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Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records

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BRASWELL v. UNITED STATES: AN EXAMINATION OF A CUSTODIAN'S FIFTH AMENDMENT RIGHT TO AVOID PERSONAL PRODUCTION OF CORPORATE RECORDS

I. INTRODUCTION

In the early part of the twentieth century, the Supreme Court denied corporations a fifth amendment privilege against compelled self-incrimination relating to their corporate records. The Court later denied unincorporated business entities a fifth amendment privilege as well. This treatment became known as the "collective entity doctrine." In order to give effect to the collective entity doctrine and prevent these entities from enjoying a derivative fifth amendment privilege, the Court also denied the custodian of corporate records a fifth amendment privilege in the documents. Known as the "representative capacity doctrine," this approach denies a custodian a privilege in the entity's records no matter how personally incriminating the records may be. However, in developing both the collective entity and the representative capacity doctrines, the Court was concerned solely with the contents of the subpoenaed records. As a result, the Court refused to recognize a custodian's claim of fifth amendment protection because if the custodian could claim a privilege in the contents of subpoenaed records, the governement would be prevented from using the contents of those records to incriminate the custodian personally.

1. Hale v. Henkel, 201 U.S. 43, 76 (1905). "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. For a discussion of Supreme Court cases which have denied a fifth amendment privilege to corporations, see infra notes 36-43 and accompanying text.


3. A derivative fifth amendment privilege would occur if a corporation or collective entity received the benefit of the custodian's personal fifth amendment privilege. For a further discussion of this concept, see infra notes 68-72 and accompanying text.

4. See Bellis v. United States, 417 U.S. 85, 101 (1973) (custodian of corporate records has no fifth amendment privilege in records' contents); White, 322 U.S. at 698 (custodian of collective entity's records has no fifth amendment privilege in their contents); Wilson v. United States, 221 U.S. 361, 385 (1911) (same).

5. See White, 322 U.S. at 699 (papers and records of collective entity cannot be subject of custodian's personal privilege even though records may incriminate him personally); Wilson, 221 U.S. at 385 (state can compel production of records without regard to how incriminating they are).

6. For a discussion of the focus of the representative capacity doctrine, see infra notes 66-91 and accompanying text.
nforcement could never obtain them. 7

Recently, however, the Court developed a new approach to fifth amendment claims concerning documents. Known as the "act of production doctrine," this approach stripped the contents of records of their previously privileged status and shifted the Court's attention from the contents of the records to the physical act of producing them. 8 This approach focuses on whether the actual act of producing subpoenaed records violates the fifth amendment. 9 In contrast to the traditional assertion of a privilege in the contents of records, recognizing a custodian's claim of privilege with respect to the act of producing the documents does not prevent the government from obtaining the subpoenaed records. 10 However, the Court only developed the act of production analysis in the context of an individual's papers and documents. 11 Therefore, it did not address whether a collective entity's

7. See Wilson, 221 U.S. at 379-80. The Court stated that if a custodian had a privilege in the record's contents then the power of the courts to require their production depends ... upon the particular custody in which they are found. If they are found in the actual custody of an officer whose criminal conduct they would disclose, then ... his possession must be deemed inviolable ... [Therefore,] he may ... assert against the visitorial power of the State, and the authority of the Government in enforcing its laws, an impassable barrier. Id. at 379. The corporation could then avoid inspection of its books by the simple expedient of placing them in the possession of someone who would be incriminated by their contents.


9. In responding to a subpoena, a custodian "tacitly concedes the existence of the papers demanded and their possession or control by the [custodian]. It also would indicate the [custodian's] belief that the papers [produced] are those described in the subpoena." Doe, 465 U.S. at 613 (quoting Curcio v. United States, 354 U.S. 118, 125 (1957)). Depending upon the circumstances of the particular case, these admissions may constitute self-incrimination. Id. For a further discussion of the possible incriminating aspects of these admissions, see infra notes 137-44 and accompanying text.

10. See Braswell v. United States, 108 S. Ct. 2284, 2294 (1988). By addressing the subpoena to the corporation, the government ensures compliance with the subpoena because the corporation "must find some means by which to comply." Id. Because the contents are not privileged, the only fifth amendment defense a custodian can raise is that the act of producing the documents is incriminating. His claim is, in essence, that he cannot produce the records, not that another employee of the corporation cannot produce them. For a further discussion of this concept, see infra notes 216-27 and accompanying text.

custodian could claim the act of production privilege.\textsuperscript{12} After the development of the act of production doctrine, the circuits split as to whether a custodian of corporate records could avail himself of this new privilege.\textsuperscript{13} In \textit{Braswell v. United States},\textsuperscript{14} the Supreme Court held that the custodian could not.\textsuperscript{15}

\section*{II. Background}

\subsection*{A. Boyd v. United States: The Genesis of the Fifth Amendment Application to Documents}

The fifth amendment protection granted to business records originated in \textit{Boyd v. United States}.\textsuperscript{16} In \textit{Boyd}, the government subpoenaed partners to produce an invoice concerning the previous purchase of twenty-nine cases of glass.\textsuperscript{17} The invoice was produced over Boyd's objection that the subpoena violated his fifth amendment rights.\textsuperscript{18}

In accepting Boyd's argument, the Court found that the fifth

\textsuperscript{12} For a discussion of the interrelation of the act of production doctrine and the representative capacity doctrine, see infra notes 203-88 and accompanying text.

\textsuperscript{13} \textit{Compare In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.) (en banc) (denying custodian's act of production privilege), cert. denied, 474 U.S. 1033 (1985) and United States v. Malis, 737 F.2d 1511 (9th Cir. 1984) (same) with In re Grand Jury Matter (Brown), 768 F.2d 525 (3d Cir. 1985) (en banc) (recognizing custodian's act of production claim) and In re Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569 (11th Cir. 1987) (same). For a discussion of the circuit split and the Supreme Court's resolution of the issue, see infra notes 147-60 and accompanying text.

\textsuperscript{14} 108 S. Ct. 2284 (1988). For the facts of \textit{Braswell}, see infra notes 153-60 and accompanying text.

\textsuperscript{15} 108 S. Ct. at 2287 (custodian has no act of production privilege under fifth amendment).

\textsuperscript{16} 116 U.S. 616 (1886). \textit{Boyd} has since been overruled \textit{sub silentio} by the cases detailed in this Note. Although the Supreme Court occasionally refers to \textit{Boyd} as retaining some vitality, it has no significance in the context of business records. At this time it is unclear whether \textit{Boyd} still offers protection to the private records of individuals. For a discussion of \textit{Boyd}'s significance in the context of private records, see infra note 120. This Note discusses \textit{Boyd} merely as a preface for later developments in the business records area.

\textsuperscript{17} 116 U.S. at 618. The government brought a suit to compel the forfeiture of several cases of glass that were allegedly illegally imported. \textit{Id.}

\textsuperscript{18} \textit{Id.} Boyd also objected to the subpoena on fourth amendment grounds, claiming the subpoena constituted an unreasonable search and seizure. \textit{Id.} at 621. The Court found that both amendments were violated by the subpoena. \textit{Id.} at 638. The Court stated that the two amendments protected the same rights of "personal security, personal liberty and private property . . . ." \textit{Id.} at 630. The Court held that a subpoena compelling the production of private property for use in a criminal proceeding violated the fifth amendment. \textit{Id. See also Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line, 49 Mo. L. Rev. 439, 446 (1984). The Court went on to hold that the fourth amendment prohibition against unreasonable searches and seizures was violated as a result of the fifth amendment violation. \textit{Boyd}, 116 U.S. at 446-47. This Note will only examine the Court's treatment of the fifth amendment issue.
amendment protected the rights of "personal security, personal liberty and private property." The Court concluded that compelling a person to produce his own private documents was not "substantially different from compelling him to be a witness against himself within the meaning of the Fifth Amendment." Thus, a subpoena compelling production of private records violated the fifth amendment.

The Court's extension of fifth amendment protection to documents turned on whether the individual owned the subpoenaed documents. The Court held that compelling the production of privately owned papers amounted to a trespass which violated the fifth amendment. In focusing on the ownership of the documents, the Court effectively constructed a protected zone around the contents of the records into which the government could not intrude.

This property-based holding created problems in the investigation and punishment of business-related crime. Because most white collar crime leaves only a "paper trail," law enforcement agencies require access to business records. Economic crimes are often sophisticated, complex transactions usually originating in the remote past and extending over a long period of time. Because this type of crime rarely leaves anything but documentary evidence, the records of the business are vital to the detection of the crime. Without access to these

19. *Boyd*, 116 U.S. at 630. The thrust of the Court's opinion was that the fifth amendment protected the private property of an accused from governmental intrusion. See *Heidt*, supra note 18, at 445.


21. Id. at 638.

22. See *Heidt*, supra note 18, at 446 (although Court referred to "private papers," it meant documents which were private property of person claiming privilege); Comment, *Fifth Amendment Protection and the Production of Corporate Documents*, 135 U. Pa. L. Rev. 747, 750 (1987) (Boyd's invoice could not be subpoenaed because it was his private property).

23. *Boyd*, 116 U.S. at 627-28. See also *Heidt*, supra note 18, at 445 (Court held that compelling partners to submit to subpoena amounted to trespass on their property). The Court stated that an extremely important purpose of society was to ensure the safety of a person's property. *Boyd*, 116 U.S. at 627-28. Governmental interference with property rights abridged one's right to property and therefore constituted a trespass. *Heidt*, supra note 18, at 445.


25. *Hale v. Henkel*, 201 U.S. 43, 74 (1905) (if corporation could refuse to produce books, result would be failure of large number of cases).


27. Id.

28. Id. See also Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1276 (1979) (because prohibited con-
records, extreme difficulty exists in even determining whether a crime was committed. If courts mechanically applied the Boyd doctrine to deny governmental access to documents owned by business entities, regulation of business activity would be impossible. It was this concern which drove the Court to develop measures calculated to avert the consequences of Boyd.

B. The Development of the Collective Entity Doctrine

In response to the problem posed by Boyd, the Supreme Court developed the collective entity doctrine, which denied fifth amendment protection to the records of collective entities. In order to give effect to this doctrine, the Court denied the collective entity's custodian of records a fifth amendment privilege in the records as well. The Court's development of the collective entity exception occurred in two distinct steps. First, the Court denied corporations a fifth amendment privilege. Later, it denied a fifth amendment privilege to other unincorporated business entities.

1. The Corporate Records Exception

The Court first considered the problem presented by the broad
Boyd holding in the context of a governmental investigation into possible corporate wrongdoing. The Court in *Hale v. Henke*\(^\text{36}\) established that a corporation could not under any circumstances claim a fifth amendment privilege with respect to corporate records.\(^\text{37}\) The Court reasoned that the fifth amendment privilege was a purely personal one and that a corporation, as a "creature of the State," could not assert it.\(^\text{38}\) The Court based its "creature of the State" rationale upon the notion that the state of incorporation grants certain privileges and franchises which the corporation retains "subject to the laws of the State and the limitations of its charter."\(^\text{39}\) According to *Hale*, the state allows a corporation to exist provided it does not violate the "laws of its creation" or abuse the privileges and franchises granted by the state.\(^\text{40}\) Therefore, in order to ensure that a corporation obeys the state's laws and its own charter, the Court held that the state necessarily reserves a right to inspect the corporation's records to discover any wrongdoing.\(^\text{41}\) As the Court stated, "[i]t would be a strange anomaly to hold that a State, having chartered a corporation . . . could not . . . [determine whether the powers granted to the corporation] had been abused, and demand the production of the corporate books and papers for that purpose."\(^\text{42}\) Therefore, a corporation could not defeat the state's visitorial power by claiming a fifth amendment privilege with respect to its records.\(^\text{43}\)

\(^\text{36}\) 201 U.S. 43 (1905). In *Hale*, the government subpoenaed Hale to produce corporate documents relevant to an investigation into possible antitrust law violations. *Id.* at 44-46. Hale refused to comply, asserting the contents of the records would tend to incriminate the corporation and him personally. *Id.* at 46. The government granted Hale immunity from prosecution, thus vitiating any self-incrimination claim he might have had. *Id.* at 66-70. As a result, the Court reached only the issue of the corporation's fifth amendment privilege. *Id.* at 70-75.

\(^\text{37}\) *Id.* at 75-76. The Court held that a corporation did not have a fifth amendment privilege to refuse production of its books, and also more broadly that a corporation had no fifth amendment privilege relating to any type of information. *Id.* at 75. See also Note, *Fifth Amendment Privilege For Producing Corporate Documents*, 84 Mich. L. Rev. 1544, 1547 (1986) (*Hale* Court limited fifth amendment privilege to protecting only natural persons from self-incrimination, thereby excluding corporations from protection).

\(^\text{38}\) *Hale*, 201 U.S. at 74-75 (corporation, as creature of state, may not lawfully refuse to produce books). See also Note, supra note 24, at 102 (corporation could not invoke fifth amendment because privilege is designed to protect individual).

\(^\text{39}\) *Hale*, 201 U.S. at 74-75.

\(^\text{40}\) *Id.* at 75.

