 57 BUS. LAW. 1421, 1423 (2002) (describing "the economy-wide leveraged buyout (LBO) boom-to-bust cycle attributed to junk bond financing purveyed by Michael Milken and Drexel Burnham Lambert in the 1980s that bankrupted in the 1990s numerous companies with values in the tens of billions of dollars") (citations omitted).

[245] *See generally* Cole, *supra* note 244, at 471 n.2 (collecting authorities). *See also* Cunningham, *supra* note 244, at 1424 (describing "the industry-wide S&L crisis (scapegoated or epitomized by Charles Keating and Lincoln Savings & Loan), with origins in the 1970s that spanned the late 1980s and early 1990s, due to poor legislative controls, weak regulatory oversight, short-sighted industry credit decisions, and aggressive accounting practices throughout the industry.") (citations omitted). *Cf.* John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 278 (2004) (observing that "Enron and the related scandals of 2001 and 2002 are probably most comparable to the Savings and Loan (S&L) crisis of the late 1980s").

The Wall Street insider trading scandals resulted in both new legislation and high profile criminal prosecutions. Ivan Boesky, Dennis Levine, and Michael Milken not only were criminally prosecuted; they became household names and nationally known symbols of corporate greed and excess.[246] Congress responded to the revelations of a "Den of Thieves"[247] on Wall Street by adopting the Insider Trading and Securities Fraud Enforcement Act of 1988[248] and the Securities Law Enforcement Remedies Act of 1990.[249] Coupled with the criminal provisions of the securities laws applicable to "willful" violations,[250] these new legislative enactments increased both the civil and criminal sanctions available to federal prosecutors in corporate malfeasance cases.

The savings and loan scandals had a similar effect on the legal regime governing corporate criminal prosecutions. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), which included "a dramatic increase in criminal penalties for violations of the bank fraud statute."[251] A new cast of characters,

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[246] *See generally* JAMES B. STEWART, DEN OF THIEVES (1991); DAVID A. VISE & STEVE COLL, EAGLE ON THE STREET (1991).

[247] *See* STEWART, *supra* note 246 (discussing insider trading scandals of the 1980s).

[248] Pub. L. No. 100-704, 102 Stat. 4677 (1988); *see generally* Stuart J. Kaswell, *An Insider's View of the Insider Trading and Securities Fraud Enforcement Act of 1988*, 45 BUS. LAW. 145 (1989).

[249] Pub. L. No. 101-429, 104 Stat. 931 (1990); *see generally* Ralph C. Ferrara et. al., *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33 (1991); Allan A. Martin et al., *SEC Enforcement Powers and Remedies Are Greatly Expanded*, 19 SEC. REG. L.J. 19 (1991).

[250] *See generally* DONNA M. NAGY ET AL., SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS, 834-35 (West 2003) (describing the criminal provisions of the federal securities laws, Section 24 of the Securities Act of 1933 and Section 32(a) of the Securities Exchange Act of 1934); *see also* Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of the Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025 (2001).

[251] Heidi Huntington Mayor et al., Note, *Financial Institutions Fraud*, 31 AM. CRIM. L. REV. 647 (1994).

including Charles Keating and Lincoln Savings, Neil Bush and Silverado Savings, and many others from that industry, came to epitomize corporate greed and excess for the American public.[252] Perhaps more important, the huge taxpayer losses that accompanied the savings and loan debacle served to legitimize—and to build widespread public support for—the use of aggressive criminal prosecutions to punish corporate chicanery.[253]

As this brief summary suggests, these two late-twentieth-century "waves" of financial scandals enhanced the ability of federal prosecutors to use criminal prosecutions as a means of regulating and punishing business entity malfeasance. They combined congressional enactment of new statutes providing for criminal prosecution with successful "test cases" in which the new legal tools could be employed and sharpened through the judicial process. In addition, from a broader public policy perspective, the cumulative effect of

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[252] *See generally* MICHAEL BINSTEIN & CHARLES BOWDEN, TRUST ME: CHARLES KEATING AND THE MISSING BILLIONS (1993); KATHLEEN DAY, S&L HELL: THE PEOPLE AND THE POLITICS BEHIND THE $1 TRILLION SAVINGS AND LOAN SCANDAL (1993); MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY (1990); STEPHEN PIZZO ET AL., INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS (1989). *See also* STEVEN WILMSEN, SILVERADO: NEIL BUSH AND THE SAVINGS AND LOAN SCANDAL (1991).

[253] Professor Baker has also recognized the importance of public support to the development of the law in this area:

> Although the Supreme Court allowed the prosecution of corporations long ago, it is understandable that relatively few such prosecutions occurred. Corporations were not subject to criminal prosecution under common law. As nonhuman persons, they were incapable of possessing *mens rea*, the essential element of a guilty mind for all common law crimes. In order to prosecute corporations as criminals, it was necessary either to eliminate formally the *mens rea* requirement, or to permit proving it fictionally by imputing the *mens rea* of some individual to the corporation. Still, as long as public support was lacking, prosecution of what has since been labeled "white-collar crime" was not very likely.

Baker, *supra* note 222, at 341 n.195 (internal citations omitted).

those two periods of highly publicized corporate scandals was a new acceptance of aggressive criminal prosecutions of business entities. As a result, their impact on the world of business entity criminal prosecutions was substantial.

As significant as the insider trading and savings and loan scandal "waves" were, however, they were mere precursors to the tsunami that was to follow with the failure of Enron, WorldCom, and a number of other major corporations at the beginning of the new century.[254] The impact of those business failures, on both the investing public and its political representatives, was of a magnitude not seen since the great stock market crash of 1929.[255] Congress responded with wide-ranging corporate reform legislation—the Sarbanes-Oxley Act of 2002[256]—that increased the criminal sanctions against corporations,[257] and federal prosecutors

[254] *See generally*, Geoffrey P. Miller, *Catastrophic Financial Failures: Enron and More*, 89 CORNELL L. REV. 423 (2004); Cunningham, *supra* note 244; Coffee, *supra* note 245. *See also* Abbe David Lowell and Kathryn C. Arnold, *Corporate Crime After 2000: A New Challenge or Déjà Vu?*, 40 AM. CRIM. L. REV. 219 (2004) (describing financial scandals and predicting that "2002 and 2003 will likely be high-water marks for such cases"). For a particularly strident critique of the economic, legal, and regulatory conditions that led to the early twenty-first century financial scandals, see William S. Lerach, *Plundering America: How American Investors Got Taken for Trillions by Corporate Insiders—The Rise of the New Corporate Kleptocracy*, 8 STANFORD J. LAW, BUS. & FIN. 69 (2002).

[255] *See* Oesterle, *supra* note 244, at 445 ("We have seen business scandals before; they seem to come in waves. The last one was the insider-trading scandal of the 1980s involving Dennis Levine, Michael Milken, Ivan Boesky and Martin Siegel. But the size of the 2002 debacle dwarfs many early ones, including the Boesky ring."); Carrie Johnson & Ben White, *No Safety at the Top for Corporate Leaders*, WASH. POST, July 9, 2004, at A1 (quoting Professor Charles Geisst as stating that "[t]his was the greatest period of malfeasance since the 1930s, and the only reason we didn't have indictments in the '30s was we didn't have the laws yet.").

[256] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 765 (2002).

[257] *See* Rashkover, *supra* note 233, at 548-49 ("The Act reflects congressional approval for criminal prosecution of corporations by increasing, from $2.5 million to $25 million, the criminal fines available under Exchange Act Section 32(a) applicable to any 'person other than a

followed suit with a host of aggressive criminal prosecutions aimed at both business entities and the executives who managed those entities.[258]

D. The New Century and the New Reality: Organizational Criminal Liability is the Rule, Not the Exception, and the Stakes Are Life and Death for Business Entities

By the turn of the century, large scale corporate prosecutions had become commonplace, but with a new twist—criminal prosecution could literally kill a business entity criminal defendant.[259] Although the Arthur Andersen case may be the most recent, and in some ways the most dramatic, example of this phenomenon, the trend began well before the Andersen prosecution. Drexel Burnham Lambert failed to survive the collateral consequences of the Michael Milken-related criminal prosecutions in the 1980s,[260] and many believe that E.F. Hutton's 1984 multi-count guilty plea in the check-kiting prosecution so weakened the firm that it ultimately led to its demise as an independent brokerage house.[261]

Rightly or wrongly, federal prosecutors now treat both failed corporations and the executives who ran them into the

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natural person.'") (internal citation omitted). *See also* Bowman, *supra* note 237, at 402-11 (describing "The Details of the Criminal Provisions of the Sarbanes-Oxley Act").

[258] *See, e.g.*, Oesterle, *supra* note 244, at 444 n.3 (listing recent corporate indictments, a number of which have subsequently resulted in convictions or guilty pleas); Johnson & White, *supra* note 255 (providing a "prosecutorial scorecard" of post-Enron indictments and convictions). *See also* Lowell & Arnold, *supra* note 254.

[259] *See generally* Oesterle, *supra* note 244, at 473-74 (discussing recent cases).

[260] *See id.* at 473 n.137 (describing the Drexel prosecution and subsequent demise of the firm and collecting relevant authorities).

[261] *See* R. William Ide III and Douglas H. Yarn, *Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust*, 56 VAND. L. REV. 1113, 1151 n.170 (2003).

ground much like they have traditionally treated organized crime figures, employing "perp walks"[262] of indicted corporate executives, draconian charges that are calculated to put the entity out of business, and similar aggressive prosecutorial tactics.[263] The consequences of these aggressive prosecutorial actions are particularly severe for business entities that rely upon their reputation to survive: even if they ultimately prevail on the merits at trial, it is usually too late and the business is ruined.[264]

Clearly by the turn of the century the stakes could not be any higher in cases of business entity criminal liability—a criminal prosecution may truly constitute a "life or death" crisis for the entity and a "life or liberty" personal crisis for its managers.[265] Moreover, as Professor Oesterle has astutely

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[262] *See supra* note 243 for discussion of then United States Attorney Rudolf Giuliani's innovative and controversial use of "perp walks" to disgrace suspects in the insider trading prosecutions of the 1980s.

