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## Personal Enough for Protection: The Fifth Amendment and Single-Member LLCs

Lila L. Inman

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PERSONAL ENOUGH FOR PROTECTION: THE FIFTH  
AMENDMENT AND SINGLE-MEMBER LLCs

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## INTRODUCTION

Julie recently opened The Bodos Shop, a bakery on Richmond Road in Williamsburg, Virginia. As a sole business owner, Julie chose to form a single-member limited liability company (LLC), as this is the only type of business entity that may be owned and operated by a single, natural person while simultaneously allowing for taxation of business profits at individual rates. There are no other employees of The Bodos Shop, and there are no other individuals sharing management functions. Only Julie's name appears on the organizational documents, and Julie is her own bookkeeper.

Unfortunately, one month after the bakery's grand opening, Julie began to experience financial difficulties and fierce competition from the many pancake houses in town. To remain in business and minimize her income tax liability, Julie decided to fudge a few numbers on her income tax return.

One year later, Julie received a subpoena from the Internal Revenue Service (IRS) addressed to The Bodos Shop. The subpoena requested production of the bakery's financial records and testimony from The Bodos Shop's custodian of records. Julie learned that the IRS was investigating her for willful subscription to a false tax return. Believing that by adhering to the subpoena request Julie would be incriminating herself, Julie notified the IRS that The Bodos Shop would be invoking the Fifth Amendment. This sort of factual situation begs the following question: Is The Bodos Shop—comprised of a single, natural person—entitled to invoke Fifth Amendment rights?

The Fifth Amendment to the Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.”<sup>1</sup> While the Supreme Court has held this privilege to be purely personal,<sup>2</sup> and thus unavailable to artificial entities

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1. U.S. CONST. amend. V.

2. See *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (citing *United States v. White*, 322 U.S. 694, 699, 701 (1944)).

such as corporations,<sup>3</sup> the applicability of the Fifth Amendment to a single-member LLC remains uncertain.<sup>4</sup>

The LLC is a form of business organization that offers its members the pass-through federal income tax treatment of a partnership, while also shielding the owners from personal liability for the obligations of the business.<sup>5</sup> Unlike other types of business entities, there are no requirements specifying the maximum or minimum number of owners.<sup>6</sup> This Note focuses on the relationship between the Fifth Amendment and single-member LLCs.<sup>7</sup>

In their article entitled *The Single-Member Limited Liability Company as Disregarded Entity: Now You See It, Now You Don't*, Professors Daniel S. Kleinberger and Carter G. Bishop commented that “[t]he sole member of [a single-member limited liability company] might ... say, ‘the entity, it’s me.’”<sup>8</sup> Under that rationale, if

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3. See *id.* at 88-89.

4. See, e.g., *Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988).

5. See *infra* Part III.A.3.

6. See ANTHONY MANCUSO, FORM YOUR OWN LIMITED LIABILITY COMPANY 4 (Bethany Laurence ed., 9th ed. 2015); Josh Seidenfeld, *Limited Liability Company (LLC): The Basics*, COOLEY GO, <https://www.cooleygo.com/llc-basics/> [<https://www.perma.cc/7X6B-7FD2>].

7. Generally, LLCs are created and owned by members. MANCUSO, *supra* note 6, at 4, 7, 23 tbl. LLC members may be artificial people—such as corporations, agencies, and partnerships—or natural people. See *id.* at 7. For cases involving LLCs owned by artificial people, see *S/N-1 Reo Ltd. Liab. Co. v. City of Fall River*, 81 F. Supp. 2d 142, 144, 148 (D. Mass. 1999) (involving the FDIC as a 51 percent member of an LLC, thereby qualifying the LLC as a “federal instrumentality” exempt from local taxation); *Fluor Daniel Intercontinental, Inc. v. Gen. Elec. Co.*, No. 98 Civ. 7181(WHP), 1999 WL 637236, at \*1 (S.D.N.Y. Aug. 20, 1999) (“GEI, as successor in interest to GETSCO owns fifty percent of SAMGE [a limited liability company]. The remainder is owned by various Saudi Arabian individuals and/or entities.”); *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715, 722 & n.1, 727 (Bankr. M.D. La. 1999) (involving an LLC formed by an electric utility and a coal provider attempting to take over the non-nuclear assets of an electric utility in a Chapter 11 bankruptcy proceeding). The business activities and management decisions of the LLC are ordinarily made by its own members (member-managed LLCs); however, members may delegate these duties to managers (manager-managed LLCs). See MANCUSO, *supra* note 6, at 6. This Note covers single-member LLCs, which are owned and managed by a sole, natural individual. For the purposes of this Note, the terms “sole owner” and “single member” both refer to the natural individual in sole possession of an LLC.

8. Daniel S. Kleinberger & Carter G. Bishop, *The Single-Member Limited Liability Company as Disregarded Entity: Now You See It, Now You Don't*, BUS. L. TODAY (Aug. 2, 2010), [http://www.americanbar.org/publications/blt/2010/08/07\\_bishop.html](http://www.americanbar.org/publications/blt/2010/08/07_bishop.html) [<https://perma.cc/3ULG-QNCE>]. Kleinberger and Bishop’s comments were a reaction to the IRS’s 1996 decision to create unique check-the-box tax regulations for single-member LLCs. *Id.*; see also *infra* Part III.