\(^\text{41}\) *Id.*

\(^\text{42}\) *Id.*

\(^\text{43}\) *Id.* The *Hale* Court went on to state why the federal government retains visitorial powers over corporations even though they are not incorporated under federal law. Because franchises granted by the state of incorporation involve questions of interstate commerce, the Court asserted that these franchises "must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in
2. The Collective Entity Doctrine

Thus, *Hale* settled the fifth amendment question with regard to corporations. However, the possibility that *Boyd* could be used to prevent government access to business documents still existed in regard to other unincorporated business entities. Corporations, although a major feature in the business landscape, certainly are not responsible for all white-collar crimes. The Court confronted this reality and developed the collective entity doctrine which expanded the corporate records exception to include other types of business entities.

The Court faced a major theoretical obstacle to expanding the corporate records exception to encompass entities other than corporations. In *United States v. White*, the Court recognized that because unincorporated entities such as labor unions and partnerships were not granted special privileges and franchises, the state could not reserve visitorial powers in return. To circumvent this problem, the *White* Court abandoned reliance on the "creature of the state" rationale and instead relied upon the "inherent and necessary power of . . . governments to enforce their laws . . .". To reach this conclusion the Court confronted what it saw as the realities of the modern business world. Recognizing that unincorporated organizations accounted for much of modern economic activity, the *White* Court stated that federal and state authorities needed to regulate these organizations. Without access to

a lawful manner . . . " *Id.* Therefore, the visitorial powers of the federal government "are the same as if the corporation had been created by an act of Congress." *Id.*

44. As early as 1905, the Court recognized that corporations had become "a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises." *Id.* at 76.

45. *See* Bellis v. United States, 417 U.S. 85 (1973) (unincorporated entities have no fifth amendment privilege if they are "collective entities"); United States v. White, 322 U.S. 694, 700 (1944) (same).

46. 322 U.S. 694 (1944). In *White* the government was conducting an investigation into alleged irregularities in the construction of the Mechanicsburg Naval Supply Depot. *Id.* at 695. A subpoena *duces tecum* was issued to Local No. 542 of the International Union of Operating Engineers requiring the union to produce relevant records. *Id.* White, the union official with possession of the records, appeared before the grand jury and refused to comply with the subpoena on the grounds that compliance would tend to incriminate both the union and White personally. *Id.* at 695-96.

47. *Id.* at 700. *See also* Note, Sole Shareholder’s Privilege Against Self-Incrimination In Producing Corporate Documents—In re Grand Jury Matter (Brown), 59 Temp. L.Q. 219, 228 (1986) (Court recognized that reserved powers of visitation rationale was absent in *White* because union was not chartered by state).

48. *White*, 322 U.S. at 701 (state chartering of corporations provides convenient justification for governmental inspection of corporate books, but fact that organization is unincorporated does not lessen necessity for regulation of its activity).

49. *Id.* at 700-01. The Court found that the "scope and nature of the economic activities of incorporated and unincorporated organizations and their
organizational records, any regulation would be effectively impossible. Therefore, White held that the power to compel production of records of incorporated and unincorporated entities arises from the government's necessary power to enforce business-related laws and regulations. The White Court thus limited the fifth amendment to "its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."

However, some unincorporated business entities, such as sole proprietorships, are so personally linked to the individual owner that in subpoenaing their business records the government is actually compelling production of an individual's personal records. The Court wanted to exempt these small, individually-run organizations from the compelled production of business records. Thus, it held that only "collective entities" are subject to mandatory production of possibly incriminating business records. The White Court "defined" a collective entity as a business organization which "one can fairly say under all the circumstances . . . has a character so impersonal in the scope of its membership and activities that it cannot be said to . . . represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only."

The Court's conception of a collective entity as defined in White is an elusive concept. Therefore, in Bellis v. United States, the Court noted representatives demand that the constitutional power of federal and state governments to regulate those activities be correspondingly effective." Id. at 700.

50. Id. (without access to records and documents, effective enforcement of federal and state laws impossible). For a further discussion of the difficulty of regulating organizations without access to business records, see supra notes 25-30 and accompanying text.

51. 322 U.S. at 700-01.

52. Id. at 701. Because the federal and state governments had the inherent power to enforce their laws, and because the fifth amendment was limited to protecting only the natural person, the unincorporated status of the union did not bar enforcement of the government's subpoena. Id. at 700-01.


54. White, 322 U.S. at 701 (if organization represents collective interests of its members, fifth amendment privilege cannot be invoked on behalf of organization). Cf. Bellis, 417 U.S. at 88 (collective entities cannot assert fifth amendment privilege).

55. White, 322 U.S. at 701. Perhaps the best way to conceptualize this abstract proposition is to view a business which solely advances the interests of its sole proprietor as nothing more than the proprietor's alter-ego. However, a collective entity is one that represents the collective interests of its members or has an identity independent of its members and is treated as a separate "person," wholly distinct from its membership. For a discussion of why these collective entities are denied a fifth amendment privilege, see supra notes 44-52 and accompanying text.

56. 417 U.S. 85 (1973). In Bellis, the defendant had been a senior partner in a Philadelphia law firm. Id. at 86. The firm had only three partners and two
its dissatisfaction with the *White* formulation and endeavored to articulate this concept with an eye toward greater certainty in its application.\(^{57}\) In holding that a three-person law partnership was a collective entity, the Court stated that the determination of what is or is not a collective entity cannot “be reduced to a simple proposition based solely upon the size of the organization.”\(^{58}\) Instead, the Court held that the organization must have an identity separate from its individual members. Significant facts to be taken into account when making this determination are the formality of the creation of the entity,\(^{59}\) length of its existence,\(^{60}\) its organizational structure,\(^{61}\) and any evidence that the organization held itself out as an “entity with an independent institutional identity.”\(^{62}\) Although the *Bellis* Court’s elaboration on the *White* formulation is hardly a paragon of certainty, the Court had no problem determining that a labor union\(^{63}\) and a small three-person law partnership\(^{64}\) both qualified as collective entities.

Contemporaneously, the Court confronted the issue of whether a custodian of records could assert a fifth amendment privilege in the records.\(^{65}\) As opposed to a collective entity, custodians are natural persons. Thus, they can invoke the fifth amendment in appropriate circumstances.

\begin{itemize}
\item The defendant left the firm in 1969 and thereafter the firm was dissolved. \textit{Id.} In early 1973, the defendant had the firm’s records removed to his new law offices. \textit{Id.} Later that year, the defendant was served with a subpoena directing him to appear before a grand jury with the partnership records for 1968 and 1969. \textit{Id.} The defendant refused, asserting his fifth amendment privilege against self-incrimination. \textit{Id.} The defendant argued that under the *White* formulation, the firm was too small to constitute a collective entity. \textit{Id.} at 95-96. Therefore, the records were not held in a representative capacity and thus were not subject to production. \textit{Id.} at 96.
\end{itemize}

\(^{57}\) \textit{Id.} at 100-01 (Court noted that it is difficult to know precisely which entities fit within *White* formulation).

\(^{58}\) \textit{Id.} at 100.

\(^{59}\) \textit{Id.} at 95.

\(^{60}\) \textit{Id.} at 95-96.

\(^{61}\) \textit{Id.} at 96.

\(^{62}\) \textit{Id.} at 97.

\(^{63}\) *White*, 322 U.S. at 701. For a discussion of the facts of *White*, see \textit{supra} note 46.

\(^{64}\) *Bellis*, 417 U.S. at 95. Although the Court’s definition of a collective entity is very broad and seemingly applies to practically any business, it does have limits. The entity “must be relatively well organized and structured, and not merely a loose, informal association of individuals.” \textit{Id.} at 92-93. This analysis presupposes that more than one individual owns the entity. If the entity is a sole proprietorship, \textit{a fortiori} the entity cannot represent the collective interest of its members. However, based upon the Court’s finding that a three-member partnership is a collective entity, it is likely that these sole proprietors are the only entities excluded from this doctrine.

\(^{65}\) The Court first addressed the issue of a corporate custodian’s possible privilege in business records in *Wilson v. United States*, 221 U.S. 361 (1911). For the facts of *Wilson*, see \textit{infra} note 69. The Court then addressed the identical issue in the context of a collective entity’s custodian in both *White* and *Bellis*. Each case involved the claims of custodians on behalf of both themselves and the
stances. In holding that a custodian has neither a fifth amendment privilege in the contents of corporate records, nor in those of a collective entity, the Court developed what has come to be known as the representative capacity doctrine.

3. The Representative Capacity Doctrine

The Court's first treatment of a custodian's possible fifth amendment privilege in business records occurred during the development of the corporate records exception.\(^{66}\) By this time, the Court had established that a corporation could not claim a fifth amendment privilege because it is not a natural person. Yet, this did not resolve whether a custodian of the corporate records, a natural person, could claim the privilege if the records would tend to incriminate him personally.\(^{67}\) However, the issue of a custodian's possible fifth amendment privilege in corporate records presented problems identical to those raised in the context of a possible corporate privilege.\(^{68}\) The Court in Wilson v. United States\(^{69}\) recognized that approval of a custodian's claim with respect to corporate records would effectively prevent the government from inspecting these documents.\(^{70}\) Therefore, the state's visitorial power over the corporate records could be defeated merely by placing the records in the possession of an officer who would be incriminated by the record's contents.\(^{71}\) Such a result would effectively eviscerate the corporate records exception to the Boyd doctrine since a corporation would

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66. See Wilson, 221 U.S. 361.
67. In Hale v. Henkel, 201 U.S. 43 (1905), the custodian of the records had been granted immunity from prosecution so he could not assert his own fifth amendment claim. Id. at 67-68. The Court held that because Hale was not exposed to a possible federal criminal charge, the fifth amendment was inapplicable. Id. at 67. Thus the Court did not consider whether a custodian had a fifth amendment privilege.
68. If a custodian of corporate records could assert a personal privilege in the records, the government would be denied access to inspect the documents. As a result, corporations would take the simple step of putting the records in the possession of a person who would be incriminated by the contents. Therefore, the detection and punishment of corporate crime would be as difficult as if a corporation itself could assert a fifth amendment claim.
69. 221 U.S. 361 (1911). In Wilson the government was investigating charges of fraudulent use of the mails. Id. at 367. The government directed a subpoena to the United Wireless Telegraph Company and to Wilson, who was president and custodian of records. Id. at 367-68. Wilson refused to deliver the records to the government, arguing that the contents would tend to incriminate him. Id. at 369.
70. Id. at 384-85 (if corporate officers could refuse inspection of organization's records, state's reserved power of visitation would be "seriously embarrassed if not wholly defeated"). See also Note, supra note 24, at 103 (if corporate officers could refuse inspection of corporate records, these records would be effectively shielded from governmental inspection).
71. Wilson, 221 U.S. at 384-85.
receive a derivative fifth amendment privilege from the custodian.\textsuperscript{72} In order to avert this possibility, the \textit{Wilson} Court held that a custodian could never assert his own personal privilege with regard to the contents of corporate documents.\textsuperscript{73} In support of its holding, the Court emphasized the corporation's superior property rights in the records.\textsuperscript{74} Because the corporation, and not the custodian, owned the documents, the custodian had no basis on which to assert his personal privilege.\textsuperscript{75} This analysis was merely a mechanical application of the \textit{Boyd} doctrine which required ownership of the subpoenaed documents in order to assert a fifth amendment privilege.\textsuperscript{76} Because the custodian could assert only a possessory interest and not an ownership interest in the records, the Court found he could not assert his own personal fifth amendment privilege in the corporation's documents.\textsuperscript{77} The Court's holding in \textit{Wilson} provided the first basis on which the representative capacity would ultimately rest: the prevention of a corporation's enjoyment of a fifth amendment privilege derived from its custodian.

The Court's expansion of the corporate records exception to include other unincorporated entities created problems in \textit{Wilson}'s ownership interest analysis of a custodian's fifth amendment claim. Because custodians of a union or partnership do have an ownership interest in the records, as well a possessory interest, the \textit{Boyd} doctrine could be applied to prevent production.\textsuperscript{78} However, in analyzing a custodian's fifth amendment claim, the Court in \textit{White} began by holding that individ-

\textsuperscript{72} The corporation would receive a "derivative privilege" because the custodian could prevent inspection of the records through his own privilege. Therefore, the exercise of the custodian's privilege by the corporation would shield the corporation from investigations. Thus, a corporation would enjoy the protections and benefits of the custodian's privilege. In effect, the corporation would receive a privilege even though it was not entitled to one. \textit{Id.}

\textsuperscript{73} \textit{Id.} The Court stated that although the government could not compel a custodian to orally testify, the government's visitorial power "with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian." \textit{Id.} at 385.

\textsuperscript{74} \textit{Id.} The Court noted that as president and custodian of the corporate records, Wilson was "subject to its [the corporation's] direction .... If another took his place his custody [of the records] would yield." \textit{Id.}

\textsuperscript{75} \textit{Id.} The Court held that Wilson "could assert no personal right to retain the corporate books against any demand of [the] government which the corporation was bound to recognize" because he had no personal property right in the records. \textit{Id.}

\textsuperscript{76} Comment, \textit{The Right Against Self-Incrimination by Producing Documents: Rethinking the Representative Capacity Doctrine}, 80 NW. U.L. REV. 1605, 1611 (1986) (Court's focus on corporation's superior property rights was consistent with property-rights approach taken in \textit{Boyd}).