[263] *See generally* Baker, *supra* note 222, at 348 (noting that "[t]he 'war' against corporate crime came at the same time that the chief of the Justice Department's Criminal Division, a former organized crime prosecutor, was also directing the Justice Department's 'war on terrorism'" and that "little if any concern has been publicly expressed about possible abuses of the civil liberties of corporations and their executives"). *See also* Bowman, supra note 237, at 399-400 (describing July 2002 congressional testimony of Assistant Attorney General Michael Chertoff, head of the Justice Department's Criminal Division, regarding the Bush Administration's approach to corporate misbehavior).

[264] *See* Oesterle, *supra* note 244, at 471-72 (discussing the "many applications of this basic principle of the prosecutor's raw power over defendants whose stock-in-trade is their business reputation").

[265] As Professor Baker has aptly and succinctly described the current system of corporate criminal law enforcement: "[A] federal raid can drive down the stock price of a public company, a federal indictment can bankrupt a company, and a federal conviction can put the CEO in jail." Baker, *supra* note 222, at 355. For a late twentieth-century economic analysis of the effect of corporate criminal prosecutions on business entities, which concluded that "efforts to substantially increase criminal penalties for corporate fraud, as reflected in the positions of the U.S. Sentencing Commission and the U.S. Department of Justice, are misguided," see Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 797 (1993). Professor Henning has identified another potential for

observed, the recent raft of high-profile corporate prosecutions "involve significant elevations of prosecutorial power without a corresponding increase in systems of prosecutorial accountability; the effectiveness of existing systems of control will be tested."[266] One of those existing systems of control—the Fifth Amendment privilege against self-incrimination as presently interpreted under the collective entity doctrine—clearly fails the test, if the test is administered fairly and with no preconceived bias as to what the outcome should be.[267] This trend toward "significant elevations of prosecutorial power" therefore is both the single most important issue for our criminal justice system that has arisen from the latest wave of corporate prosecutions and a signal reason why the new legal environment necessitates a reexamination of the collective entity doctrine.

E. Implications of this New Business Crime Environment for the Collective Entity Doctrine

Now that prosecutors have readily available both the legal tools to put business entities out of business and widespread public support for aggressive use of those tools, one can reasonably expect that criminal prosecutions of business entities will continue to flourish.[268] In this environment it is no longer necessary—or acceptable—for

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abuse of prosecutorial power over corporations—asset forfeiture that results in the corporation being deprived of assistance of counsel. "The government's power to seize assets before trial raises the troubling possibility that it may seek to use that power to prevent a corporation from defending itself because the business does not have the right to appointed counsel under the Sixth Amendment." Henning, *Corporate Constitutional Rights*, *supra* note 25, at 883. Professor Henning argues that the potential for abuse is serious enough that "at least in that narrow circumstance, a court should recognize the corporation's right to invoke the Sixth Amendment and have counsel appointed for it." *See id.*

[266] Oesterle, *supra* note 244, at 445.

[267] *See supra* Part II (discussing the dubious origins and unprincipled expansion of the collective entity doctrine).

[268] *Cf.* Lowell & Arnold, *supra* note 254 (predicting that "2002 and 2003 will likely be high-water marks" of corporate criminal prosecutions).

courts to employ the collective entity doctrine to empower prosecutors to fight business and economic crime.[269] Prosecutors no longer need the help that the collective entity doctrine provides,[270] if they ever truly did. It is also not acceptable to deprive the owners of business entities, whether a wholly owned corporation as in *Braswell*[271] or a huge partnership as in the *Arthur Andersen* prosecution,[272] of

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[269] *But see Braswell*, 487 U.S. at 115 ("We note further that recognizing 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.").

[270] *See supra* Part III.B.3 (describing the effect of recent legal developments on the law enforcement rationale for the collective entity doctrine). *But see* Oesterle, *supra* note 244, at 446-47 (describing the difficulties prosecutors face in bringing complex business crime cases).

[271] 487 U.S. at 99.

[272] Not all prosecutors agree with the decision of the Department of Justice to put the Arthur Andersen firm out of business. New York Attorney General Eliot Spitzer, for instance, stated:

> The consequence of indicting Arthur Andersen was we went from five major accounting firms to four, and 60,000 people were thrown out of work. The indictment was predicated on destruction-of-evidence charges. That destruction of evidence was criminal. However, there was no corporate-wide policy to destroy evidence. Therefore, I felt that if you're going to indict the entire company and destroy the company, do it for a policy that went to the core of the business.

Oesterle, *supra* note 244, at 453 n.38. In a March 13, 2002 letter to Assistant Attorney General Michael Chertoff, then the head of the Department of Justice Criminal Division, outside counsel to the Arthur Andersen accounting firm argued against a prosecutorial charging decision that would effectively put the firm out of business: "The Department proposes an action that could destroy the firm, taking the livelihoods of thousands of innocent Andersen employees and retirees; that will substantially reduce any possibility that claimants against the firm will obtain a recovery; and that will greatly diminish the chance for necessary reform of the accounting profession." (Copy of letter on file with author.) Those arguments were rejected by Mr. Chertoff and the Department of Justice, and the Andersen firm was indicted and convicted, and soon thereafter failed (as the government surely knew would be the case,

a constitutional right affecting their potential loss of livelihood (*Andersen*) or liberty (*Braswell*) based upon an unquestioning, knee-jerk application of the collective entity doctrine.[273]

As discussed above, the three great waves of financial scandals that took place over the past twenty-odd years have resulted in significant changes to the legal environment in which business entity crime is now prosecuted. The world of business crime prosecution today is radically different even from the legal environment that existed in 1988 when the Supreme Court decided the *Braswell* case and by a narrow five-four majority reaffirmed the collective entity doctrine (and it is so different as to be almost unrecognizable compared to the law of business entity criminal liability that existed when the Court first adopted the collective entity doctrine).[274] This new business crime legal environment, coupled with the radically different post-*Fisher* conception of the Fifth Amendment and post-*Kastigar* conception of immunity from prosecution that are described in Part III above, together mandate a new look at the collective entity doctrine.[275]

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because a criminal conviction automatically disqualified the firm from practicing public accounting. *See* Securities and Exchange Commission Rule 102(e)(2), 17 C.F.R. 201.102(e)(2) (2002)). History may well judge the *Andersen* prosecution, with its enormous collateral consequences and impact on the lives of innocent persons, to have been the ultimate "sideshow prosecution." *See generally* Oesterle, *supra* note 244.

[273] For an example of such an approach, see the *Braswell* majority's treatment of the petitioner's argument that the collective entity doctrine should not apply to custodians of corporate records after *Fisher* "embarked upon a new course of Fifth Amendment analysis." *Braswell*, 487 U.S. at 109. *Cf. supra* Part III (discussing the impact of *Fisher* on the collective entity doctrine). The *Braswell* majority rejected this argument because "[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." 487 U.S. at 110.

[274] *See supra* Part IV.A.

[275] Although at first blush the suggestion that business entities should be able to assert a Fifth Amendment privilege against self-incrimination may appear bold or even revolutionary, particularly with respect to large

While these two radically changed legal regimes—the law governing business crime prosecutions and Fifth Amendment law applicable to production of documents and immunity from prosecution—alone are sufficient to necessitate a reexamination of the collective entity doctrine, there is another compelling reason to do so. That reason is the proliferation of new kinds of limited liability business entities that has taken place in the last decade and the manner in which the collective entity doctrine, as presently defined, applies to those entities. Those developments are discussed in the next Part of this Article.

V. RECENT DEVELOPMENTS IN THE LAW OF BUSINESS ENTITY FORMATION AND THEIR RELEVANCE TO THE COLLECTIVE ENTITY DOCTRINE

A final important reason to reexamine the collective entity doctrine is the rise of new forms of business entities that further complicate application of the doctrine and blur the traditional distinctions between individual and group business activities. The world of business entity formation and operation has changed dramatically in the almost two decades that have passed since the Supreme Court decided *Braswell v. United States*.[276] As two commentators described

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corporations, other commentators have advanced even more radical changes to the current legal regime. Professor Baker, for example, argues that corporations should not be subject to criminal prosecution at all, because they lack the ability to possess the requisite *mens rea* for criminal culpability. *See* Baker, *supra* note 222, at 332-36. For a response to Professor Baker, see Rashkover, *supra* note 233, at 535-36. Professor Oesterle has suggested taking a "fresh look" at relying more heavily on civil remedies rather than "sideshow" criminal prosecutions which often fail to address the core business entity wrongdoing that first precipitated prosecutorial attention. *See* Oesterle, *supra* note 244, at 458-59. Others have questioned the wisdom of the current regime of corporate criminal liability imposition. *See, e.g.*, Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477, 1477-79 (1996).

[276] 487 U.S. 99 (1988).

the business entity legal landscape in 1997, "[a]n LLC bandwagon has rolled across the country."[277] This LLC bandwagon, growing ever more crowded and steadily gaining momentum, has since rolled over and largely demolished many of the traditional distinctions between incorporated and unincorporated business entities. The demolition of those more-than-a-century-old distinctions has important implications for many areas of law,[278] not the least of which is the collective entity doctrine and its continued viability in this new business entity environment. To examine the effect

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[277] William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629, 633 (1997). Two other influential commentators have used another colorful term to describe the rapid growth of limited liability business entities, referring to it as "the jungle of newly created unincorporated business forms that have appeared in the 1990s." Robert W. Hamilton & Larry E. Ribstein, *Limited Liability and the Real World*, 54 WASH. & LEE L. REV. 687, (1997).