\textsuperscript{77} \textit{Wilson}, 221 U.S. at 385.

\textsuperscript{78} This assumes, of course, that the custodian is also a member of the entity. For a discussion of the \textit{Boyd} doctrine, see supra notes 16-24 and accompanying text. The defendant in \textit{White} successfully made this proprietary interest argument in the circuit court. \textit{White}, 322 U.S. at 696-97. The court ruled that the records were the property of \textit{all} the union's members and therefore the de-
uals, when acting as representatives of a collective entity, can neither exercise their "personal rights and duties nor be entitled to their purely personal privileges." Rather, the individual assumes the duties and privileges of the entity which he represents. Therefore, if a custodian is holding the entity's records in his representative capacity, the custodian has no personal privilege in the records and instead assumes the entity's privileges and obligations. If the entity has no privilege in the records, the custodian has none as well. The Court, in effect, repudiated the Boyd analysis in which the applicability of the fifth amendment turned on the type of interest the custodian had in the records. Instead, this new analysis made the applicability of the fifth amendment contingent on the capacity in which the custodian holds the records.

A problem arises, however, in determining whether a custodian is holding the records in a representative or personal capacity. The Court resolved this issue by looking to the second policy underlying the representational capacity doctrine, which is to limit the fifth amendment to the protection of an individual's privacy. If a custodian can assert a substantial privacy interest in the records, then he holds them in a personal capacity and thus cannot be forced to produce them. Therefore, to determine if the records are held in a representative capacity, the inquiry is whether the custodian has a privacy interest in the records.

The defendant had only to prove that he was a union member and that the records would incriminate him in order to invoke the fifth amendment. In Bellis v. United States, the Court based this holding on two separate considerations. The first was a pragmatic consideration which recognized that a valid fifth amendment claim by a custodian would frustrate governmental attempts to gain access to business records. Recognition of a custodian's claim would give a derivative privilege to the collective entity and "would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege." The second basis for the holding is the Supreme Court's belief that the fifth amendment protects an individual's "private inner sanctum of individual feeling and thought." In the case of a collective entity's records, a custodian has no privacy interest in the records and therefore the fifth amendment is inapplicable.

For a further discussion of a custodian's privacy interest in the collective entity's records, see infra notes 84-90 and accompanying text.

82. See Note, supra note 24, at 104 (representative capacity doctrine rulings effectively overruled Boyd).
83. See Bellis, 417 U.S. at 90 (if records held in capacity as entity's representative, then fifth amendment is inapplicable); White, 322 U.S. at 699 (same).
84. Bellis, 417 U.S. at 91 (protection of privacy is second policy underlying application of fifth amendment privilege).
85. Id. (fifth amendment bars compulsory production of individual's papers).
86. White, 322 U.S. at 700 (if records "embody no element of personal pri-
Facts significant in determining whether a custodian has a substantial privacy interest in the records are the custodian's power to prevent others from inspecting the records, the custodian's control over the contents and location of the records, and whether maintenance of the records is regulated by statute. If the custodian has a substantial privacy interest in the records, he is holding them in a personal capacity and consequently can claim his own personal fifth amendment privilege to prevent production.

In sum, the Court established that a custodian must have a personal privacy interest in the records in order to exercise his personal fifth amendment privilege. Without this privacy interest, the custodian is deemed to hold the records in his representative capacity. While a custodian acts in his representative capacity he assumes the privileges and obligations of the entity which he represents. If the custodian represents a collective entity, the custodian cannot claim any fifth amendment privilege because the entity has none. Consequently, the custodian...

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87. White, 322 U.S. at 699-700. The Court found that the custodian had no power to prevent inspection of the records by other members of the union. Id. at 699. Therefore, the records "embodied no element of personal privacy." Id. at 700. Similarly in Bellis, the Court found that the records of collective entities are often regulated by statute and the custodian "lacks the control over their content and location and the right to keep them from the view of others..." Bellis, 417 U.S. at 92. Therefore, the custodian did not have a privacy interest in the records sufficient to invoke the fifth amendment. Id. Interestingly, the Court then resurrected the visitatorial power of the state rationale. Id. The Court stated that this rationale itself was premised on the fact that corporations have no privacy interest in their records. Id. For a discussion of this rationale, see supra notes 38-43 and accompanying text. Therefore, the denial of a privilege to the corporation itself can be analyzed through use of the privacy analysis rather than on the reserved right of visitation. The clear implication is that the rationale for denial of a fifth amendment privilege to a collective entity also has changed from the inherent power of the state to enforce its laws to a privacy analysis. If a state chooses to regulate records of collective entities, then the collective entities have no privacy interest in the records and therefore cannot refuse to produce them. This analysis, however, "presupposes the existence of an organization which is recognized as an independent entity apart from its individual members." Id. Presumably, then, if a state could legitimately regulate the private records of individuals, such as diaries, this would deprive the individual of a privacy interest in the records and thus strip them of their privileged status.


89. Id.

90. White, 322 U.S. at 700; Bellis, 417 U.S. at 92. If the custodian lacks the power to deny access to other members of the organization and lacks substantial authority concerning the contents and location of the records, the "characteristic[s] of a claim of privacy are absent." Id.

91. In Bellis, the Court abandoned reliance upon the inherent power of the state to enforce its laws as a rationalization for denying collective entities a fifth amendment privilege and instead substituted a privacy rationale. Bellis, 417 U.S. at 92. If states regulate the content, location and accessibility of the records, a
assumes the entity’s obligation to produce the requested records.

4. The Limitation on the Scope of the Representative Capacity Doctrine

Although the Court has been uniform in its denial of fifth amendment protection to collective entities and their custodians with respect to the contents of business records, the Court has been unwavering in its protection of a custodian’s personal rights and privileges. In *Curcio v. United States*, the Court declined to extend the representative capacity doctrine to include compulsion of a custodian’s testimony concerning the location of subpoenaed records. In *Curcio*, the government subpoenaed Joseph Curcio, the custodian of records and secretary-treasurer of a labor union, to appear before a grand jury and produce the union’s books and records. The subpoena was addressed to Curcio in his capacity as secretary-treasurer. Curcio appeared and testified that the records were not in his possession and thereafter refused to answer questions pertaining to their location on fifth amendment grounds. The government argued that because Curcio was custodian of the union’s records, his testimony regarding the books would have been given in his capacity as custodian.

Therefore, the collective entity does not have a privacy interest in the records and thus cannot refuse to produce them in response to a valid subpoena. *Id.* at 92-93. However, the Court limited this privacy analysis only to entities which are “independent entities apart from [their] individual members.” *Id.* at 92. Furthermore, such an entity must “maintain a distinct set of organizational records, and recognize rights in its members of control and access to them.” *Id.* at 93. Therefore, a court must first determine whether a collective entity exists and then whether it has a privacy interest in its records. Although this seems to repudiate the older corporate and collective entity cases which denied a fifth amendment privilege in every case, a “substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity.” *Id.* at 92. Indeed, in light of *Bellis*, which held a three-person partnership had no privacy interest in the records, it is extremely doubtful that a court will find that a collective entity has a substantial privacy interest in its records.

93. *Id.* at 128.
94. *Id.* at 119. The government was conducting an investigation into possible racketeering in labor unions throughout New York City. *Id.* Pursuant to this investigation, the government subpoenaed Curcio to produce the union’s records. *Id.*
95. *Id.*
96. *Id.* Curcio testified that he was the union’s secretary-treasurer and that the union did have records, but that they were not in his possession. *Id.* The district court then ordered Curcio to answer fifteen questions concerning the whereabouts of the books. *Id.* at 119-20. The district court found that Curcio had not sufficiently demonstrated that his answers would incriminate him and therefore the fifth amendment was inapplicable. *Id.* at 120-21. After Curcio again refused to answer the questions, the district court found him guilty of criminal contempt. *Id.* at 121. The court of appeals affirmed the conviction and held the fifth amendment did not “attach to questions relating to the whereabouts of union books.” *Id.*
97. *Id.* at 123. The government did not argue to the Supreme Court that
no fifth amendment privilege would attach to Curcio's testimony because when acting in a representative capacity, Curcio assumed the union's lack of a fifth amendment privilege.\textsuperscript{98}

The Court rejected the government's argument. It held that a custodian only assumes the entity's privileges and duties with respect to the contents of the records.\textsuperscript{99} Moreover, the Court stated that the government cannot compel a custodian to orally incriminate himself even if the custodian's testimony is given in his representative capacity.\textsuperscript{100} The Court distinguished the production of records from testimony concerning the records. While the custodian has no "legally cognizable interest" in the records themselves,\textsuperscript{101} the custodian's testimony about them would force him to "disclose the contents of his own mind."\textsuperscript{102} In addition, the Court reasoned that the fifth amendment protects against such governmental intrusions into an individual's "inner sanctum of individual feeling and thought."\textsuperscript{103} Although Curcio dealt specifically with oral testimony, the Court made clear that the disclosure of the contents of Curcio had failed to show that his answers would incriminate him. \textit{Id.} Instead, the government's only argument was that the fifth amendment privilege did not attach to questions concerning the whereabouts of records ordered by the subpoena. \textit{Id.} at 121 n.2.

\textsuperscript{98} \textit{Id.} For a discussion of why a custodian, when acting in a representative capacity, has no fifth amendment privilege, see \textit{supra} notes 79-91 and accompanying text.

\textsuperscript{99} 354 U.S. at 124-25. In this fifth amendment analysis, the Court's attention is fixed entirely upon the contents of the records and not upon the actual, physical act of production. Therefore, when the Court states that a custodian has no privilege with regard to the documents, it is referring to the contents and not to any incriminating aspects resulting from the production of the documents. The act of production doctrine had yet to be developed at the time of Curcio. \textit{See} Fisher v. United States, 425 U.S. 391 (1976). For a discussion of the act of production doctrine and how it differs from the representative capacity doctrine, see \textit{infra} notes 105-46 and accompanying text.

\textsuperscript{100} \textit{Curcio}, 354 U.S. at 124 (custodians of records "may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation against them individually be established without the aid of their oral testimony . . . .") (quoting Wilson v. United States, 221 U.S. 361, 385 (1911)).

\textsuperscript{101} \textit{Id.} at 128. This refers to the finding in United States v. White, 322 U.S. 694 (1944), that custodians of collective entities' records did not have a sufficient privacy interest in the records to successfully invoke the fifth amendment. For a further discussion of the privacy analysis employed in White, see \textit{supra} notes 84-90 and accompanying text.

\textsuperscript{102} 354 U.S. at 128. Because the Court has stated that the fifth amendment protects an individual's privacy, the fact that testimony which reveals the contents of one's mind is protected means that the individual has a privacy interest in his own thoughts. \textit{Bellis} v. United States, 417 U.S. 85, 91 (1973). Therefore, the fifth amendment privilege serves to protect the custodian if the government seeks to intrude upon his "private inner sanctum" of individual privacy to extract incriminating information. \textit{Curcio}, 354 U.S. at 128.

\textsuperscript{103} \textit{Bellis}, 417 U.S. at 91 (quoting Couch v. United States, 409 U.S. 322, 327 (1973)). Inside this inner sanctum are the defendant's privacy interests which are protected by the fifth amendment. \textit{Note, supra} note 24, at 101.
the custodian's mind was the factor which brought this case within the ambit of fifth amendment protection.104

C. The Act of Production Doctrine

The Supreme Court's traditional approach to documents and records extended fifth amendment protection to the contents of records provided that the owner or possessor had a privacy interest in the documents.105 Therefore, an owner with a privacy interest could permanently deprive the government of the records unless he received immunity from use of the record's contents.106 However, the successful assertion of a fifth amendment privilege had the effect of keeping useful, if not crucial, information from the government.107 In order to alleviate this serious difficulty, the Court has recently adopted a more literal and

104. The Court stated that because the custodian had no "legally cognizable interest" in a corporation's records, it was justifiable to compel him to produce them. Curcio, 354 U.S. at 128. However, the Court held that oral testimony could not be compelled because it requires a custodian to disclose the contents of his own mind. Id. Therefore, the disclosure of one's mind gives a custodian a "legally cognizable interest" upon which to assert a fifth amendment privilege. Id. Reading this "legally cognizable interest" along with later cases demonstrates that the Court meant that a custodian had a sufficient privacy interest in his own thoughts to invoke the protections of the fifth amendment. See Bellis, 417 U.S. at 91 (fifth amendment protects individual's privacy).

105. See, e.g., Bellis, 417 U.S. at 91-92 (fifth amendment protects individual's privacy, so one needs privacy interest in documents to assert privilege).

106. In order for a grant of immunity to overcome a fifth amendment privilege, it must be "coextensive with the scope of the privilege." Kastigar v. United States, 406 U.S. 441, 449 (1972). If the grant of immunity "has removed the dangers against which the [fifth amendment] privilege protects," the defendant cannot refuse to testify. Id. In Counselman v. Hitchcock, 142 U.S. 547 (1892), the Court held that only transactional immunity was sufficient to overcome a valid fifth amendment defense. Id. at 585-86. Transactional immunity "afford[s] absolute immunity against future prosecution for the offense to which the [government's] question relates." Id. at 586. However, in Kastigar, the Court held that transactional immunity actually offered greater protection than that of the fifth amendment. 406 U.S. at 453. Recognizing that a person who successfully invokes the fifth amendment may still be prosecuted, the Court held that a more limited "use" immunity was coextensive with fifth amendment protections, and thus constitutional. Id. Use immunity prevents information supplied by the defendant and any information discovered as a result of the defendant's admissions from being used against him. Id. Therefore, "[i]mmunity from the use of compelled testimony, as well as evidence derived directly or indirectly therefrom" is sufficient to overcome a fifth amendment claim. Id. Once information is obtained under a grant of use immunity, the prosecution bears the burden of proving that evidence used against the defendant was not directly or indirectly derived from the previous admissions. Id. at 460. This burden "imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Id. If the government fails to meet its burden, the evidence will be suppressed. Congress has provided for use immunity in federal prosecutions. See 18 U.S.C. §§ 6002-6003 (1982).

107. Heidt, supra note 18, at 465 (privacy approach resulted in unwarranted suppression of many documents).
restrictive interpretation of the fifth amendment which has permanently stripped the contents of records of their privileged status. Although the Court applied the traditional elements required to make out a fifth amendment claim, it applied these elements in a new, more analytical manner. In order to successfully invoke the fifth amendment, a communication must be (1) compelled, (2) testimonial and (3) incriminating. This analysis has shifted scrutiny from the contents of the records to the physical act of producing the documents in order to ascertain the applicability of the fifth amendment.

1. Compulsion

The fifth amendment by its express language, protects only against compelled self-incrimination. In early cases, the Court had accepted without question the proposition that a subpoena ordering the production of documents was in reality compelling the individual subject to the subpoena to produce the contents of those documents for use by the government. Therefore, an individual could assert a fifth amendment claim if the contents of the records would incriminate him.

108. This new approach has come to be known as the act of production doctrine. The Court developed the doctrine in Fisher v. United States, 425 U.S. 391 (1976) and United States v. Doe, 465 U.S. 605 (1984). For a discussion of the act of production doctrine and of these cases, see infra notes 105-46 and accompanying text.


110. See Doe, 465 U.S. at 610-11 (government subpoena compels custodian of records to perform act which may have testimonial aspects and incriminating effect, all of which must be present to invoke fifth amendment); Fisher, 425 U.S. at 408 (individual is only protected by fifth amendment when compelled to make testimonial communication which is incriminating). See also Comment, supra note 76, at 1615; Note, supra note 24, at 106-07; Note, Corporate Record-Keepers And The Right Against Self-Incrimination: An Equitable Approach To Fifth Amendment Analysis, 27 SANTA CLARA L. REV. 411, 426 (1987).

111. Comment, supra note 76, at 1606 (act of production doctrine focused on act of producing documents rather than on contents of documents to determine whether fifth amendment is implicated); Note, supra note 109, at 794 (contents of business records not privileged under fifth amendment but individual can assert fifth amendment privilege for act of producing documents).

112. The fifth amendment states that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. (emphasis added).

113. Braswell v. United States, 108 S. Ct. 2284, 2298 (1988) (Kennedy, J., dissenting) (decisions in previous representative capacity cases premised on fact that custodian’s claims concerned incrimination in regard to contents of documents).

114. In the past, the Court had considered whether the contents of the sub-
Fisher v. United States, 1 and in Doe v. United States, 2 the Court rejected this traditional approach and instead relied on a much more technical and rigid interpretation of “compulsion.”

The Court recognized that the ordinary subpoena does not compel an individual to create the contents of the requested records. 3 In the vast majority of cases, the individual compiles the records without governmental compulsion. Instead, the subpoena, in the most literal sense, only compels an individual to produce the records. 4 Because the subpoena compels the production of records and not their creation, the Court held that the contents of the records were no longer privileged regardless of their incriminating nature. 5 In adopting this approach, the Court limited fifth amendment claims concerning business documents solely to the act of producing the requested records. 6


115. 425 U.S. 391 (1976). In Fisher, a consolidation of two cases with similar facts, a subpoena directed taxpayers’ attorneys to produce papers which the attorneys held in a fiduciary capacity. Id. at 394. The attorneys had been retained to assist the taxpayers in connection with an Internal Revenue Service (IRS) investigation. Id. After discussions with IRS agents, the taxpayers obtained documents relating to their tax return preparations from their accountants and transferred these documents to their attorneys. Id. After learning the whereabouts of the records, the IRS served a subpoena on the attorneys requesting production of the records. Id. The attorneys claimed that compliance with the subpoena would involve a violation of their clients’ fifth amendment rights. Id. at 395. Although recognizing that normally a person may not invoke the fifth amendment on behalf of another, the Court held that due to the attorney-client privilege, if the records were privileged in the taxpayers’ possession, they would be privileged in the attorneys’ possession. Id. at 404.

116. 465 U.S. 605 (1984). In Doe, the government was investigating possible corruption in the awarding of civil and municipal contracts. Id. at 606. The defendant was the owner of several sole proprietorships which had their records subpoenaed in the course of the investigation. Id.

117. Fisher, 425 U.S. at 409-10, 410 n.11 (ordinary subpoena does not compel person to create records and fact that person asserting privilege actually wrote records is insufficient to trigger privilege).

118. Id. at 410 n.11 (“In the case of documentary subpoena the only thing compelled is the act of producing the document . . .”).

119. Id. at 409-10 (“Where the preparation of all the papers . . . was wholly voluntary, . . . they cannot be said to contain compelled testimonial evidence . . . . The [defendant] cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing . . . .”). See also Note, supra note 109, at 804 (fifth amendment does not protect contents of business records).

120. See Braswell v. United States, 108 S. Ct. 2284, 2290 (1988) (Fisher and Doe developed doctrine which denies all business records fifth amendment privilege but which allows act of producing documents to be privileged). However, there is a dispute whether non-business records, such as diaries, are subject to
2. Testimonial

Although the fifth amendment speaks in terms of being a witness against oneself,\textsuperscript{121} the Court has recognized that oral testimony is only one manner through which a person may incriminate himself.\textsuperscript{122} However, the Court has consistently recognized that not every compelled act which incriminates the individual deserves fifth amendment protection.\textsuperscript{123} Further, even certain oral statements are excluded from the fifth amendment shield.\textsuperscript{124} In deciding which potential evidence deserves constitutional protection, the Court has held that only "testimonial" evidence is protected.\textsuperscript{125}

The Court has determined that a primary purpose of the fifth amendment is to protect the sanctity of an individual's thoughts and feelings.\textsuperscript{126} Therefore, in order for a compelled act to be considered the act of production doctrine. Justice O'Connor believes that the fifth amendment "provides absolutely no protection for the contents of private papers of any kind." \textit{Doe}, 465 U.S. at 618 (O'Connor, J., concurring). Conversely, Justices Marshall and Brennan feel that Justice O'Connor's pronouncement is overly broad. They "continue to believe that under the Fifth Amendment 'there are certain documents no person ought to be compelled to produce.'" \textit{Id.} at 619 (Marshall, J., concurring in part and dissenting in part) (quoting \textit{Fisher v. United States}, 425 U.S. 391, 431-32 (1976) (Marshall, J., concurring)). Because personal, non-business records implicate a higher degree of concern for privacy interests, Justices Marshall and Brennan believe that they are not subject to compulsion under the act of production doctrine and instead are analyzed under the traditional privacy approach. \textit{Id.} As of this writing, this dispute has not been resolved.

\textsuperscript{121} For the relevant language of the fifth amendment, see \textit{supra} note 1.


\textsuperscript{123} \textit{Dionisio}, 410 U.S. at 5 (compelled provision of incriminating voice exemplar did not violate fifth amendment); \textit{Gilbert}, 388 U.S. at 266 (compelled provision of handwriting exemplar did not violate fifth amendment); \textit{Wade}, 388 U.S. at 221 (compelling accused to stand in line-up not violative of fifth amendment); \textit{Schmerber}, 384 U.S. at 761 (compelled provision of blood sample did not violate fifth amendment); \textit{Holt}, 218 U.S. at 252-53 (compelled modeling of blouse did not violate fifth amendment).

\textsuperscript{124} \textit{Dionisio}, 410 U.S. at 5-6 (provision of voice exemplar did not violate fifth amendment because statement given was not used for its content but only for comparison); \textit{Curcio v. United States}, 354 U.S. 118, 125 (1957) (testimony authenticating books produced in response to subpoena did not violate fifth amendment).

\textsuperscript{125} \textit{Schmerber}, 384 U.S. at 761 (fifth amendment privilege protects accused only against being compelled to provide evidence of testimonial nature).

\textsuperscript{126} \textit{Bellis v. United States}, 417 U.S. 85, 91 (1973) ("We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought" . . . .") (quoting \textit{Couch v. United States}, 409 U.S. 322, 327 (1973)).
testimonial, it must reveal the contents of the accused's mind.\(^{127}\) Thus, compelling an individual to provide blood samples,\(^{128}\) handwriting\(^{129}\) or voice exemplars,\(^{130}\) or compelling the accused to stand in a line-up,\(^{131}\) or model a blouse\(^{132}\) are not testimonial acts regardless of how incriminating the resulting evidence may be. In these situations the accused is not forced to reveal the contents of his mind.\(^{133}\)

The critical question concerning the Court's act of production analysis was whether the production of records was a testimonial act.\(^{134}\) In holding that the act of producing documents can be testimonial in nature, the Court recognized that producing the records has many of the same characteristics of oral testimony.\(^{135}\) The Court noted that, in responding to a subpoena, the custodian concedes the existence of the records, their possession by the custodian and indicates the custodian's belief that the records produced are those demanded by the subpoena.\(^{136}\) That is, the custodian is using his own thoughts to assemble documents which he believes are responsive to the subpoena and he relates those thoughts to a grand jury when he produces the documents. Therefore, the production of documents can be a testimonial act deserv-

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\(^{127}\) See also Note, supra note 24, at 101 (fifth amendment assures respect for individuals' personality and right of individual to private enclave to lead private life).

\(^{128}\) Curcio, 354 U.S. at 128 ("[F]orcing the custodian to testify orally as to the whereabouts of non-produced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment."); see also Note, supra note 37, at 1550 ("To be testimonial, evidence must reveal the contents of one's mind.").

\(^{129}\) Schmerber, 384 U.S. at 761 (withdrawal of blood does not provide state with testimonial evidence).

\(^{130}\) Gilbert v. California, 388 U.S. 263, 266-67 (1967) (handwriting exemplar not testimonial because not used for content of what was written).

\(^{131}\) United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice exemplar not testimonial because not used for testimonial content of what was said).


\(^{133}\) Holt v. United States, 218 U.S. 245, 252-53 (1910) (using body as comparative evidence does not exact communications from him).

\(^{134}\) Curcio v. United States, 354 U.S. 118, 128 (1957) (compelling custodian to reveal contents of mind is contrary to spirit and letter of fifth amendment).

\(^{135}\) Fisher v. United States, 425 U.S. 391, 410 (1976) (more difficult issue is whether custodian's averments are testimonial for purposes of applying fifth amendment).

\(^{136}\) Id. (although contents of documents are not privileged, "act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own . . . ."); Curcio, 354 U.S. at 125 (orally authenticating records produced in response to subpoena does no more than make explicit what is implicit in act of production).

\(^{137}\) Fisher, 425 U.S. at 410 ("Compliance with the subpoena tacitly concedes the existence of the papers . . . . their possession or control by the custodian, and . . . . would indicate the [custodian's] belief that the papers are those described in the subpoena.").
ing of fifth amendment protection, provided that the information obtained as a result of this act is incriminating to the custodian.

3. **Incriminating**

In order to receive fifth amendment protection, the compelled communication must be incriminating as well as testimonial. In general, to be incriminating, the evidence need not conclusively prove an accused's guilt. Rather, the evidence need only provide a "link in the evidentiary chain" connecting the accused to a crime. In *Doe*, however, the Court stated that a person wishing to "claim the Fifth Amendment privilege must be 'confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination.' In demanding a substantial risk of incrimination, the Court apparently meant that the defendant must "reasonably believ[e] [that the disclosure] could be used in a criminal prosecution or could lead to other evidence that might be so used." Therefore, the more likely the government will use the incriminating evidence, the more substantial and real the hazards of incrimination become. If a defendant does prove that the production of the requested documents is incriminating, the government may then rebut that finding by "producing evidence that possession, existence, and authentication were a 'foregone conclusion.'" The government may do so by proving that it has independent evidence of the existence, possession and authenticity of the requested records, so that the custodian's act of production adds nothing to the government's information. The effect of the foregone conclusion test is to deprive an individual of a fifth amendment claim when the individual's compelled act adds nothing to the "sum total of the Government's information." The Court in *Fisher* and *Doe* developed a new analysis for fifth amendment claims regarding production of documentary evidence. In

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137. *Id.* at 408 (fifth amendment protects only against compelled, testimonial and incriminating communications).


141. *Note*, *supra* note 37, at 1555 ("substantial risk" indicates that likelihood of use is what is incriminating about evidence).