[278] *See generally* Bratton & McCahery, *supra* note 277, at 634 (observing that "[t]he LLC brings us to the final stage in the evolutionary abandonment of the historical association of, on the one hand, limited liability, corporate governance norms, and two-tier tax treatment, and, on the other hand, unlimited liability, partnership governance norms, and one-tier tax treatment"). *See also* Committee on Bankruptcy and Corporate Reorganization of The Association of the Bar of the City of New York, *New Developments in Structured Finance*, 56 BUS. LAW. 95 (2000) (discussing issues arising out of the emergence since 1998 of a new trend toward the use of LLCs as the "special purpose vehicles" or "SPVs" in structured finance transactions); Jesse J. Richardson, Jr. & L. Leon Geyer, *Ten Limitations To Ponder On Farm Limited Liability Companies*, 4 DRAKE J. AGRIC. L. 197 (1999) (discussing limited liability companies as a choice of entity for family owned farms); Donald A. Frederick, *The Impact of LLCs on Cooperatives: Bane, Boon or Non-Event?*, 13 J. COOPERATIVES 42 (1998) (arguing the limited liability company as an alternative membership business organization has at least the potential to erode the popularity of agricultural cooperatives); Laurence Keiser, *"Hot Issues" in Estate Planning Part II: Asset Protection Vehicles, Valuation Discounts, Family Limited Partnerships and Limited Liability Companies*, 267 PRAC. L. INST. 875 (1998) (discussing choice of entity, reporting rules, how fair market value may be determined, and court decisions affecting family limited partnerships).

of the limited liability entity revolution[279] on the collective entity doctrine, it makes sense to begin the analysis with the Supreme Court's most recent reaffirmation of the doctrine in *Braswell*,[280] decided in 1988—a time when only two states had LLC statutes and the limited liability entity revolution had only just begun.[281]

A. Deficiencies of the Collective Entity Doctrine as Currently Defined by the Supreme Court and Applied to New Forms of Business Entities

The core assumption of *Braswell* was that a business owner's decision to operate his business "through the corporate form"[282] justified treating him differently than the owner of a sole proprietorship for purposes of the constitutional privilege against self-incrimination.[283] This corporate-sole proprietorship dichotomy may have made some sense when *Braswell* was decided,[284] as most businesses were operated in one of those two forms at that time,

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[279] *See supra* note 1 (collecting authorities describing "the limited liability revolution").

[280] 487 U.S. at 99.

[281] *See* Bratton & McCahery, *supra* note 277, at 633 ("Since 1988, when two states provided for the new business form, forty-six additional states have enacted enabling statutes.") (internal citation omitted). All states now have statutes providing for the formation of LLCs. *See supra* note 4.

[282] 487 U.S. at 104.

[283] *See* 487 U.S. at 104 ("Had petitioner conducted his business as a sole proprietorship, [*United States v.*] *Doe*[, 465 U.S. 605 (1984),] would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination."). *See also* 487 U.S. at 130 ("Braswell was the sole stockholder of the corporation and ran it himself. Perhaps that is why the Court suggests he waived his Fifth Amendment self-incrimination rights by using the corporate form.") (Kennedy, J., dissenting).

[284] *Cf.* 487 U.S. at 112 n.5 ("A sole proprietor does not hold records in a representative capacity. Thus the absence of any discussion of the collective entity rule [in *United States v. Doe*, 465 U.S. 605 (1984),] can in no way be thought a suggestion that the status of the holder of the records is irrelevant.").

although even then the issue of what to do about partnerships confused the issue.[285] It makes less sense today, however, when the availability and widespread use of the LLC form, and particularly the single-member LLC, has blurred the "representative capacity" distinction[286] between sole proprietorships and the corporate form.

The *Braswell* Court made quite clear that its decision turned on the fact that "petitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."[287] The reasons supporting this differential treatment are less clear, however, particularly if one parses carefully the portions of the *Braswell* opinion that discuss the collective entity doctrine. The *Braswell* Court acknowledged that the original rationale for the collective entity doctrine, the visitatorial powers rationale,[288] had long since been "jettisoned" by the Court and therefore no longer served to support the collective entity doctrine.[289] The Court also acknowledged that the other historical rationale for the collective entity doctrine, the "group interests" rationale,[290] no longer provided adequate support for the doctrine, particularly when "reduced to a simple proposition based

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[285] *See* Bellis v. United States, 417 U.S. 85, 101 (1974) (acknowledging the difficulties of applying the collective entity doctrine to a small partnership). *See also In re* Grand Jury Subpoena Duces Tecum Dated November 13, 1984 (Doe), 605 F. Supp. 174 (E.D.N.Y. 1985) (refusing to apply the collective entity doctrine to a husband and wife partnership with no employees); Slone-Stiver v. Broock (*In re* Tower Metal Alloy Co.), 200 B.R. 598 (Bankr. S.D. Ohio 1996) (allowing husband and wife to invoke their Fifth Amendment privilege for papers created under an entity name where the nature of the entity was in question but determined by the court not to be a collective entity).

[286] *See* 417 U.S. at 97-101.

[287] 487 U.S. at 104.

[288] *See supra* Parts II.A and B (discussing the visitatorial powers rationale for the collective entity doctrine).

[289] 487 U.S. at 108.

[290] *See supra* notes 101-15 (discussing the "group interests" rationale articulated by the Court in *United States v. White*, 322 U.S. 694 (1944)).

solely upon the size of the organization."[291] In essence, the Court acknowledged that neither of the two primary rationales for the collective entity doctrine throughout the many decades of its development retains any vitality today. What, then, did the Court identify as the supporting rationale for the doctrine in the modern era?

The *Braswell* decision purports to review the development of the collective entity doctrine up to that point in time and identify a new rationale for the doctrine—an "agency rationale" based upon the "representative capacity" in which the holder of entity documents and records produces those records in response to governmental process.[292] Under this "agency rationale"[293] rubric a "custodian's act of production is not deemed a personal act"[294] because the custodian of business entity records, unlike a sole proprietor, "holds . . . documents in a representative rather than a personal capacity."[295] This new rationale is unsatisfying, however, because when carefully examined it fails to answer the critical question of why a collective entity should not be permitted to assert a fundamental[296] constitutional right—the privilege against self-incrimination—when the previous rationales for depriving collective entities of that right have been found inadequate to support the doctrine's current application. Instead, *Braswell* says only that the custodian of the collective entity's documents and records should be

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[291] 487 U.S. at 108 (citing Bellis v. United States, 417 U.S. 85, 100 (1974)).

[292] *See id.* at 109-10 (rejecting the argument that the holdings of *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), "rendered the collective entity doctrine obsolete"). *See also supra* notes 180-86 (discussing the author's view of how *Fisher* in fact did affect the continued viability of the collective entity doctrine).

[293] *See* 487 U.S. at 109.

[294] *Id.* at 110.

[295] *Id.*

[296] The Fifth Amendment privilege against self-incrimination is a "fundamental" constitutional right both in the sense that it is a right that is textually recognized in the Constitution and has been "incorporated" and held applicable to the states; *see* Malloy v. Hogan, 378 U.S. 1 (1964).

denied that right because "[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."[297]

The Court's reasoning on this crucial issue is both circular and tautological; it fails to provide a satisfactory rationale for withholding the privilege from corporations and other collective entities.[298] As in the Court's earlier collective entity cases, discussed in Part II *supra*, the *Braswell* Court's real reason for clinging to the collective entity doctrine appears to have been the concern that abandoning the doctrine "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious

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[297] *See* 487 U.S. at 110. *See also id.* at 111 n.5 ("A sole proprietor does not hold records in a representative capacity. Thus, the absence [in *Doe*] of any discussion of the collective entity rule can in no way be thought a suggestion that the status of the holder of the records is irrelevant.").

[298] Justice Kennedy's *Braswell* dissent does not question the continued vitality of the collective entity doctrine, but rather takes issue with the majority's application of the doctrine to deprive the owner of a wholly owned corporation of his Fifth Amendment privilege against self-incrimination. Justice Kennedy does, however, go farther than the *Braswell* majority in articulating a rationale for the continued vitality of the doctrine, stating that the doctrine "illuminated" a critical foundation of the Fifth Amendment—"that it is an explicit right of a natural person, protecting the realm of human thought and expression." *See* 487 U.S. at 119. Commentators since the *Braswell* decision have expanded upon this conceptual approach to the protection provided by the Self-Incrimination Clause. *See* Nagareda, *supra* note 29; Amar & Lettow, *supra* note 34; Stuntz, *Privacy's Problem*, *supra* note 171; Henning, *Testing the Limits*, *supra* note 35. While this conceptual approach explains the importance of the Fifth Amendment privilege against self-incrimination to natural persons, it does not explain why business entities that can also be subject to criminal prosecution, see Part IV *supra*, and who otherwise enjoy the privileges and immunities of a legal "person" under the Constitution should be denied this particular constitutional right. *Cf.* Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1452 n.103 (1992) (listing the evolution of Supreme Court decisions that expanded the definition of "person" to include corporations under the Fourteenth Amendment Equal Protection Clause and the Due Process Clause for property rights).

problems confronting law enforcement authorities."[299] No matter how serious the problem of white collar crime may be, however, the assertion that abandoning the collective entity doctrine would have a significant detrimental impact on governmental efforts to combat the problem no longer is well-founded, as demonstrated by the analysis in Part III.B of this Article.[300]

These deficiencies in the collective entity doctrine as redefined by the *Braswell* Court have taken on new importance as a result of the "explosion" since the 1990s[301] in the formation of new limited liability entities that are potentially subject to the doctrine. As one commentator has described the situation, "[t]he rate of growth of LLCs is

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[299] *See* 487 U.S. at 115.

[300] *See supra* notes 268-75.