143. *Fisher*, 425 U.S. at 411 (existence, location and custodian's admission of possession of records are foregone conclusions if they add little or nothing to sum total of government's information).

144. *Id.*
holding that a subpoena only compels the production of documents, the Court stripped the contents of business records of fifth amendment protection regardless of how incriminating the contents may be.\textsuperscript{145} However, by holding that the act of production is a testimonial act,\textsuperscript{146} the Court granted a limited fifth amendment privilege to custodians provided they show the act of production involves testimonial self-incrimination.

D. Braswell v. United States

After \textit{Doe} the circuits split as to the effect the act of production analysis\textsuperscript{147} had on the collective entity doctrine\textsuperscript{148} and particularly the effect it had on the representative capacity corollary\textsuperscript{149} to the collective entity doctrine. Some circuits held that the act of production analysis replaced the representative capacity doctrine and allowed the custodian to assert a fifth amendment privilege.\textsuperscript{150} Others held that the collective entity and representative capacity doctrines remained unchanged in the wake of \textit{Doe}.\textsuperscript{151} The Supreme Court resolved this split among the circuits in \textit{Braswell v. United States}.\textsuperscript{152}

\textit{Braswell} was the sole stockholder in two Mississippi corporations.\textsuperscript{153} In accordance with Mississippi law, each corporation had three

\textsuperscript{145} Dispute does exist as to whether the act of production doctrine strips contents of all records of their formerly privileged status. For a discussion of this dispute, see \textit{supra} note 120.

\textsuperscript{146} For a discussion of why the act of production is testimonial, see \textit{supra} notes 121-36 and accompanying text.

\textsuperscript{147} For a discussion of the act of production doctrine, see \textit{supra} notes 105-46 and accompanying text.

\textsuperscript{148} For a discussion of the collective entity doctrine, see \textit{supra} notes 44-65 and accompanying text.

\textsuperscript{149} For a discussion of the representative capacity doctrine, see \textit{supra} notes 66-91 and accompanying text.

\textsuperscript{150} See \textit{In re Grand Jury No. 86-3} (Will Rogers Corp.), 816 F.2d 569 (11th Cir. 1987) (record custodian can assert personal fifth amendment privilege to avoid having to produce records himself); United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67 (2d Cir. 1986) (act of production doctrine prohibits government from compelling custodian to produce documents if it would incriminate him); \textit{In re Grand Jury Matter (Brown)}, 768 F.2d 525 (3d Cir. 1985) (en banc) (custodian can show that production and authentication would incriminate him and avoid personally producing subpoenaed records).

\textsuperscript{151} See \textit{In re Grand Jury Proceedings (Morganstern)}, 771 F.2d 143 (6th Cir.) (en banc) (collective entity rule prevents custodian of corporate records from relying on act of production doctrine to avoid production), \textit{cert. denied}, 474 U.S. 1033 (1985); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984) (custodian may not assert fifth amendment privilege to avoid producing records held in representative capacity); \textit{In re Grand Jury Proceedings (Vargas)}, 727 F.2d 941 (10th Cir.) (en banc) (records held in representative capacity are not protected by fifth amendment, even after development of act of production doctrine), \textit{cert. denied}, 469 U.S. 819 (1984).

\textsuperscript{152} 108 S. Ct. 2284 (1988).

\textsuperscript{153} Id. at 2286.
officers, but Braswell retained all the authority in each corporation. A federal grand jury subpoenaed Braswell in his capacity as president of the two corporations, ordering him to produce the records of both corporations. Braswell moved to quash the subpoena, arguing that producing the documents would incriminate him personally. The district court denied Braswell's motion to quash, holding that the collective entity doctrine prevented him from asserting a fifth amendment privilege with regard to corporate records. The United States Court of Appeals for the Fifth Circuit affirmed the decision, asserting that Braswell, in his capacity as custodian of the corporations' records, had no privilege with regard to the records. The Supreme Court affirmed the Fifth Circuit by a 5-4 vote.

Braswell raised two arguments in attacking the Fifth Circuit's holding. First, Braswell argued that the act of production doctrine had replaced the collective entity and representative capacity doctrines. He asserted that the production doctrine abandoned the privacy-based representative capacity rationale and replaced it with a testimonial communication standard. Therefore, he argued that while the contents of business records are never privileged, the act of producing the documents may be, regardless of the type of entity the custodian represents. He then argued that his act of producing the documents would have "independent testimonial significance, which would incriminate him individually ...." Therefore, under the act of production analysis, he was privileged to refuse compliance with the subpoena.

Secondly, Braswell argued that even if the entity and representative

154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id. at 2286-87. See also In re Grand Jury Proceedings (Doe), 814 F.2d 190, 192 (1987) (individual enjoys no fifth amendment privilege from producing records of collective entity).
160. Chief Justice Rehnquist was joined by Justices O'Connor, White, Blackmun and Stevens in affirming the Fifth Circuit's decision. 108 S. Ct. at 2286. Justice Kennedy was joined by Justices Brennan, Marshall and Scalia in dissent. Id. at 2296.
161. 108 S. Ct. at 2290. For a discussion of the privacy rationale, see supra notes 84-91 and accompanying text.
162. 108 S. Ct. at 2290. For a discussion of the testimonial communication standard, see supra notes 121-36 and accompanying text.
163. 108 S. Ct. at 2290.
164. Id. at 2287. Recognizing that the subpoena compelled the production of the records, Braswell alleged that production was both testimonial and incriminating. Therefore, under the act of production doctrine as developed in Doe, the government could not compel Braswell to personally produce the records. For a discussion of the act of production doctrine, see supra notes 103-46 and accompanying text.
165. 108 S. Ct. at 2287.
capacity doctrines continued unchanged despite the development of the act of production doctrine, the Court had carved out an exception to the representative capacity doctrine. Specifically, this exception provided a fifth amendment privilege to a custodian if he was compelled to perform a testimonial act. Braswell based this argument upon the Curcio case, which granted the custodian a privilege to refuse to answer questions concerning the location of the entity's records.

Chief Justice Rehnquist, writing for the majority, rejected both of these arguments. First, the Court held that the collective entity doctrine stands for the proposition that collective entities are treated differently than individuals. The Court reasoned that the history of the collective entity doctrine demonstrates that collective entities are not entitled to any fifth amendment privilege. The Court stated that this fundamental principle of the collective entity doctrine could never be altered regardless of the type of analysis employed. Moreover, the Court held that the representative capacity corollary to the entity doctrine also survived the development of the act of production doctrine. Without analyzing the rationale for the creation of the representative capacity corollary, the Court held that the custodian assumed certain obligations, among them the duty to produce the entity’s documents on demand by the government, which cannot be avoided by invoking the fifth amendment. Because the custodian is acting in his representative capacity in delivering the records, the act of production is not his but rather that of the entity. Therefore, the Court asserted that to recognize a privilege in the act of production would, in effect, give a fifth amendment

166. Id. at 2293.
167. Id. For a discussion of Curcio, see supra notes 92-98 and accompanying text.
168. 108 S. Ct. at 2288. The Court noted that “we have long recognized that for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.” Id.
169. Id. at 2288-90. The Court stated that it is “settled that a corporation has no Fifth Amendment privilege.” Id. at 2288 (citing Hale v. Henkel, 210 U.S. 43 (1905)).
170. Id. at 2290-92. The Court stated that “[t]he plain mandate of these [collective entity] decisions is that . . . a corporate custodian such as [Braswell] may not resist a subpoena for corporate records on Fifth Amendment grounds.” Id. at 2290. Further, in the act of production cases, “[t]he Court . . . reaffirmed the obligation of a corporate custodian to comply with a subpoena addressed to him.” Id. at 2292.
171. Id. at 2291. The Court held that the representative capacity doctrine “undergirding the collective entity decisions, in which custodians asserted that production of entity records would incriminate them personally, survive[d]” the development of the act of production doctrine. Id.
172. Id. “[A] custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government.” Id.
173. Id. The Court held that the “custodian’s act of production is not deemed a personal act, but rather an act of the corporation.” Id.
privilege to an entity which does not possess such a privilege. The Court also rejected Braswell's reading of the Curcio decision. The Braswell Court held that Curcio did not stand for the proposition that a custodian has a fifth amendment privilege for incriminating testimonial communications. Rather, Curcio granted an exception solely for oral testimony. In support of its conclusion, the Court quoted the language from Curcio which stated that a custodian cannot be compelled to "condemn himself by his own oral testimony." Relying on this and prior cases which also had held that a custodian does not waive his fifth amendment privilege with respect to oral testimony, the Court held that Braswell could not avail himself of the Curcio exception because he was not being compelled to give oral testimony.

The Court thus rejected both of Braswell's arguments and unequivocally held that a custodian of corporate records has no fifth amendment privilege in producing corporate records. The Court then developed a rule preventing the government from making evidentiary use of the custodian's individual act of producing the records against the custodian personally. Because the custodian acts as a representative of the corporation rather than as an individual, the government cannot present evidence that the "subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian." Instead, according to the Court, the government may only

174. Id. (claim of fifth amendment privilege asserted by custodian would be tantamount to claim of privilege by corporation).

175. Id. at 2293-94. The Court held that Curcio made it clear "that with respect to a custodian of a collective entity's records, the line drawn was between oral testimony and other forms of incrimination." Id. at 2293.

176. Id. at 2293 (emphasis added by Court) (quoting Curcio v. United States, 354 U.S. 118, 123-24 (1957)). For a discussion of why the Curcio Court's use of oral testimony is not significant, see infra note 275 and accompanying text.

177. Shapiro v. United States, 335 U.S. 1, 27 (1948) (oral testimony can be compelled only by exchange of immunity); Wilson v. United States, 221 U.S. 361, 385 (1911) (custodian may decline to incriminate himself through testifying).

178. Braswell, 108 S. Ct. at 2293-94. The Court found it significant that the Curcio Court had recognized that the act of producing records is testimonial in nature. Id. at 2293. Therefore, because the Curcio Court did not find the act of production incriminating and thus protected by the fifth amendment, the Curcio Court must have intended its exception to the representative capacity doctrine to be limited to oral testimony only. Id.

179. Id. at 2295. Because the Court held that the custodian's act of producing the records is actually the corporation's act, the government "may make no evidentiary use of the 'individual act' against the individual." Id.

180. Id. The approach developed by the Court is quite similar to that of the Sixth Circuit in In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.) (en banc), cert. denied, 474 U.S. 1033 (1985). In Morganstern, the court held that "if the government later attempts to implicate the custodian on the basis of the act of production, evidence of that fact is subject to a motion to suppress." Id. at 148. The court in Morganstern held that the fifth amendment is inapplicable
present evidence that the subpoena was served and that the records were produced, leaving it up to the jury to draw the "conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena." 181 The Court then stated that the government may introduce evidence of the custodian's position in the corporation. This allows the jury to "reasonably infer that he had possession of the documents or knowledge of their contents. . . . Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case." 182 Although the majority did not link this "evidentiary use" rule to the fifth amendment, the rule does provide protection similar to use immunity. 183 Therefore, Braswell received diluted fifth amendment protection for his act of production even though the majority held that he has no fifth amendment privilege in these circumstances. 184

In contrast to the majority, Justice Kennedy, in dissent, stated that the continued validity of the representative capacity doctrine was irrelevant to the issue presented in Braswell. 185 Instead, the issue was one of
to a custodian because his act of producing the records is not testimonial because he acts in his representative capacity. Id. Therefore, the custodian cannot meet the basic requirements needed to invoke the act of production doctrine. Once the government attempts to introduce the evidence at trial, it is giving testimonial significance to an otherwise testimony-free act. Id. Once the custodian's act is given testimonial significance, presumably the fifth amendment would operate to suppress the evidence.

182. Id.
183. Id. at 2301 (Kennedy, J., dissenting) (new rule confers upon individual partial use immunity). The majority, however, rejected the suggestion that this affords the custodian any use immunity at all. Rather, the "limitation is a necessary concomitant of the notion that a corporate custodian acts as an agent . . . when he produces corporate records." Id. at 2295 n.11. Although the Court disputed the notion that immunity has been conferred, the practical effect of the limitation is to deprive the government of useful and legally obtained information. The limitation does not, however, offer the broad range of protection of use immunity. For example, the government is apparently free to use evidence indirectly derived from the act of production. However, it does at least provide protection against using information directly and proximately derived from the custodian's act. Therefore, as Justice Kennedy asserts, there has been at least a partial judicial grant of use immunity. Id. at 2301 (Kennedy, J., dissenting). The Court has left the boundaries of the limitation undefined, so it is unclear whether information indirectly derived from the act can be used. Extending this evidentiary use restriction to exclude indirectly derived information, however, would be tantamount to granting full use immunity. Therefore, the majority would be extending use immunity to the custodian while maintaining that the fifth amendment is inapplicable to a custodian's act of producing a collective entity's records.

184. For a discussion of this diluted immunity, see supra note 183.
185. 108 S. Ct. at 2300 (Kennedy, J., dissenting) (validity of representative capacity doctrine is not in issue before Court).
determining the scope of the representative capacity doctrine. Justice Kennedy asserted that the representative capacity doctrine does not deny a custodian a fifth amendment privilege. Therefore, if a custodian can assert a valid fifth amendment claim, the representative capacity doctrine does not prevent judicial recognition of the claim.

Justice Kennedy did not call into doubt the continued validity of the collective entity doctrine. Rather, he questioned whether the collective entity doctrine “contains any principle which overrides the personal Fifth Amendment privilege of someone compelled to give incriminating testimony.” Justice Kennedy stated that in the collective entity cases, the custodians were denied a fifth amendment privilege in the records because they could not meet the minimum requirements necessary to assert a fifth amendment claim. However, Braswell satisfied the threshold requirements of the act of production doctrine, and therefore the denial of his claim of privilege flowed from his status as custodian. Justice Kennedy relied on Curcio to demonstrate that the entity doctrine does not require a custodian to give up his fifth amendment privilege when compelled to provide testimonial evidence, even when the custodian acts in a representative capacity. Justice Kennedy additionally argued that Braswell’s act of producing the documents cannot be imputed to the corporation because the act disclosed the contents of Braswell’s mind.

Justice Kennedy further argued that the Court’s evidentiary use rule lends support to the custodian’s claim of an act of production privi-

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186. Id. at 2299 (Kennedy, J., dissenting) (issue presented is whether representative capacity doctrine allows compulsion of testimonial incriminating information).
187. Id. at 2298 (Kennedy, J., dissenting) (collective entity doctrine provides no support for Court’s finding that custodian is not entitled to fifth amendment privilege).
188. Id. at 2300 (Kennedy, J., dissenting) (representative capacity doctrine precedents establish firm basis for assertion of personal fifth amendment privilege).
189. Id. at 2299 (Kennedy, J., dissenting) (question of validity of collective entity rule is not before Court).
190. Id. (Kennedy, J., dissenting).
191. Id. See also Bellis v. United States, 417 U.S. 85 (1973); United States v. White, 322 U.S. 695 (1943). In both cases, the custodian was denied a fifth amendment privilege because he could not assert a valid claim. Bellis, 417 U.S. at 101; White, 322 U.S. at 704. Because the custodian had no privacy interest in the records, their fifth amendment rights were not implicated. Bellis, 417 U.S. at 92; White, 322 U.S. at 699-700.
192. Braswell, 108 S. Ct. at 2296 (Kennedy, J., dissenting) (Braswell submitted on assumption that Braswell’s act of production will involve testimonial self-incrimination).
193. Id. at 2300 (Kennedy, J., dissenting) (Curcio held that testimony cannot be compelled from custodian even when acting in representative capacity).
194. Id. (Kennedy, J., dissenting) (Braswell’s act requires personal disclosure of individual knowledge, fact which cannot be dismissed by labeling him agent).
He noted that the Court's holding denies a jury evidence which the government has lawfully gathered. Therefore, the only ground on which this information can be excluded is that it violated the custodian's fifth amendment rights. However, according to Justice Kennedy, if the evidence is excluded because its use violates the custodian's fifth amendment rights, then the government could not have compelled the evidence from the custodian in the first place absent a grant of immunity. If the majority's evidentiary use restriction is the grant of immunity necessary to overcome the custodian's fifth amendment claim, then the Court has implicitly acknowledged that a custodian's personal fifth amendment rights have been implicated by compliance with the subpoena. In Justice Kennedy's view, the fifth amendment is either applicable or it is not. If it is not applicable, then the government has legitimately obtained the evidence and there is no basis in precedent for the majority to fashion new evidentiary rules. The Court's development of the evidentiary use rule, according to the dissent, detracts from its denial of the custodian's fifth amendment privilege. If the Court developed this rule because of fifth amendment concerns, the holding and the evidentiary use rule cannot be reconciled. The fifth amendment does not allow for the balancing of an individual's fifth amendment rights against the convenience of the government in order to reach a middle road. Therefore, the dissent argued, if the fifth amendment is applicable, "precedents require the Government to use the only mechanism yet sanctioned for compelling testimony which is privileged: a request for immunity . . . ."

**III. Analysis**

The act of production doctrine as developed in *Fisher* and *Doe* recognized a fifth amendment privilege for the physical act of producing

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195. *Id.* at 2296 (Kennedy, J., dissenting) (creation of use restriction admits that compliance with subpoena implicates custodian's fifth amendment rights).

196. *Id.* at 2300 (Kennedy, J., dissenting) (use restriction deprives jury of relevant information).

197. *Id.* (Kennedy, J., dissenting) (fifth amendment is only ground for declaring act of production information inadmissible).

198. *Id.* (Kennedy, J., dissenting) (if fifth amendment is applicable, government must make request for statutory use immunity).

199. *Id.* at 2296 (Kennedy, J., dissenting) (creation of use restriction admits that compelled compliance with subpoena implicates custodian's fifth amendment rights).

200. *Id.* at 2301 (Kennedy, J., dissenting) (precedents require government to request statutory immunity, rather than Court establishing new judicially created rules of evidence).

201. *Id.* at 2300 (Kennedy, J., dissenting) (fifth amendment does not permit balancing of government convenience against witness' fifth amendment rights).

202. *Id.* at 2301 (Kennedy, J., dissenting).
In both cases, the extension of the privilege did not turn "on who owned the papers, how they were created, or what they said; instead [the holdings] rested on the fact that 'the act of producing the documents would involve testimonial self-incrimination.' Because the act of production analysis did not depend upon the status of the person holding the records, this Note submits that Braswell should have been entitled to invoke the act of production doctrine to avoid having to personally produce the subpoenaed records. His inability to do so is directly attributable to his status as custodian of the corporations' records. Therefore, Braswell's status as custodian of corporate records overrode his fifth amendment privilege against self-incrimination.

The Court based its rationale for this result on the representative capacity corollary to the collective entity doctrine which denies custodians any fifth amendment privilege with respect to the production of the entity's records. The Court also stated that the act of production doctrine did nothing to change this traditional approach. As a result, a custodian cannot avail himself of the act of production doctrine.

Part A of this section analyzes the purposes of the representative capacity doctrine and submits that the act of production doctrine effectively achieves these purposes. Therefore, there is no longer a compelling rationale for the existence of the collective entity doctrine. Consequently, a custodian should be able to invoke the act of production doctrine. However, even if the collective entity doctrine has contin-

205. The Court did not hold that the act of production in this case did not involve testimonial self-incrimination. As Justice Kennedy noted, both the court and the government assumed that the act of production would personally incriminate Braswell. Id. (Kennedy, J., dissenting). The Court stated that had Braswell conducted his businesses as sole proprietorships, under Doe he could have availed himself of the act of production privilege. Id. at 2288. Because Braswell operated his businesses in the corporate form, however, the Court denied him the act of production privilege. Id. Therefore, his status as corporate custodian of records denied him a fifth amendment privilege.
206. The Court developed the representative capacity corollary primarily to prevent frustration of the collective entity doctrine. The Court denied a custodian a fifth amendment privilege in the records because the custodian held these records as a representative of the collective entity rather than in his personal capacity. For a discussion of the representative capacity doctrine, see supra notes 66-91 and accompanying text.
207. 108 S. Ct. at 2290 ("plain mandate" of collective entity cases is that corporate custodian may not resist subpoena for corporate records on fifth amendment grounds).
208. Id. at 2290-91 (act of production doctrine did not render collective entity doctrine obsolete).
209. Id. at 2291 (act of production doctrine did not render collective entity rule obsolete).
ued vitality, Part B of this section submits that the representative capacity doctrine itself allows a custodian to invoke the fifth amendment to avoid testimonial self-incrimination. Finally, Part C of this section analyzes the Court’s restriction on the use of evidence obtained as a result of the custodian’s act of production, and submits that such a restriction is neither consistent with the Court’s holding in Braswell nor an effective substitute for fifth amendment protections.

A. The Demise of the Representative Capacity Doctrine

It is submitted that the shift in fifth amendment protection from the contents of the records to the testimonial nature of the act of production has satisfied the basic purposes of the representative capacity doctrine. Without these purposes, the representative capacity doctrine no longer has a rationale which justifies its continued existence. Residual law enforcement problems would exist as a result of granting the custodian an act of production privilege. However, these problems were anticipated when the fifth amendment was promulgated. Therefore, they are a necessary result of having the fifth amendment privilege against self-incrimination.

1. The Purposes of the Representative Capacity Doctrine

As the Court stated in Bellis v. United States, the representative capacity doctrine has two rationales for its existence. First, the doctrine was designed to prevent a collective entity from enjoying a fifth amendment privilege derived from the custodian’s privilege. Additionally, the doctrine arose as a means to limit the fifth amendment to protection of an individual’s personal privacy.

a. Prevention of a Derivative Fifth Amendment Privilege

The collective entity doctrine was, in large part, developed to ensure effective governmental regulation of business entities. By denying collective entities any fifth amendment privilege, the Court assured that a “cloak of... privilege” would not be thrown around business...
records. However, if the custodian could assert a privilege in the records' contents, the purpose of the collective entity doctrine would often be frustrated. Therefore, a primary purpose of the representative capacity doctrine was to ensure that the entity would not enjoy a derivative privilege and thereby escape governmental regulation.

At the time of the development of the representative capacity doctrine, the threat that a custodian's claim of privilege would deny the government possession of the documents was a very real concern. Because the Court focused its attention solely on the contents of the records, the custodian's privilege would permanently deprive the government of the records. Therefore, in order to obtain the records from the custodian, the government would have to grant him immunity with respect to the record's contents, thereby rendering any prosecution of the custodian virtually impossible. This result offended the Court's sense of justice because collective entities can only commit crimes through the actions of those in control of them. Thus, a person responsible for the economic crime could not be prosecuted merely because he had possession of the entity's records, yet the tool used to complete the crime, the entity itself, would bear the penalty of any sanctions. Therefore, the Court developed the representative capacity doctrine to avoid the dilemma of choosing to forego inspection of an entity's records or granting immunity to a person likely to have been at least partly responsible for any crime committed. By denying both the entity and custodian a privilege in the records, the Court ensured that the government could inspect the records and punish any and all offenders.


217. Id. Because the custodian could prevent governmental inspection of the records so long as he had possession, the effectiveness of the collective entity doctrine would be significantly reduced. Id.

218. Comment, supra note 47, at 1613 (purpose underlying representative capacity doctrine was to prevent custodian from shielding entity through custodian's own privilege); Note, Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe, 54 FORDHAM L. REV. 935, 937 (1986) (purpose behind representative capacity doctrine was prevention of granting entity de facto fifth amendment privilege through custodian); Note, supra note 110, at 422-23 (only way to give effect to collective entity doctrine was by preventing entity's individual representatives from invoking fifth amendment).

219. More accurately, a claim of privilege would deny the records to the government so long as the custodian retained possession of the records. See Wilson v. United States, 221 U.S. 361, 379 (1911). Because both the corporation and the custodian would be interested in preventing governmental inspection of records, it is unlikely that a custodian would voluntarily surrender the records.

220. The immunity granted to the custodian would prevent the government from using any evidence found in the records or evidence in any way derived from the records. See Kastigar v. United States, 406 U.S. 441, 453 (1972). For a discussion of use immunity, see supra note 106.

221. See Note, supra note 28, at 1242 (discussing unfairness of imputing actions of agents to corporation).
However, the act of production analysis fundamentally altered the basic assumptions underlying the representative capacity doctrine. Because the production doctrine focuses strictly upon the specific action actually compelled by the subpoena, the contents of the records will never be protected by the fifth amendment. The collective entity doctrine, however, still denies entities a fifth amendment privilege. Thus, the collective entity doctrine precludes the entity itself from asserting the act of production privilege, thereby avoiding governmental inspection of its records. Therefore, even if the custodian successfully asserts an act of production privilege, the collective entity still must produce the documents. The custodian, in asserting this privilege, is

222. Many commentators on this subject have reached the same conclusion. See Comment, supra note 76, at 1637 (policies underlying collective entity doctrine do not prevent custodian from claiming act of production doctrine); Note, supra note 37 (application of act of production doctrine rests on principles of collective entity doctrine); Note, supra note 47, at 235 (because act of production doctrine addresses policy concerns underlying collective entity doctrine, it is unnecessary to observe distinction between custodians of collective entities and individuals); Note, supra note 109, at 793 (goals implicit in collective entity doctrine provide basis for act of production doctrine).

223. Braswell, 108 S. Ct. at 2287 (Court rejected argument that contents of records are privileged). In complying with a subpoena, a record holder is not compelled to create the contents of the records. Therefore, the contents of the records are not compelled and thus not subject to fifth amendment protections. See United States v. Doe, 465 U.S. 605, 608 (1984) (contents of business records not privileged because they are voluntarily created). For a further discussion of why the contents of business records are no longer privileged, see supra notes 112-20 and accompanying text.