[301] *See* David L. Cohen, *Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?*, 51 OKLA. L. REV. 427, 429 (1998) ("The past seven years have seen an explosion in the kinds of new entities with limited liability."); Thomas E. Rutledge, *supra* note 3, at 1414 (making reference to "the Limited Liability Company (LLC) explosion in the 1990s"); Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 881 (1995) ("The ongoing revolution in small business structure is driven by the belief that limited liability should be available to businesses without a tax penalty."). As a leading commentator has explained, it was the Internal Revenue Service classification of a Wyoming LLC as a partnership for tax purposes that ignited the LLC explosion of the 1990s. *See* Larry E Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995) [hereinafter Ribstein, *Emergence of the LLC*] ("The first LLC statute was adopted in Wyoming in 1977. The LLC was not truly born, however, until 1988 when it was 'spanked' by *Revenue Ruling* 88-76. With this now famous ruling, the IRS classified a Wyoming LLC as a partnership for tax purposes. The importance of *Revenue Ruling* 88-76 to the development of LLCs is illustrated by a few statistics. By 1988 [the year the Supreme Court decided *Braswell*], eleven years after the enactment of the Wyoming Statute, only one other state (Florida) had enacted an LLC statute and there were only twenty-six LLCs in Wyoming. By the end of 1994, forty-six additional statutes had been passed and tens of thousands of LLCs had been formed.") (citations omitted).

phenomenal"[302] and "[t]he percentage increase in nationwide LLC filings is incredible."[303] Some of this rapid growth is attributable to the proliferation of single-member LLCs, as small business owners who otherwise would have operated their business as a sole proprietorship have recognized that forming an LLC is a simpler and less costly alternative to incorporation that provides the same limited liability protection without adverse tax consequences.[304] Those business owners (with the assistance of their counsel in most instances, one hopes) are forming LLCs in order to obtain these benefits. They may be doing so without realizing—and without their counsel realizing—that under present law one unintended adverse consequence may be the loss of their Fifth Amendment privilege against self-incrimination for production of their business records and documents.[305]

B. Special Problems Arising Out of Application of the Collective Entity Doctrine as Currently Defined by the Supreme Court to Single-Member Limited Liability Companies

While the narrow holding of *Braswell* applies only to corporations with a sole shareholder, and perhaps not even

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[302] Cohen, *supra* note 301, at 448.

[303] *Id.* at 448 n.113.

[304] *See* GUIDE TO LIMITED LIABILITY COMPANIES 2 (CCH 2001) (noting that "currently only Massachusetts still requires that an LLC have two or more members"). *See generally* Ribstein, *Emergence of the LLC*, *supra* note 301, at 7 n.41 (noting that in 1995 approximately one-third of states permitted formation of single-member LLC's); Larry E. Ribstein, *The New Choice of Entity for Entrepreneurs*, 26 CAP. U. L. REV. 325, 340 (1997) (describing the special legal issues presented by the formation of a single-member LLC); Debra Cohen-Whelan, *Individual Responsibility in the Wake of Limited Liability*, 32 U.S.F. L. REV. 335, 340-45 (1998) (describing the incentives for forming an LLC).

[305] *Cf.* Mitchell F. Crusto, *Extending the Veil to Solo Entrepreneurs: A Limited Liability Sole Proprietorship Act (LLSP)*, 2001 COLUM. BUS. L. REV. 381, 389 (2001) (noting that a sole proprietorship is entitled to Fifth Amendment protection regarding its business records, although the contents of those records are not protected).

to all such corporations,[306] the reasoning of *Braswell* is also potentially applicable to single-member LLCs, and some courts have already applied it to such LLCs.[307] Whether or not *Braswell*'s reasoning should be applied to a single-member LLC is by no means an open-and-shut case, however. Even if one accepts the *Braswell* Court's distinction between a sole proprietorship and a wholly owned corporation,[308] the same distinction may not be present if the comparison is between a sole proprietorship and a single-member LLC.

In particular, the "agency rationale" and "representative capacity" reasoning relied upon in *Braswell* as reasons to retain the collective entity doctrine and apply it to a wholly owned corporation do not apply with the same force to a single-member LLC (or for that matter, to member-managed LLCs, which are discussed in the next section of this Article). The legal structure and operating arrangements of a single-member LLC differ in important ways from those of a traditional business corporation like the one before the Court in *Braswell*.[309] Perhaps most important, the owners of an LLC are permitted by law to organize and operate the business entity in a very informal manner, without adherence to "corporate formalities" and in most jurisdictions without keeping any particular records.[310] Even closely held

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[306] *See Braswell*, 487 U.S. 99, 118-19 n.11 ("We leave open the question whether the agency rationale 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.").

[307] *See* SEC v. Dunlap, 253 F.3d 768 (4th Cir. 2001).

[308] *See Braswell*, 487 U.S. at 111 n.5 (discussing the sole proprietorship-corporation distinction).

[309] *See id.* at 101 (discussing the legal structure and operating arrangements of the wholly owned corporations that Randy Braswell had formed).

[310] *See* Cohen, *supra* note 301, at 456-57 (discussing the differences between corporations and LLCs with respect to judicial "veil piercing"). *See also* Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 89-91 (2001) (discussing

corporations, in contrast, are required to comply with a variety of state-law incorporation, corporate governance, and record-keeping requirements.[311] Unlike corporations, which under state law must have officers, LLCs are not required to have officers[312] and under the laws of most states the management rights of an LLC are vested in the members unless the LLC's operating agreement provides otherwise.[313]

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the differences between LLCs and corporations); Richardson & Geyer, *supra* note 275 (discussing the differences between LLCs and corporations in the agricultural law context); Cohen-Whelan, *supra* note 304, at 341-44 (discussing the flexibility of LLC operating agreements and less governmental regulation in comparison to corporations).

[311] *See generally Managing Closely Held Corporations: A Legal Guidebook (Report by the Committee on Corporate Laws*, ABA Section of Business Law), 58 BUS. LAW. 1077 (2003); Sela E. Stroud, *Director and Officer Liability to Non-Shareholders*, 64 ALA. LAW. 316, 316-17 (2003) (stating that even without piercing the corporate veil, directors and officers of a closely held corporation may still be held individually liable if they participate in unscrupulous behavior); G. Michael Epperson & Joan M. Canny, *The Capital Shareholder's Ultimate Calamity: Pierced Corporate Veils and Shareholder Liability in the District of Columbia, Maryland, and Virginia*, 37 CATH. U. L. REV. 605, 612-14 & 630-31 (1988) (discussing piercing the corporate veil generally and treatment in Virginia specifically); Cohen, *supra* note 301, at 455-58 (discussing piercing the LLC veil).

[312] The *Braswell* Court noted that in compliance with Mississippi law, the corporations in that case had both directors and officers other than Randy Braswell, although the other officers and directors were Braswell's wife and mother, and neither had "any authority over the business affairs of either corporation." *See* 487 U.S. at 101.

[313] *See* GUIDE TO LIMITED LIABILITY COMPANIES, *supra* note 304, noting that this default provision is present in almost all state statutes and that "LLCs do not generally have the same requirement" for officers that corporations have by state statutes). *See generally* JAMES D. COX ET AL., 1 CORPORATIONS §§ 1.11-1.12 (Aspen 2002) (discussing LLC management); J. William Callison, *Venture Capital and Corporate Governance: Evolving the Limited Liability Company to Finance the Entrepreneurial Business*, 26 IOWA J. CORP. L. 97, 106-08 (2000) (discussing forms of LLC management); Carol J. Miller et al., *Limited Liability Companies Before And After The January 1997 IRS "Check-The-Box" Regulations: Choice Of Entity And Taxation Considerations*, 25 N. KY. L. REV. 585, 588-93 (1998) (discussing the management structure of LLCs).

These differences between a corporation and a single-member LLC are important because they go to the heart of the Supreme Court's reasoning in *Braswell*—owners of single-member LLCs (or, for that matter, most member-managed LLCs) do not necessarily view themselves as, or conduct their business as if they were, agents of a separate corporate entity. Unlike an individual who forms a corporation and must recruit directors, appoint officers, keep minutes of board meetings, and file tax returns for the corporate entity,[314] the owner of a single-member LLC may well view the entity as an extension of himself—in other words, much more like a sole proprietorship than a corporation. These comparisons all point to the conclusion that in many ways a single-member LLC, as a practical matter, is more like a sole proprietorship than it is like a corporation.[315] For this reason, at least in the case of a single-member LLC, it is far from clear that the "agency rationale" relied upon in *Braswell* justifies depriving the LLC owner of his or her Fifth Amendment privilege.[316] A

[314] *Braswell*, 487 U.S. at 101 ("Both companies are active corporations, maintaining their current status with the State of Mississippi, filing corporate tax returns, and keeping current corporate books and records. In compliance with Mississippi law, both corporations have three directors, petitioner, his wife, and his mother.").

[315] As one commentator has observed, "[i]f there is only one LLC member, the company is effectively a sole proprietorship." Cohen-Whelan, *supra* note 304, at 349. Moreover, IRS "check-the-box" regulations treat a single-member LLC as a sole proprietorship. *See* Jeffrey A. Maine, *Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporters' Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223, 239 n.81 (2000) (noting that in response to the I.R.S. regulations a number of states amended their LLC statutes to allow single-member LLCs).

[316] The *Braswell* Court acknowledged some limitation to the "agency rationale," albeit one based upon the act of production doctrine, in a footnote at the end of the majority opinion: "We leave open the question whether the agency rationale 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." 487 U.S. at 118-19 n.11.

mechanical application of the collective entity doctrine of the type employed by the majority in *Braswell* would lead to that result, however, because an LLC is no less a separate "collective entity" than the wholly owned corporation in *Braswell*, and therefore, under the reasoning of that decision, should also be "treated differently from individuals"[317] for purposes of the Fifth Amendment privilege against self-incrimination.