224. Braswell, 108 S. Ct. at 2287 (artificial entities are not protected by fifth amendment).

225. Id. at 2294 (if subpoena is addressed to corporation, it must find some means to comply).

226. The collective entity must comply with a government subpoena. Id. However, because the custodian has possession of the subpoenaed records, the custodian might not turn over the records to the collective entity for ultimate delivery to the government. Therefore, the entity could state that it is unable to obtain the records from the custodian and, as a result, is unable to comply with the subpoena through no fault of its own. If this is permitted, a corporation interested in keeping its records from the government would simply not pressure the custodian to deliver the records to an alternative custodian and then assert that it is unable to comply with the subpoena. The Court dealt with a similar situation earlier in the development of the collective entity doctrine. In Wilson v. United States, 221 U.S. 361 (1911), Wilson, the president and custodian of the books, was subpoenaed to deliver the corporate records. Id. at 370. A second subpoena was addressed to the corporation requesting the same records. Id. Wilson refused either to produce the books himself or to give them to the corporation for delivery to the government. Id. at 371. The Supreme Court held that service of a subpoena “imposed upon the corporation the duty of obedience.” Id. at 376. Therefore, a corporation can be held in contempt for failure to comply with a valid subpoena. Consequently, it must make a diligent effort to obtain the books from the custodian in order to avoid contempt sanctions. Id. However, because the custodian is not directly affected by the contempt order against the corporation, it may be to the custodian’s advantage to
only stating that he cannot produce the records, not that the records cannot be produced. Thus, because the representative capacity doctrine was based, in large part, upon concerns dealing with the contents of the records, this basis has been destroyed by the act of production analysis.\textsuperscript{227} The combination of the act of production doctrine, which strips the contents of records of their formerly privileged status, and the collective entity doctrine, which imposes upon a collective entity an absolute duty to produce subpoenaed records, effectively eviscerates this traditional rationale for the existence of the representative capacity doctrine.

b. Protection of an Individual’s Personal Privacy

The second major purpose behind the representative capacity doctrine is to limit the fifth amendment to the protection of an individual’s privacy.\textsuperscript{228} Therefore, the contents of a collective entity’s records were never privileged because neither the entity nor the custodian had a privacy interest substantial enough to invoke the fifth amendment.\textsuperscript{229} The Fisher Court, however, seemingly divorced the fifth amendment from privacy concerns.\textsuperscript{230} Stating that the Court “cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy,” the Court reasoned that other amendments, particularly the fourth, serve as protectors of individual privacy.\textsuperscript{231} Clearly, if the Court eliminated privacy concerns from withhold the books to shield the custodian’s own wrongdoing. \textit{Id.} To circumvent this possibility, the Court went on to hold in \textit{Wilson}, that

[a] command to the corporation is in effect a command to those who are officially responsible for the conduct to its affairs. If they . . . prevent compliance [with the subpoena] or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt. \textit{Id.} In other words, the custodian can be held in contempt for preventing the corporation from complying with the subpoena. The combination of the potential sanctions of imprisonment and fine are generally enough to ensure that a custodian will acquiesce to a request to turn the books over to a representative of the entity for ultimate delivery to the government.

\textsuperscript{227} Comment, \textit{supra} note 76, at 1634 (recognition of custodian’s privilege would not undermine law enforcement because contents of records are not privileged and corporation must comply with subpoena); Note, \textit{supra} note 37, at 1565 (because act of production not concerned with record’s contents, entity’s custodian cannot prevent their disclosure by invoking doctrine).

\textsuperscript{228} Bellis v. United States, 417 U.S. 85, 91 (1973) (fifth amendment respects individual’s personal privacy).

\textsuperscript{229} \textit{Id.} at 92 (substantial claim of privacy cannot be maintained with respect to financial records of collective entity).

\textsuperscript{230} Fisher, 425 U.S. at 401 (fifth amendment protects against compelled self-incrimination, not disclosure of private information).

\textsuperscript{231} \textit{Id.} at 400. The Court stated that the framers of the Constitution addressed the protection of privacy in the fourth amendment. \textit{Id.} Therefore, it is unlikely that the fifth amendment also seeks to “achieve a general protection of
the scope of fifth amendment protections, then the privacy rationale underlying the representative capacity doctrine no longer has validity. Because the Court has stripped the contents of business records of any fifth amendment privilege, there is no need to determine whether the custodian has a privacy interest in the documents.

In reality, however, the Court did not eliminate privacy protection from the fifth amendment. Rather, the Court made explicit that a claim of privacy is not sufficient by itself to invoke the fifth amendment. However, the Court limited the applicability of the act of production itself to situations in which a custodian’s privacy interests have been compromised. As a prerequisite to invoking the production privilege, a custodian must assert a privacy interest in the act of production. Consequently, the privacy rationale underlying the representative capacity doctrine is satisfied when an individual meets the requirements needed to invoke the act of production privilege.

Traditionally, in the representative capacity doctrine, a custodian had to assert a substantial privacy interest in the records in order to invoke the fifth amendment. In order to implicate a custodian’s personal privacy interest, the government had to intrude upon an individual’s “private inner sanctum of individual feeling and thought.” Therefore, in order to invoke the fifth amendment, the government must intrude upon the custodian’s feelings and thought to extract self-condemnation. In *Fisher*, however, the Court held that an individual must show that the compelled act is a testimonial one in order to invoke the act of production doctrine. As previously discussed, a testimonial act is one which forces the accused to “disclose the contents of his own mind.” To compel an individual to disclose the contents of his own mind necessarily involves a governmental intrusion into his inner sanctum of feeling and thought. In other words, governmental compulsion of a testimonial communication implicates an individual’s personal privacy. Therefore, in requiring a testimonial communication in order to invoke the act of production doctrine, the Court has limited the fifth amendment only deals with the issue of compelled self-incrimination. Instead, the fifth amendment only deals with the issue of compelled self-incrimination.

232. See Note, supra note 37, at 1563 (no longer any need to distinguish between private and business documents).


234. Id. The Court held that private information is protected so long as it involves compulsion of self-incriminating testimony. Id.

235. *See Bellis v. United States*, 417 U.S. at 85, 91-92 (1973) (custodian must have privacy interest in entity’s records to invoke the fifth amendment).

236. Id. at 91.

237. Id. (fifth amendment proscribes state intrusion into individual’s private enclave to extract self-condemnation).


239. *See Comment, supra note 76, at 1657 (testimonial admissions implicit
amendment to protection of an individual’s personal privacy and, as a result, the second purpose of the representative capacity doctrine has been satisfied.

Because the act of production doctrine advances the purposes underlying the representative capacity doctrine, the latter doctrine no longer has a compelling rationale to exist. Filling this fifth amendment void is the newly developed act of production doctrine. Although an entity cannot invoke the act of production privilege itself, a custodian should be able to avail himself of the privilege. If the custodian is successful in raising a fifth amendment claim, the entity is still bound to produce its records. Because the custodian’s claim relates only to the act of production, any information derived from the contents of the records is available for use against the custodian.

2. The Residual Problems of a Custodian’s Claim

Although the primary purposes justifying the representative capacity doctrine have been eliminated by the act of production analysis, the Court pointed out another problem posed by recognizing a custodian’s act of production claim. Specifically, the Court was concerned that the extension of the act of production analysis to collective entity custodians would make the government’s task of prosecuting both the entity and custodian more difficult. If the custodian is excused from producing the records, the collective entity will have to appoint another custodian to deliver the documents to the government. However, this substitute custodian may not have the former custodian’s knowledge of the records and probably will not receive any aid from the former custodian in responding to the subpoena. This solution does not ensure that all the required books will reach the grand jury. Consequently, prosecution of economic crimes will become more difficult, although not impossible.

To alleviate this problem, the government could grant the custo-
dian use immunity with respect to the act of production. As a result, the
government could not use any evidence derived from this act against
the custodian, although it could use the contents of the records. The
Court, however, viewed this situation as increasing the govern-
ment's burden in prosecuting the custodian. Because the government
must prove it did not obtain any evidence introduced against the custo-
dian as a result of the act of production, the Court felt that often
relevant information could be withheld from the government due to the
government's failure to meet this burden.

The mere presence of the fifth amendment, however, leads to diffi-
culties in prosecuting crime. Frequently, the fifth amendment denies
the government important information. However, this result was antici-
pated, even intended, when the fifth amendment was promulgated.
Although the fifth amendment often creates difficulties for the govern-
ment in prosecution, such difficulties should not be considered when
determining the applicability of the fifth amendment.

245. Id. The custodian would then have to produce the subpoenaed
records. However, the government could not use any incriminating evidence
obtained directly or indirectly from the act of production against the custodian.
For a discussion of the consequences of granting use immunity, see supra note 106.

246. Id. at 2295 (government cannot use evidence it obtains under use im-
unity either directly or derivatively against custodian).

247. The government's grant of immunity would extend only to the act of
production, and not to the records themselves. See id. at 2295 n.10. Conceiva-
ibly, however, the government could grant the custodian transactional immunity,
which would preclude prosecution for the offense under investigation. For a
discussion of transactional immunity, see supra note 106. However, because the
more limited use immunity is sufficient to overcome a custodian's fifth amend-
ment privilege, it is unlikely that the government would extend transactional
immunity solely for the production of the records.

248. For a discussion of immunity and the government's evidentiary bur-
den, see supra note 106.

249. 108 S. Ct. at 2295 (government's inability to meet burden may result
in exclusion of legitimately obtained evidence).

250. Our forefathers, when they wrote . . . the Fifth Amendment . . .
made a judgment and expressed it in our fundamental law, that it were
better for an occasional crime to go unpunished than that the prosecu-
tion should be free to build up a criminal case . . . with the assistance of
enforced disclosures by the accused . . . .

States, 209 F.2d 225, 227 (1st Cir. 1954)).

251. Curcio v. United States, 354 U.S. 118, 127 (1957). In Curcio the gov-
ernment argued that compulsion of custodians' testimony concerning the
whereabouts of entity records would result in greater ease in obtaining the
records. Id. However, the Court refused to balance the government's ease
against the custodians' rights. Id. Curcio's valid fifth amendment claim out-
weighed any considerations concerning the government's convenience. Id. See also In re Grand Jury Matter (Brown), 768 F.2d 525, 529 (3d Cir. 1985) (en banc)
(allowing compulsion of act of production would be great convenience to gov-
ernment, but until fifth amendment is repealed, government must live with rule
that custodian cannot be compelled to disclose contents of his mind).
Although the fifth amendment sometimes works to save culpable persons from punishment, it was “aimed at . . . more far-reaching evil[s].” These evils include the prevention of physical or moral compulsion to extort information from the accused. Also, the fifth amendment preserves our accusatorial system of criminal justice by forcing the government to produce its own evidence against an accused rather than obtaining it “by the cruel, simple expedient of compelling it from his own mouth.” Moreover, it recognizes an individual’s right to a “private enclave where he may lead a private life.” The recognition of a custodians’ privilege often makes prosecution more difficult. However, this is not a rationale compelling enough to deny a privilege to the custodian in light of the history and purpose of the fifth amendment.

Furthermore, because most prosecutions against custodians will be based upon the contents of the records, the Court exaggerates the potential dangers to the prosecution of white-collar crime. None of the information contained in the records themselves will be denied to the government. Policy reasons notwithstanding, if the government cannot successfully prosecute the custodian by using the information contained in the records, it should not be allowed to strengthen its case through use of the legal process to compel other incriminating evidence from the custodian.

B. The Limitation on the Scope of the Representative Capacity Doctrine

Although the Court held that the representative capacity doctrine had continued vitality, that determination is not dispositive of whether a

253. Id.
255. Id. (quoting United States v. Grunewald, 233 F.2d 556, 579, 581-82 (2d Cir. 1956) (Frank, J., dissenting), rev’d, 353 U.S. 391 (1957)).
256. Braswell, 108 S. Ct. at 2301 (Kennedy, J., dissenting). Justice Kennedy asserts that the Court’s concerns are overstated for several reasons. First, even if custodians are granted this privilege, it is not at all certain that it will exist in many cases. Id. (Kennedy, J., dissenting). Whether the act of production involves testimonial self-incrimination is a factual issue decided in each case. Moreover, where the testimonial communications of the act of production are foregone conclusions, the act of production privilege does not apply. Id. (Kennedy, J., dissenting). Second, he argued that even in the event of a successful act of production claim, the government can grant the custodian use immunity “without impeding the investigation.” Id. (Kennedy, J., dissenting). Because the contents of the records are not privileged, the immunity would extend exclusively to evidence obtained as a result of production of the documents. The government “would be free to use the contents of the records against everyone, and it would be free to use any testimonial act implicit in production against all but the custodian . . . .” Id. (Kennedy, J., dissenting).
257. Id. (Kennedy, J., dissenting) (government is free to use contents of records against everyone, including custodian).
custodian may invoke the act of production doctrine. It is submitted that the representative capacity doctrine does not preclude a custodian from invoking the act of production doctrine. Contrary to the Court's holding, the representative capacity doctrine's scope does not comprehend preclusion of the act of production doctrine. Instead, the scope of the representative capacity doctrine is limited to the prevention of fifth amendment claims in the contents of business records. Thus, if a custodian asserts a valid fifth amendment claim concerning subject matter other than the contents of the subpoenaed records, the representative capacity doctrine is inapplicable. Therefore, because Braswell asserted a fifth amendment claim based upon the act of production and not the contents of the entity's records, the representative capacity doctrine does not prevent judicial recognition of his claim.