C. Special Problems Arising Out of Application of the Collective Entity Doctrine as Currently Defined by the Supreme Court to Member-Managed Limited Liability Companies (and to General Partnerships)

Under present law one of the most significant legal distinctions among the many forms of LLCs is the distinction between "member-managed" LLCs and "manager-managed" LLCs.[318] This distinction is also relevant to an analysis of the application of the collective entity doctrine to limited liability companies, particularly under the "agency rationale" employed by the Supreme Court in its *Bellis* and *Braswell* decisions.[319] Non-manager members of LLCs who knowingly and intentionally contract away their rights to participate in the management and operation of the LLC are consenting to an agency relationship in which the manager-members represent their interests, much like the shareholders in a widely held corporation. Treating those LLC members differently from the members of a member-managed LLC,

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[317] *Braswell*, 487 U.S. at 104.

[318] *See* HUMPHREYS, *supra* note 10, at § 4.02 (stating the flexible management of the LLC is a significant advantage); Ribstein, *supra* note 10, at 323-24 (stating that a major difference between LLCs and LLPs is the flexibility in LLC management structure); Scott R. Anderson, *The Illinois Limited Liability Company: A Flexible Alternative for Business*, 25 LOY. U. CHI. L.J. 55, 91-93 (1993) (discussing the importance of the different management structures of LLCs).

[319] *See supra* notes 140-45 (discussing *Bellis*'s "held by a member of the firm in a representative capacity" analysis) and notes 294-302 (discussing *Braswell*'s "agency rationale" and "representative capacity" analysis).

who participate directly in the affairs of the entity and have not contracted away their rights to do so, with respect to assertion of a Fifth Amendment privilege may make sense.[320]

1. Relevant Characteristics of Member-Managed LLCs

Based upon this distinction, there is good reason to conclude that the members of a manager-managed LLC should not be permitted to assert a Fifth Amendment privilege with respect to LLC documents, but to reach that conclusion it is not necessary to rely upon the collective entity doctrine "agency rationale" reasoning the Supreme Court employed in *Bellis* and *Braswell*. Instead, that conclusion is amply supported by another more fundamental, and much more doctrinally solid, long-standing principle of Fifth Amendment law—the principle that the privilege against self-incrimination is a personal privilege that cannot be asserted by a third party, whether the third party is another individual or a business entity and whether or not the witness is an agent of the third party.[321] While that

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[320] *Cf.* Cohen, *supra* note 301, at 458 (recognizing that a distinction based upon whether an LLC is manager controlled or member controlled "might make sense" under "dominance doctrine" of veil piercing).

[321] *See supra* note 41 (discussing the holding of *Hale v. Henkel*). This principle has two corollaries. One is the rule that a witness cannot assert the Fifth Amendment as to the witness's own testimony to protect a third party. *See, e.g.*, *Braswell*, 487 U.S. at 120 ("All accept the longstanding rule that labor unions, corporations, partnerships, and other collective entities have no Fifth Amendment self-incrimination privilege [and] that *a natural person cannot assert such a privilege on their behalf.*") (Kennedy, J., dissenting) (emphasis added); United States v. Mandujano, 425 U.S. 564 (1976) (noting that the Fifth Amendment gave a grand jury witness the right not to answer questions which would be incriminating, but that the witness could not commit perjury and then use the Fifth Amendment to suppress his grand jury statements as incriminating); Rogers v. United States, 340 U.S. 367, 371 (1951) (holding that the privilege against self-incrimination cannot be asserted by a Communist Party treasurer as grounds for refusing to answer grand jury questions regarding to whom she turned over the party's financial books, thereby seeking to protect the holder of the books); *In re* Investigative Grand Jury Proceedings, 432 F.

principle does not address the question of whether or not the business entity itself should be permitted to assert a Fifth Amendment privilege against self-incrimination with respect to production of entity documents and records, an issue that is addressed below, it does strongly support the conclusion that non-manager members of a manager-managed LLC should not be permitted to assert a Fifth Amendment privilege for LLC documents and records (just as the shareholders of a widely held corporation should not be permitted to assert a Fifth Amendment privilege for corporate books and records).

Basing Fifth Amendment privilege against self-incrimination analysis on this distinction—the distinction

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Supp. 50 (W.D. Va. 1977) (multiple representation of clients was improper partly because clients could improperly assert the Fifth Amendment to protect others involved in the investigation). The other corollary is the rule that a defendant or target of a prosecution cannot assert the Fifth Amendment as to a third party witness's testimony, no matter how incriminating that testimony may be for the defendant/target. *See, e.g.*, Couch v. United States, 409 U.S. 322 (1973) (affirming appellate court's finding that defendant could not assert Fifth Amendment to halt compelled production of incriminating documents from her attorney); United States v. Richardson, 1 F. Supp. 2d 495 (D.V.I. 1998) (holding defendant had no standing to complain of violation of co-defendant's Fifth Amendment right against self-incrimination when co-defendant's statement incriminated the defendant); United States v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955) (holding that indicted partner could not assert Fifth Amendment protections to quash a subpoena to a third party partner that sought incriminating documents against the indicted partner). Both of these corollaries apply to the manager-managed LLC situation discussed above—a non-manager member should not be permitted to assert a Fifth Amendment privilege as to her own testimony in order to avoid incriminating the LLC, and a non-manager member should not be permitted to assert a Fifth Amendment privilege on behalf of the LLC with respect to LLC documents or records that would incriminate her. The rationale supporting these conclusions is not the collective entity doctrine *per se*, however; it is instead a recognition that in this situation the entity and the non-manager member are distinct legal persons. This rationale also says nothing, one way or the other, about whether the LLC entity itself should be permitted to assert a Fifth Amendment privilege as a distinct legal person with respect to production of entity documents and records.

between member-managed limited liability entities and manager-managed limited liability entities—makes at least as much sense as *Braswell*'s distinction between wholly owned corporations and sole proprietorships. It also would recognize, and respect, the practical reality that the members of a member-managed LLC (much like the owner of a single-member LLC and unlike corporate shareholders), do not regard the LLC as a separate legal entity with an identity distinct from that of its members. In this regard, a member-managed LLC is much more like a general partnership than it is like a corporation (or for that matter a manager-managed LLC).

2. How Should Member-Managed LLCs and General Partnerships Be Treated Under the Fifth Amendment?—The Most Difficult Cases

This analogy to general partnerships leads ineluctably to the most difficult issue presented under the current application of the collective entity doctrine by the Supreme Court and, not coincidentally, the issue that presents the greatest analytical challenge when positing a regime in which business entities are permitted to assert a Fifth Amendment privilege, as this Article advocates: How should general partnerships be treated under the Fifth Amendment? The Supreme Court last addressed this issue in *Bellis v. United States*[322] and, as discussed above,[323] failed to provide a satisfying rationale for depriving the members of a small general partnership of their ability to assert a Fifth Amendment privilege against self-incrimination with respect to partnership documents and records. The reasons advanced by the *Bellis* majority for doing so in 1974 hinged upon acceptance of two conceptual propositions.

The first, and most hotly debated in partnership law generally, is the proposition that in general a partnership is "an organization which is recognized as an independent

[322] 417 U.S. 85, 93-94 (1974).

[323] *See supra* at notes 140-45 and accompanying text.

entity apart from its individual members."[324] The second, and no less debatable, proposition advanced by the *Bellis* majority was that even the small, three-person partnership before the Court in that case had "an established institutional identity independent of its individual partners."[325] Acceptance of these propositions led the Court to conclude that an individual partner in even a very small partnership holds partnership records in "a representative capacity" and therefore should not be permitted to assert a personal privilege against self-incrimination as to those records. Neither of these conceptual points is nearly as clear-cut as the *Bellis* majority opinion suggests, however.

The problem with relying upon the "independent entity" conceptual proposition as the basis for deciding a case involving a core constitutional right is that in essence it represents yet another front, although admittedly a somewhat obscure one, in the ongoing conflict between the "aggregate theory" and the "entity theory" of partnership law that has raged for a century without any satisfactory resolution.[326] The difficulty of this core conceptual issue of partnership law—and its lack of susceptibility to a definitive "right" answer—is demonstrated by the fact that it remains unresolved to this day, as some states continue to adhere to the "aggregate theory" of the original 1914 Uniform Partnership Act ("UPA") while other states have adopted the new 1997 Revised Uniform Partnership Act ("RUPA") with

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[324] 417 U.S. at 92.

[325] *Id.* at 95.

[326] *See generally* WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP, at § 182 (3d ed. 2001). *See also* Deborah A. DeMott, *Symposium: Unincorporated Business Entities: Transatlantic Perspectives on Partnership Law: Risk and Instability*, 26 IOWA J. CORP. L. 879, 882-83 (2001) (discussing difference between aggregate and entity theories); Larry E. Ribstein, *Preparing The Corporate Lawyer: Corporations or Business Associations? The Wisdom and Folly of an Integrated Course*, 34 GA. L. REV. 973, 983-84 (2000); J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U.L. REV. 727, 731 nn.23 & 24 (1992).

its shift to an "entity theory" of partnership law.[327] The closeness of the issue is further illustrated by the fact that the states are almost evenly split between adoption of the UPA and RUPA.[328] For these reasons, the Court's first conceptual proposition of general partnership law is not a sound basis for deciding such an important constitutional issue. This flaw in the Court's reasoning is compounded when applied to the particular kind of partnership that was before the Court in *Bellis*.

What appears to have been the most troubling issue for the *Bellis* majority was whether the small, three-person Pennsylvania law partnership before the Court should be treated differently for Fifth Amendment purposes than a much larger, more institutional partnership entity. The majority had little difficulty concluding that it should deny a Fifth Amendment privilege against self-incrimination to the kind of large, institutional partnerships that include "[s]ome of the most powerful private institutions in the Nation . . . [such as] Wall Street law firms and stock brokerage firms . . . [that are] large, impersonal, highly structured enterprises of essentially perpetual duration."[329] The Court agreed with lower courts that applying the then-governing *White* test[330] for application of the collective entity doctrine covered such organizations. Even stretched to its limits, however, the

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[327] *See generally* GREGORY, *supra* note 326, at §§ 174 & 182 (describing differences between UPA and RUPA and collecting early authorities on the "aggregate vs. entity" debate in partnership law). *See also* Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 S.M.U. L. REV. 3, 43 n.237 (2004) (stating that as of 2002 thirty-one states had adopted RUPA with its 1997 Amendments); Peter B. Oh, *A Jurisdictional Approach To Collapsing Corporate Distinctions*, 55 RUTGERS L. REV. 389, 389 n.1 (2003) (discussing UPA and RUPA and listing citations).

[328] *See* REV. UNIFORM PARTNERSHIP ACT APP. B (2003 ed.) (listing state adoptions of RUPA). For the most current breakdown of UPA and RUPA among the states see http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upa9497.asp (last visited Jan. 22, 2005).

[329] *See Bellis*, 417 U.S. 85, at 93-94 (1974).

[330] The *White* test for application of the collective entity doctrine is discussed *supra* in the text accompanying notes 109-14.

White test would have difficulty encompassing the small partnership in *Bellis*.[331] The Court, appearing reluctant,[332] went on to hold that the small *Bellis* partnership was encompassed by the *White* test, based on the conclusion, discussed above, that even the very small *Bellis* partnership had "held itself out to third parties as an entity with an independent institutional identity."[333] The Court's discomfort in doing so, evident in the language of its opinion,[334] as well as its obvious motivation to avoid interfering with law enforcement efforts directed at business entities,[335] are ironic when one considers that within little more than a year's time the Court would decide the *Fisher* case and redefine the Fifth Amendment in a manner that would make the holding in

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[331] *See Bellis*, 417 U.S. at 100 ("On its face, the [*White*] test is not particularly helpful in the broad range of cases, including this one, where the organization embodies neither 'purely ... personal interests' nor 'group interests only,' but rather some combination of the two.").

[332] For evidence of the Court's reluctance, see the portions of the *Bellis* opinion that acknowledge "the force of [the] arguments" against application of the doctrine to such a small partnership, *id.* at 95, and concede that a different conclusion might be appropriate if the case "involved a small family partnership ... or ... if there were some other pre-existing relationship of confidentiality among the partners," *id.* at 101 (internal citations omitted).

[333] *Id.* at 97. The weakness of the majority's conclusion on this point is succinctly exposed by Justice Douglas's retort in his dissenting opinion: "This partnership is as different from a labor union or the run of corporations as black is from white." *Id.* at 103 (Douglas, J., dissenting).

[334] *See supra* note 143 (quoting language evidencing the Court's reluctance to expand the collective entity doctrine to cover very small general partnerships that lack a clearly defined institutional identity separate from the individual general partners).

[335] *See Bellis*, 417 U.S. at 94 ("It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from SEC scrutiny solely because it operates as a partnership rather than in the corporate form."). *See also supra* notes 106-09 and accompanying text (discussing the law enforcement rationale underlying the *White* case).

Bellis (and the subsequent, even more misguided, holding in *Braswell*) unnecessary.[336]

3. A Fully Informed Analysis of the Application of the Collective Entity Doctrine to Unincorporated Business Entities After *Fisher* and *Kastigar*

Under current law, post-*Kastigar* and post-*Fisher*, it is not necessary to take the position as a matter of Fifth Amendment constitutional law that a general partnership—or even a member-managed limited liability company—has a legal identity separate from its individual members. After *Fisher*, a privilege against self-incrimination cannot be asserted as to the contents of partnership records, so the only issue in such cases is whether the privilege can be asserted for the act of producing those records.[337] Moreover, in all cases in which the government has prior knowledge of the existence, location, and authenticity of the records, no act of production privilege can be asserted because there is no testimonial aspect to the act of production. As a consequence of this now-settled law, in most criminal investigations involving business entities, the Fifth Amendment privilege against self-incrimination simply has no application and cannot be asserted—either on behalf of the business entity or its individual members.[338] The same is true, of course, for records of wholly owned corporations, single-member limited liability companies, and sole proprietorships—whenever the government has prior knowledge of the documents or records

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[336] *See supra* Part III.B.3 (describing the author's view of the combined effect of the *Fisher* and *Kastigar* holdings on the application of the Fifth Amendment privilege to collective entities).

[337] Or, in the unusual case in which tangible evidence other than documents and business records is sought, some other tangible thing.

[338] *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, 184-87 (2002); Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487, 543-46 (2001).

it is seeking, the Fifth Amendment privilege against self-incrimination cannot be asserted as to those documents or records.

For analytical purposes, this leaves a relatively narrow category of cases in which the government lacks information concerning the existence, location, or authenticity of business records but seeks to subpoena such records if they exist. These might be called "fishing expedition" cases[339] in which a prosecutorial fishing expedition is appropriate even though the prosecutor's fishing line (a grand jury subpoena) is being cast into more or less uncharted waters. But would permitting a general partnership or a member-managed limited liability company—or any other business entity, for that matter—to assert a Fifth Amendment privilege against self-incrimination really make a difference and "largely frustrate legitimate governmental regulation of such organizations"[340] in even this narrow class of cases? The answer is that it would not, for reasons that are discussed below. Moreover, the Supreme Court's concerns in *Bellis* and *Braswell* about interfering with law enforcement can be dismissed if one takes into account the peculiar facts of those cases that make them both unrepresentative of typical criminal investigations. Those facts are also discussed below.

The reason that permitting a general partnership or other business entity to assert a Fifth Amendment privilege would not have a significant adverse effect on law enforcement interests is that in almost all such cases the government would be able to overcome an assertion of privilege by the entity through one of two ways provided for under post-*Kastigar* and post-*Fisher* constitutional law. The first, and simplest, way to do so would be simply to grant act of

[339] *See* United States v. Hubbell, 530 U.S. 27, 42 (2000) ("What the District Court characterized as a 'fishing expedition' did produce a fish, but not the one the Independent Counsel expected to hook."). *See also* H. Richard Uviller, *Forward:* Fisher *Goes on the Quintessential Fishing Expedition and* Hubbell *is Off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 311 (2001).

[340] *Bellis*, 417 U.S. at 90.

production immunity to the entity and compel production of the subpoenaed documents. In cases where the objective of the government is to prosecute responsible individual members of the entity, and not the entity itself (as appears to have been the case in both the *Bellis* and *Braswell* cases, where the target of the investigation was an individual and not the entities involved) the government gives up nothing by granting act of production immunity to the entity.

Even in cases where the government lacks information about the existence, location, or authenticity of documents and wishes to prosecute, or at least retain the ability to prosecute, the entity itself, a grant of use and derivative use immunity for the act of producing documents will not necessarily always preclude subsequent prosecution of the entity. In fact, prior to the Supreme Court's *Hubbell* decision, a good argument could be made that such a grant of immunity should never preclude subsequent prosecution of the party producing the documents because of the paucity of testimonial information communicated by the act of production. The *Hubbell* decision's broad conception of what constitutes a derivative use of the communicative aspects of the act of production of documents has complicated the analysis, and in some cases a prudent prosecutor now may have legitimate concerns that granting act of production immunity to a business entity could foreclose a subsequent prosecution of the entity.[341] Even where those concerns are present, however, there is a second way to overcome an entity's assertion of the privilege, and it is a way that should be available in every case in which the privilege can be overcome without unduly abrogating individual rights (as arguably occurred in the *Braswell* case).

This second way to overcome an entity assertion of the privilege is for the government to obtain enough information about the documents or records being sought to establish

[341] Professor Mosteller has described this repercussion of the *Hubbell* holding as "The Practical Death of Use Immunity for Unknown Documents." *See* Mosteller, *supra* note 337, at 517.

their existence, location, and authenticity. As noted above,[342] *Fisher* and *Hubbell* make clear that once the government has obtained such information an act of production privilege cannot be asserted. The government will have the means to obtain that information in any case involving a collective entity simply by obtaining testimony, whether or not pursuant to a grant of immunity, from an employee or member of the organization whom the government does not view as a potential subject or target of prosecution. This will be easily accomplished in all cases except those few in which the organization is so small that everyone associated with it who has knowledge sufficient to confirm the existence, location, and authenticity of subpoenaed records—whether an employee or a member—is involved in the suspected criminal misconduct and is a subject or target of the criminal investigation (and therefore have reason to assert the privilege against self-incrimination). Those situations should be exceedingly rare, however, and in almost all cases involving even small business entities the government should be able to identify a good candidate for immunity (or a plea bargain) who can provide the requisite information about entity documents or records so as to overcome any assertion of an act of production privilege with respect to those documents and records. Moreover, in some such cases the government may be able to obtain testimony about the existence, location, and authenticity of entity documents from some third party who is not a subject or target of the investigation, as was the case in *Fisher* with the accountants who had knowledge of the tax working papers that the government was seeking.[343]

So what of the remaining very small class of cases in which the government wishes to prosecute a business entity and all of its members and employees, but does not have enough information about the documents and records of the

[342] *See supra* notes 181-84 (discussing *Fisher*) and notes 213-17 (discussing *Hubbell*).

[343] *See generally* Mosteller, *supra* note 176, at 519-20 (analyzing the extent of the government's knowledge of the documents at issue in *Fisher*).

business to overcome an assertion of act of production privilege and is unwilling to grant immunity to any employee or member of the entity so as to obtain that information? Ironically, *Braswell* appears to have been just such a case. Randy Braswell was the sole shareholder of the corporations involved and appears to have been the only person with knowledge about the existence, location, and authenticity of the subpoenaed records.[344] He also appears to have been the target of the criminal investigation.[345] If such a case arose today a prosecutor presumably would not be willing to grant him act of production immunity because after *Hubbell* doing so might well preclude any subsequent prosecution.[346]

This conclusion does not, however, suggest that courts should continue to cling to the collective entity doctrine. To the contrary, the reason the prosecution would not be able to overcome assertions of the privilege against self-incrimination by Randy Braswell and his companies is that in such a case his custody of the corporate records really cannot "be fairly said to be [in] a representative capacity"[347] and his act of production of those records really is not "one in his representative rather than [his] personal capacity."[348] To

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[344] *See* Braswell v. United States, 487 U.S. 99, 101 (1988).