To reach its conclusion in Braswell, the Court held that the scope of the representative capacity doctrine is determined by the individual's status as custodian. Thus, the relevant inquiry is whether the custodian's compelled act is performed in a representative capacity. If the act is performed in a representative capacity, it is imputed to the entity. Therefore, any privilege claimed in relation to these acts "would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege."

It is submitted that the Court's approach to the scope of the representative capacity doctrine is flawed. In the representative capacity cases, the custodian was denied a privilege because he could not assert the required elements necessary to make out a valid fifth amendment claim. However, it was not the individual's status as a custodian which denied him the ability to assert the required interest. Instead, it was the subject matter of his claim which prevented him from invoking the fifth amendment. That is, the nature of the subpoenaed documents as collective entities' records was the dispositive factor, not the individual's status as a custodian. Therefore, the scope of the representative capacity doctrine is determined by the nature of the subpoenaed documents, not the individual's status as a custodian.

258. Id. at 2291 (assumption of representative capacity leads to certain obligations which include duty to produce records).

259. Id. (acts performed in representative capacity are deemed act of entity; any claim of fifth amendment privilege asserted by custodian would be claim of privilege by entity).

260. Id. (acts performed in representative capacity are deemed act of entity).

261. Id.


263. Grant v. United States, 227 U.S. 74, 80 (1913). In Grant, the attorney of a stockholder of a dissolved corporation refused to produce subpoenaed records, claiming they were his client's personal property. Id. at 77. The Court's inquiry into whether the attorney or the client could refuse to produce the records sheds light on the scope of the representative capacity doctrine. Be-
capacity doctrine is properly delineated by determining the subject matter of the fifth amendment claim and not by inquiring into whether the compelled act was performed in a representative capacity. If the subject matter of a valid fifth amendment claim is not the contents of the subpoenaed records, the representative capacity doctrine is inapplicable and, thus, does not preclude recognition of the asserted privilege.

This conclusion is illustrated in Curcio v. United States.264 In Curcio, the custodian asserted a fifth amendment claim relating to the attempted compulsion of his testimony concerning the location of subpoenaed records.265 Although the testimony related to the entity's records, the Court held that Curcio could not be compelled to testify.266 The government argued, however, that Curcio was not entitled to a fifth amendment privilege.267 Because the testimony would be given in his representative capacity, the government argued that Curcio deserved no privilege.268 In response, the Court replied that the fifth amendment does not contain an exception for testimony given in a representative capacity.269 Thus, the Court's inquiry ended when it determined that Curcio had asserted a valid fifth amendment claim.270

The implication of Curcio is clear. Because Curcio did not assert a privilege in the record's contents, the representative capacity doctrine did not prevent recognition of his fifth amendment rights. Further, the Curcio Court elaborated on why the representative capacity doctrine prevents a privilege in the records: "[B]ecause [the custodian] does not own the records and has no legally cognizable interest in them," he cannot make out a valid claim.271 Even though title to the records had passed to the stockholder, "their essential character was not changed."272

The Court was even more explicit in Wheeler v. United States, 226 U.S. 478 (1913). In Wheeler, the Court held that dissolution of a corporation did not permit a custodian to make out a valid claim.273 "It was the character of the books and papers as corporate records and documents which justified . . . their production."274 Clearly, the Court, even in these predecessors to the representative capacity doctrine, was concerned with the nature of the documents and not the individual's status. The subsequent development of the representative capacity doctrine supports this conclusion. In Wilson, the custodian could not assert an ownership interest in the records.275 Wilson, 221 U.S. at 378. However, Wilson's status as custodian did not deprive him of an ownership interest. Instead, the nature of the documents as corporate documents precluded Wilson from asserting an ownership interest. In both Bellis and White the custodian could not make out a privacy interest in the records. Again, this was not because of their status as custodian, but because the records themselves could not support such an interest. Bellis, 417 U.S. at 92; White, 322 U.S. at 699-700.

265. Id. at 119.
266. Id. at 128.
267. Id. at 123.
268. Id.
269. Id. at 123-24.
270. Id.
not invoke the fifth amendment.\textsuperscript{271} Thus, the \textit{Curcio} Court recognized that the scope of the representative capacity doctrine is determined by the nature of the records and not the individual’s status. The \textit{Braswell} Court, however, incorrectly characterized \textit{Curcio} as creating an exception to the representative capacity doctrine for oral testimony.\textsuperscript{272} In treating \textit{Curcio} as an exception for oral testimony, it is submitted that the Court misapprehended the focus of \textit{Curcio} for two reasons.

First, in treating \textit{Curcio} as an exception to the representative capacity doctrine, the Court necessarily assumes that the doctrine deprives custodians of their fifth amendment privilege when acting in a representative capacity.\textsuperscript{273} As previously discussed, the history of the representative capacity doctrine demonstrates that the Court was not concerned with the custodian’s general fifth amendment rights. Instead, the Court focused on the custodian’s fifth amendment rights in the contents of business records.\textsuperscript{274} Because the Court found that a custodian did not have a fifth amendment claim in the contents of an entity’s records, it never reached the issue of whether the representative capacity doctrine overrode a valid fifth amendment claim until \textit{Curcio}. In \textit{Curcio}, the Court held that a valid claim of privilege is not precluded by the representative capacity doctrine. Therefore, in treating \textit{Curcio} as an exception to the representative capacity doctrine the Court incorrectly broadens the scope of the doctrine.

Second, the \textit{Curcio} Court did not intend to limit its holding to only oral testimony. The Court did not reach the decision in \textit{Curcio} because it felt that one mode of communication was more incriminating than another. Rather, the custodian’s testimony was privileged because it would “disclose the contents of . . . [the custodian’s] mind.”\textsuperscript{275} As a result of this intrusion into Curcio’s mind, he made a valid fifth amendment claim which the representative capacity doctrine could not over-ride. Because Braswell made out a fifth amendment claim which was not based upon the contents of the entity’s records, the representative capacity precedents allow recognition of his claim. However, after rejecting these arguments and holding that Braswell cannot assert a fifth amendment claim because of his status as custodian, the Court then restricted the government’s use of Braswell’s act of production.

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\textsuperscript{271} Id. at 128.
\textsuperscript{272} Braswell, 108 S. Ct. at 2293 (Curcio Court made clear that line was drawn between oral testimony and other forms of incriminating testimony).
\textsuperscript{273} In fact, the Court was more explicit. The Court stated that “[t]he plain mandate of [the representative capacity cases] is that . . . the individual in his capacity as a custodian . . . may not resist a subpoena for corporate records on Fifth Amendment grounds.” \textit{Id.} at 2290.
\textsuperscript{274} For a discussion of the history of the scope of the representative capacity doctrine, see supra notes 66-91 and accompanying text.
\textsuperscript{275} 108 S. Ct. at 2290.
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C. The Evidentiary Use Restriction

After analyzing Braswell's fifth amendment claim and concluding that the representative capacity corollary to the collective entity doctrine precludes a custodian from invoking the act of production doctrine, the Court then restricted the government's use of information obtained as a result of production. Although this limitation provides some measure of protection to a custodian, it is neither a logical result of the Court's holding nor a satisfactory substitute for the fifth amendment.

The Court rationalizes the limitation placed on the government by stating that the custodian holds the records in his representative capacity. Therefore, the production of the records is performed in his representative capacity as well. Consequently, the act is deemed one of the corporation and not the individual. Direct use of this act by the government as evidence against the custodian is impermissible because it is the corporation's act of production rather than that of the custodian. However, the corporation's act of production may be used against the custodian. This analysis is similar to that adopted by the United States Court of Appeals for the Sixth Circuit in In Re Grand Jury Proceedings (Morganstern). In Morganstern, however, the court held that the act of production is not a testimonial act when done in a representative capacity. Thus, the act of production doctrine is not available because the custodian cannot meet the Doe requirements for a fifth amendment claim. However, if the government then attempted to introduce evidence of the act of production against the custodian, "[s]uch proof would seek to add testimonial value to the otherwise testimony-free act of production." Once the government added testimonial value to the act of production, the custodian could meet the Doe requirements and presumably invoke the fifth amendment to exclude the evidence.

In Braswell, however, the Court recognized that the act of produc-

276. Id. at 2295 (government can make no evidentiary use of custodian's act of production against custodian individually). For a discussion of this use restriction, see supra notes 179-84 and accompanying text.

277. 108 S. Ct. at 2291 (Court has consistently recognized that custodian of entity records holds those documents in representative capacity).

278. Id.

279. Id. In other words, the government cannot introduce evidence that the custodian produced the subpoenaed records. This would be using the custodian's individual act against him. Instead, the government may introduce evidence that the corporation produced its records in response to the subpoena. Id. Also, the government may establish the custodian's position in the corporation and allow the jury to infer that he had possession of the records and produced them himself. Id. In essence, the government cannot make explicit the nexus between the custodian and the production of the records. Id.


281. Id. at 147-48.

282. Id.

283. Id. at 148 (quoting In re Grand Jury Empanelled, 722 F.2d 294, 297 (6th Cir. 1983)).
tion is testimonial even when undertaken in a representative capacity.\textsuperscript{284} It is solely the individual's status as custodian which prevents invocation of the fifth amendment. The significance of the distinction between the Morganstern and Braswell approaches is that under Braswell the government may introduce evidence obtained as a result of the act of production in the custodian's trial whereas under Morganstern it could not. Although the nexus between the evidence and the custodian is left for the jury to determine, if the jury infers such a nexus, the custodian has been compelled to provide testimonial, incriminating evidence that could help convict him. Because of the vaguely defined boundaries of this evidentiary use restriction, it is impossible to tell just how much the government must leave up to the jury's imagination and powers of deduction. Therefore, the inference of a connection between the custodian and the production of the records often may not be difficult to make.\textsuperscript{285} However, whether difficult to make or not, it is undeniable that the government compelled the custodian to provide incriminating evidence used at his own trial.

Furthermore, the fact that the Court developed the evidentiary use limitation at all detracts from its holding that a custodian is not entitled to a fifth amendment privilege. The use limitation will often work to withhold relevant information from the jury, but the source of the Court's authority to create such a limitation remains undivulged.\textsuperscript{286} Logically, the Court cannot invoke the fifth amendment to limit the government's use of the information. To do so would be to admit that a custodian's act of production implicates the fifth amendment.\textsuperscript{287} However, "there are no grounds . . . for declaring the information inadmissible, unless it be the Fifth Amendment."\textsuperscript{288} The absence of an alternative ground to create such a limitation weakens the Court's assertion that a custodian is not entitled to a fifth amendment privilege. This evidentiary limitation implies that use of the evidence has been wrong-

\textsuperscript{284} Braswell, 108 S. Ct. at 2288.

\textsuperscript{285} Braswell presented a case where the inference of the nexus between the act of production and Braswell's participation is not difficult for the jury to make. The prosecution can point out to the jury that although Braswell's wife and mother were officers of the corporations, they had little or no actual authority. Braswell was responsible for the operations of the corporations. Therefore, Braswell was the only officer in charge of the day-to-day operations of the corporations. The implication that Braswell possessed the books and was responsible for their production is clear. Indeed, the smaller the size of the entity, the easier it is for the government to link the custodian to the act of production.

\textsuperscript{286} Id. at 2300 (Kennedy, J., dissenting) (Court's source of authority to create such exception "remains unexplained").

\textsuperscript{287} Id. at 2296 (Kennedy, J., dissenting) (creation of use restriction "admits what the Court denied in the first place, namely that compelled compliance with the subpoena implicates the Fifth Amendment self-incrimination privilege").

\textsuperscript{288} Id. at 2300 (Kennedy, J., dissenting).
fully obtained, but the Court went to great pains to demonstrate that the collection of the evidence by the government was permissible.

IV. CONCLUSION

This Note submits that the Braswell Court incorrectly denied a custodian a fifth amendment privilege in producing subpoenaed records of a corporation. This conclusion stands on two separate rationales. First, the act of production doctrine satisfies the underlying policies of the representative capacity doctrine. Because recognition of a custodian's assertion of the act of production analysis does not confer a derivative fifth amendment privilege on the collective entity, and because a custodian has a substantial privacy interest in the act of production, the policies supporting the representative capacity doctrine have been washed away. Without these policies, the representative capacity doctrine loses its justification for continued existence. Therefore, there is no bar to the recognition of a custodian's act of production analysis claim.

Second, and more importantly, the representative capacity doctrine itself does not preclude recognition of a custodian's act of production analysis claim. Therefore, even if the representative capacity doctrine has continued validity, it does not bar a custodian's act of production claim. In developing the representative capacity doctrine, the Court limited its scope to the prevention of fifth amendment claims in the contents of the business records. Therefore, if a custodian asserts a valid fifth amendment claim based upon something other than the contents of the subpoenaed records, the representative capacity doctrine is inapplicable. Consequently, an act of production analysis claim, because it is not based upon the contents of the records, is not barred by the representative capacity doctrine.

Although the Court limited the government's use of the act of production against the custodian, this restriction does not afford protection coextensive with that of the fifth amendment and is not a logical result of the Court's denial of a privilege. In sum, it is submitted that the Court's resolution of the issue of whether a collective entity's custodian can invoke the act of production analysis is incorrect because the Court adequately addressed neither the scope of nor the justifications for the representative capacity doctrine.

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