[345] *See id.* at 127 (Kennedy, J., dissenting).

[346] *See generally* Mosteller, *supra* note 176, at 517-19 (describing "The Practical Death of Use Immunity for Unknown Documents" post-*Hubbell*).

[347] *See* Bellis v. United States, 417 U.S. 85, 101 (1974).

[348] *See Braswell*, 487 U.S. at 118. With respect to the "representative capacity" issue, it should be noted that a key assumption of *Braswell* does not survive after the Court's decision in *Hubbell*. In *Braswell*, Chief Justice Rehnquist analyzed the "testimonial nature of the act of production" when a corporate custodian produces corporate documents and records. *Id.* at 114. He asserted that in *Curcio v. United States*, 354 U.S. 118 (1957), "the line drawn was between oral testimony and other forms of incrimination," 487 U.S. at 114, and therefore a custodian's act of production is not sufficiently testimonial to be covered by the privilege. *Id.* at 115 n.8 (citing *Bellis*). The *Hubbell* decision obviously rejected what it characterized as this "anemic view" of the testimonial aspects of the act of production. *See* 530 U.S. 27, 43 (citing *Curcio*). Chief Justice Rehnquist's position as the sole dissenter in *Hubbell* suggests that he well understood that the *Hubbell* majority's conception of the testimonial aspects of the act

the contrary, in that situation there is such a unity of interest and identity between the entity and its owner that using the collective entity doctrine to compel the owner to produce documents, and in so doing provide testimony, inappropriately deprives the owner of his or her privilege against self-incrimination, as the four dissenters in *Braswell* recognized.[349] The better approach, and the one most consistent with the protections intended to be conferred by the Fifth Amendment, is to recognize that in such cases the entity does not have an identity separate from that of its owner and therefore neither should be compelled to provide incriminating testimony, absent a grant of immunity.[350]

For these reasons *Braswell* was an unusual case, and because it was so unusual the Court's concern that permitting an assertion of the Fifth Amendment privilege on the facts of that case "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,'"[351] was not well founded. The same can be said about the *Bellis* case and the similar concerns voiced by the Court in that

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of production was at odds with the conception that he had espoused in *Braswell*. 530 U.S. at 49.

[349] Justice Kennedy wrote that:

> [i]t is regrettable that the very line of cases which at last matured to teach these principles is now invoked to curtail them, for the Court rules that a natural person forfeits the privilege in a criminal investigation directed against him and that the Government may use compulsion to elicit testimonial assertions from a person who faces the threat of criminal proceedings.

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

[350] Ironically, this result is not inconsistent with the pre-*Bellis* and pre-*Braswell* version of the collective entity doctrine because under the *White* test the doctrine applied only if an entity had "a character so impersonal in the scope of its membership and activities that it cannot be said to embody the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *See* United States v. White, 322 U.S. 694, 701 (1944). *Cf. Braswell*, 487 U.S. at 119 (arguing that the *Braswell* majority misapplied the collective entity doctrine in that case) (Kennedy, J., dissenting).

[351] 487 U.S. at 115.

decision. Mr. Bellis had been a partner in a three-person Pennsylvania law partnership, but left the firm in late 1969 to join another firm.[352] The three-person partnership's financial records stayed at the old firm until February or March 1973, when Bellis sent his secretary to the old firm to retrieve the records and bring them to his new office.[353] Shortly thereafter Bellis received a grand jury subpoena for the partnership records, and he asserted his Fifth Amendment privilege and refused to produce the records.[354] Expressing concern that a partnership not be able to "immunize its records" from production to government investigators,[355] and asserting that "the applicability of the [Fifth Amendment] privilege should not turn on insubstantial differences in the form of the business enterprise,"[356] the *Bellis* Court held that the collective entity doctrine applied to the three-person law partnership.

The facts of the *Bellis* case were unusual in that while Bellis was no longer a member of the partnership, he nevertheless had managed to obtain sole custody of the partnership records for the relevant time period during which he had been a partner in the firm. The members of the *Bellis* majority may have been concerned that if they did not apply the collective entity doctrine to the small, three-person partnership, future government efforts to obtain partnership documents might be frustrated if a partner

[352] 417 U.S. at 86.

[353] *Id.*

[354] *Id.* at 85-87.

[355] *Id.* at 94.

[356] *Id.* at 101. This assertion is notable because in *Braswell* Chief Justice Rehnquist expressed no concerns about having the applicability of the privilege turn upon the legal distinction between a sole proprietorship and a wholly owned corporation. *See* 487 U.S. at 104. While he and the other four members of the *Braswell* majority may have viewed this as a "substantial difference," to use the language of *Bellis*, it is not clear that business owners who retain sole control of their business but have incorporated or formed a single-member limited liability company solely to take advantage of the limited liability shield would agree that the difference in form is substantial enough to justify depriving them of a fundamental constitutional right.

absconded with partnership records.[357] That concern may have had some basis at that time because under pre-*Fisher* Fifth Amendment law Bellis could have asserted the privilege as to the contents of the partnership records in his custody and control. After *Fisher* held that the contents of pre-existing documents are not privileged, however, that concern is no longer present. In addition, the facts of the case suggest that, at least after *Fisher*, any act of production privilege that Bellis might have sought to assert with respect to the partnership records could easily have been overcome by the government in the manner that is described above—the secretary who obtained the records could have been compelled to provide testimony (whether or not pursuant to a grant of immunity) as to the existence, location, and authenticity of the records that she had obtained for Bellis.[358] Once the government obtained that information, Bellis would

[357] *See* 417 U.S. at 99. If this were the Court's concern, even holding that the collective entity doctrine applies to all forms of business entities, as *Bellis* and *Braswell* taken together suggest, is not sufficient to ensure that the government will always be able to obtain entity documents. *See, e.g., In re* Three Grand Jury Subpoenas Duces Tecum Dated Jan. 29, 1999, 191 F.3d 173 (2d Cir. 1999) (holding, pre-*Hubbell*, that ex-employees of a corporation who absconded with corporate documents may assert a personal act of production privilege as to the documents because the agency relationship terminated when the employment relationship terminated). *Cf. In re* Grand Jury Subpoena Dated Nov. 12, 1991, 957 F.2d 807, 810-13 (11th Cir. 1992) (holding that the "immutable character of the records as corporate" requires their production and "dictates that they are held in a representative capacity.").

[358] *Cf.* Fisher v. United States, 425 U.S. 391, 411 (1976) ("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."). *Cf.* United States v. Hubbel, 530 U.S. 27, 44-45 (2000) ("Whatever the scope of this 'foregone conclusion' rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorneys' possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent.").

not have been able to assert an act of production privilege. The facts of *Bellis* therefore, like the facts of *Braswell*, do not support the concerns about interference with law enforcement that seem to have been the driving force behind the majority opinions in both of those cases.

4. Conclusion: The Collective Entity Doctrine is No Longer Needed to Protect Law Enforcement Interests

This analysis demonstrates that the Supreme Court's recent cases expanding the collective entity doctrine have been based upon the flawed premise that an unacceptable degree of interference with law enforcement would exist if the Court did otherwise. Those cases also have failed to adequately assess the effect of important recent changes in Fifth Amendment law on immunity and production of documents. At the same time, the explosive proliferation of new limited liability entities has increased both the breadth of application of the collective entity doctrine and the potential for unfairness if that doctrine is applied to certain kinds of business entities. These are all good reasons to reexamine, and ultimately to reject, the continued application of the collective entity doctrine. Additional significant problems with the collective entity doctrine also point to the conclusion that the doctrine should be abandoned.

D. Additional Criticisms of Application of the Collective Entity Doctrine as Currently Defined by the Supreme Court to New Forms of Business Entities

The collective entity doctrine is also subject to criticism for its failure to comply with one of the central doctrines of constitutional law—the law governing waiver of constitutional rights. It has long been settled law that an effective waiver of a constitutional right requires "an intentional relinquishment or abandonment of a known right

or privilege."[359] In other words, to be effective, an individual's waiver of a fundamental constitutional right must involve "express, intelligent consent"[360] by a person who "knows what he is doing and [whose] choice is made with eyes open."[361] The collective entity doctrine, particularly as applied by the *Braswell* Court, is clearly inconsistent with these principles. A business owner who decides to form a wholly owned corporation or a single-member LLC in order to obtain the benefits of limited liability for debts and obligations incurred by the business has no reason to believe, or even to suspect, that the change in operating form of the business will result in a loss of the owner's Fifth Amendment privilege for the documents and records of the business. That is the result that follows from *Braswell*, however, and after the Supreme Court's decision in *Hubbell* it is also clear that the consequences for the individual of losing the Fifth

[359] *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (announcing standard for waiver of the Sixth Amendment right to counsel). *See also* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (applying *Johnson* standard to waiver of right to jury trial); Fay v. Noia, 372 U.S. 391 (1963) (applying *Johnson* standard to waiver of right to appeal). The *Johnson v. Zerbst* principles have been applied to waiver of the Fifth Amendment privilege against self-incrimination in the context of custodial interrogation of suspects. *See* Colorado v. Spring, 479 U.S. 564, 566 (1987) (citing Miranda v. Arizona, 384 U.S. 436 (1966)). *See also* Garrison v. Elo, 156 F. Supp. 2d 815 (E.D. Mich. 2001) (applying *Johnson* standard to guilty pleas).

[360] *See Adams*, 317 U.S. at 277.

[361] *See id.* at 279. *Cf.* Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 136-40 (1993) (discussing waiver law in custodial interrogation cases and noting that "[t]he burden on the government to show a knowing and voluntary waiver in *Miranda* cases is 'great' and 'heavy'") (internal citations omitted); Phong T. Dinh, Topical Survey, Criminal Law, *Self-Incrimination Clause Requires That Suspects Understand Plain Meaning of* Miranda *Rights Before Making Valid Waiver*—State v. Leuthavone, *640 A.2d 515 (R.I. 1994)*, 29 SUFFOLK U. L. REV. 619 (1995); W. Brian Stack, Note, *Criminal Procedure—Confessions—Waiver of Privilege Against Self-Incrimination Held Invalid Due to Police Failure to Inform Suspect of Attorney's Attempt to Contact Him*—State v. Reed, *133 N.J. 237, 627 A.2d 630 (1993)*, 25 SETON HALL L. REV. 353 (1994).

Amendment privilege for business records can be substantial—perhaps even the difference between going to jail and avoiding prosecution altogether.

The Supreme Court's jurisprudence on waiver of constitutional rights provides yet another reason to scrutinize carefully an implied waiver of the kind created by the *Braswell* holding. Implied waivers are disfavored and the Court has developed a presumption "against waiver of fundamental constitutional rights."[362] This presumption should have caused the *Braswell* Court to pause before applying the collective entity doctrine to a wholly owned corporation with the result that the corporation's owner was effectively treated as having waived his Fifth Amendment privilege against self-incrimination by choosing to operate his business as a wholly owned corporation rather than a sole proprietorship. As discussed above, however, the five-member majority of the Court appears to have been more concerned with protecting law enforcement interests than in safeguarding constitutional rights; as a consequence, they applied the collective entity doctrine in a mechanical, knee-jerk fashion and ignored the issue of whether or not it was being applied in a manner that was consistent with well-established waiver doctrine.[363] The clear inconsistency with

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[362] *See Johnson*, 304 U.S. at 464 ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'") (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), Hodges v. Easton, 106 U.S. 408, 412 (1882), and Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937)).

[363] In this regard *Braswell* can be seen as the successor to a long line of Supreme Court cases that demonstrate a cavalier approach to waiver of constitutional rights in the criminal process. *See generally* Michael E. Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 9 (1970) (examining how the Supreme Court has applied the *Johnson v. Zerbst* waiver standard and concluding that "cases show that it has commonly been ignored"). Professor Tigar's 1970 analysis of Supreme Court waiver decisions includes a criticism of waiver based upon agency principles that appears particularly prescient in light of the *Braswell* Court's reliance, almost two decades later, on an "agency rationale" to uphold the collective entity doctrine in a context that in

waiver law does, however, support an argument that the collective entity doctrine should be re-examined in the new era of limited liability entities.

The waiver criticism of the collective entity doctrine as applied in *Braswell* is consistent with a final reason not to deprive limited liability entities of the Fifth Amendment privilege against self-incrimination, a reason that is based upon more fundamental notions of fairness and equity.[364] Commentators have asserted that under the "communitarian theory of limited liability" the individuals who form a limited liability entity should not be permitted to use the limited liability form to "hide from their duties as citizens."[365] Under this theory individuals who form LLCs are viewed as having certain duties as citizens that they should not be permitted to avoid by forming a limited liability entity, and the state

practical effect amounted to an implied waiver of a constitutional right. In Professor Tigar's view an agency rationale for waiver "lack[s] any intelligible account of the meaning of 'consent'" that is required under the *Johnson* standard. *See id.* at 12. In this sense *Braswell* can be seen not only as "The Ultimate Expansion of the 'Collective Entity' Doctrine," *see supra* Part II.C, but also as the ultimate denigration of the *Johnson v. Zerbst* waiver standard.

[364] This unfairness in depriving business entities of a Fifth Amendment privilege against self-incrimination is not the only unfairness that has been magnified by the recent explosion of new kinds of limited liability firms. Both tax law treatment, *see* Maine, *supra* note 315, at 238 (discussing the unfairness and inequities of permitting some but not all private business entities to choose among three applicable tax regimes "have been magnified recently in light of state legislative responses to check-the-box entity classification, which have liberalized existing forms of business organization making them more corporate-like"), and limited liability law, *see* Crusto, *supra* note 305 (describing the unfairness of denying limited liability to unincorporated sole proprietorships), arguably are inequitable in their treatment of different forms of business entities.

[365] *See* Cohen, *supra* note 301, at 457 (discussing the communitarian theory of limited liability in the context of veil piercing). *See also* Michael E. DeBow and Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393 (1993). For a comprehensive analysis of communitarian legal principles in tort law generally, see ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS (2004).

grants the right to form such an entity under the implicit condition that it will not be used to avoid those duties.[366] If one accepts this communitarian view of the limited liability entity, in which individual members' duties as citizens survive the formation of the entity, then it follows that fairness and reciprocity of obligation demand that the individual members' rights as citizens should also survive the formation of the entity. High on the list of rights that should not be arbitrarily withheld is the privilege against self-incrimination with respect to the operation of the entity. The contrary position yields the anomalous result that we see under current law when we compare the *Braswell* and *Hubbell* cases—Randy Braswell loses his Fifth Amendment privilege 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. This result is untenable, particularly when, as discussed above, those who form limited liability entities neither know nor intend that their actions constitute a waiver of a fundamental constitutional right. In this important respect the current conception of the collective entity doctrine represents the worst of all possible worlds—an unnecessary and unjustifiable legal doctrine that treats similarly situated people differently.

VI. CONCLUSIONS

The world of business entity formation has changed dramatically in the almost two decades since the Supreme Court decided *Braswell v. United States* and a narrow five-four majority declined to reexamine the collective entity doctrine. The world of Fifth Amendment immunity and document production law had already changed dramatically at the time *Braswell* was decided, but the *Braswell* majority failed to recognize the significance of those changes. Beyond these extremely important changes in the legal doctrines that underlie the collective entity doctrine, the very manner

[366] *See* Cohen, *supra* note 301, at 457 n.163.

in which business entities are subjected to the criminal justice system has been transformed in recent decades. All of these important developments in the law point to the same conclusion: the collective entity doctrine should be abandoned.

The only real argument in favor of retaining the collective entity doctrine is, to paraphrase Chief Justice Rehnquist in *Braswell*, its lengthy—although hardly distinguished—pedigree. But survival over a long period based upon a shifting series of rationales, none of which withstands principled analysis, is not sufficient reason to retain a flawed legal doctrine. Doing so becomes even less defensible if the legal doctrine results in unfair and inequitable treatment of individuals who are facing loss of both property and liberty, as is the case with the collective entity doctrine. Add the final element that the doctrine no longer is necessary to further law enforcement interests, and every argument for retaining the doctrine has been rebutted. This Article demonstrates that the doctrine is of dubious origin, lacks principled doctrinal support, and no longer even serves a significant normative or utilitarian purpose. In short, it is an anomaly of constitutional law that should no longer be preserved.

Assuming that the Supreme Court cannot be expected to overturn the collective entity doctrine in the near future, and assuming that Congress lacks the power to enact a legislative fix of a flawed interpretation of the Constitution by the Court, then what can be done, beyond registering academic complaints in law review articles? One thing that can be done immediately is for courts and criminal litigants to recognize the flaws in the collective entity doctrine and seek to halt its heretofore relentless expansion. Litigants should challenge the doctrine, and its validity should be reexamined by the courts, at each and every opportunity in any case involving a fact pattern that is not indisputably governed by controlling precedent. Courts should no longer be mechanically applying the doctrine to any new entity or new fact situation that arguably is within its purview. In particular, it should not be applied to single-member limited

liability entities, notwithstanding *Braswell*. The "agency rationale" relied upon in *Bellis* and *Braswell* should not be applied to single-member limited liability companies, which are more akin to sole proprietorships (albeit ones that have registered with the state to obtain limited liability) than corporations, or at least should be considered so for purposes of application of the Fifth Amendment privilege against self-incrimination. Applying the collective entity doctrine to single-member entities in the way that *Braswell* applied the doctrine to a wholly owned corporation both results in unfair treatment of similarly situated individuals and is contrary to established legal doctrines governing waiver of constitutional rights and privileges.

There is also opportunity for courts and litigants to reexamine the collective entity doctrine beyond the relatively narrow issue of whether the doctrine should be applied to single-member limited liability companies. Courts and litigants should seize upon the Supreme Court's open invitation at the conclusion of the *Bellis* opinion to reject application of the collective entity doctrine to "a small family partnership" or to a partnership in which there is "some other pre-existing relationship of confidentiality among the partners."[367] These Supreme Court-sanctioned exceptions to the application of the collective entity doctrine should also be vigorously exploited in cases involving general partnerships, member-managed limited liability companies, limited liability partnerships, and any other business entities that feature the expectations of confidentiality and the lack of "representative capacity" of members that the Court referenced in *Bellis*. This more rigorous and discerning application of the collective entity doctrine should avoid some of the worst abuses that will result if it is instead applied in a mechanistic, indiscriminate fashion to new forms of business entities. More importantly, over time more rigorous application of the doctrine should help reveal the fundamental truth that the collective entity doctrine is both unjustified and unnecessary.

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[367] *See Bellis*, 417 U.S. at 101.

Once this central truth is recognized, the courts will be more likely to take the next step and consider abandoning the collective entity doctrine altogether and conforming this aspect of Fifth Amendment law with the treatment of business entities under other provisions of the Bill of Rights. As this Article demonstrates, permitting corporations and other kinds of business entities to assert a Fifth Amendment privilege would not have any significant adverse effect on law enforcement and would rationalize Fifth Amendment law in this important area. Abandoning the collective entity doctrine also would eliminate the arbitrary disparity between sole proprietorships and wholly owned corporations or single-member limited liability that is the result of the *Braswell* and *Hubbell* holdings under current law.