Julie and The Bodos Shop are one and the same, then the bakery must be allowed to seek Fifth Amendment protection.<sup>9</sup> While the legal rights of single-member LLCs are still largely undeveloped<sup>10</sup>—and existing scholarship and court precedent focuses almost exclusively on the rights of corporations<sup>11</sup>—the Supreme Court left open the possibility for single-member LLCs to avail themselves of the Fifth Amendment in two different cases: derivatively in *Bellis v. United States*,<sup>12</sup> and explicitly in *Braswell v. United States*.<sup>13</sup>

On the whole, the debate concerning the applicability of constitutional rights to various types of business entities has received varying amounts of judicial attention over the years. In 2010, the Supreme Court brought this constitutional quandary back into the spotlight by holding in *Citizens United v. FEC* that campaign finance spending was a form of protected First Amendment speech and that the government could not prevent corporations from attempting to persuade voters by funding political advertising.<sup>14</sup> This decision sparked an ongoing conversation about whether corporations should be able to claim other constitutional and statutory rights as well.<sup>15</sup> For example, research scholar Professor Kent Greenfield argues that corporations “should not ... receive all the constitutional rights that you and I can claim. Corporations cannot vote or serve on juries .... [I]t does not make sense to think of corporations asserting those rights, both because of the nature of the right and the nature of the corporate entity.”<sup>16</sup> Yet, the Supreme Court has clearly held that corporations are permitted to invoke the

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9. See *infra* Part III.B.

10. See *infra* Part III.A.4.

11. See *infra* notes 12-27 and accompanying text.

12. 417 U.S. 85, 100-01 (1974). This Note does not consider the *Bellis* decision in isolation. Rather, the Fifth Amendment analysis includes *derivative* findings and considerations stemming from the dissenting opinion of Justice Black, see *id.* at 103-04 (Black, J., dissenting), and other courts' applications of the *Bellis* framework. See *infra* note 74 and accompanying text.

13. 487 U.S. 99, 118 n.1 (1988).

14. 558 U.S. 310, 364-65 (2010).

15. See, e.g., Kent Greenfield, *If Corporations Are People, They Should Act Like It*, ATLANTIC (Feb. 1, 2015), <http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> [<https://perma.cc/2KT5-6FQ9>] (“When [critics argue] that corporations are not people, what they mean is that corporations should not be able to claim the constitutional rights that human beings can.”).

16. *Id.*

First Amendment<sup>17</sup> and are guaranteed Fourth Amendment protection.<sup>18</sup> Furthermore, the Supreme Court has held that for-profit, closely held corporations are “persons” under the Religious Freedom Restoration Act (RFRA) and may thus exercise religion.<sup>19</sup> While scholars such as Professors Alan Meese and Nathan Oman endorse this conception of the corporation,<sup>20</sup> others remain unpersuaded.<sup>21</sup>

Although the Supreme Court has held certain constitutional privileges applicable to corporations,<sup>22</sup> historically the Court has opposed extending Fifth Amendment rights to artificial entities.<sup>23</sup> In fact, the Supreme Court has made clear that Fifth Amendment protection is irrefutably unavailable to corporations.<sup>24</sup> As such, debate over the Fifth Amendment rights of corporations has significantly subsided in the last decade. In the 1980s, scholars such as Professor Robert Mosteller wrote that “the question is certainly an intriguing one. Indeed, because the Court has extended the warrant requirement of the [F]ourth [A]mendment to corporations, it is far from clear why corporations should not be granted [F]ifth [A]mendment rights as well.”<sup>25</sup> Today, however, this important issue sparks less controversy. Perhaps this is because many legal minds believe that the Court’s decision to refuse corporations a Fifth Amendment privilege “makes sense, since corporations could other-

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17. See *id.* Greenfield also noted that this is not the first time in history that the Supreme Court has held the First Amendment applicable to corporations. *Id.* (“In 1971 ... the government sought to stop the *New York Times* ... from publishing the leaked Pentagon Papers. The Supreme Court correctly decided that the newspapers had a First Amendment right to publish.”).

18. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (holding that the rights of a corporation against unlawful search and seizure are to be protected).

19. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-69 (2014).

20. See Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 HARV. L. REV. F. 273, 275, 285-88 (2014).

21. See generally Amicus Curiae Brief of Corporate and Criminal Law Professors in support of Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) (presenting the argument from forty-four corporate and criminal law professors and scholars that treating corporations as persons under RFRA is in conflict with basic corporate law principles).

22. See *supra* notes 14-21 and accompanying text.

23. See *infra* Part II.

24. See *Hale v. Henkel*, 201 U.S. 43, 69-70, 74 (1906).

25. Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 50 n.149 (1987) (internal citation omitted).

wise evade all kinds of disclosure obligations necessary to make markets work,”<sup>26</sup> or perhaps because Supreme Court precedent has now become widely accepted as the status quo.<sup>27</sup>

Whether single-member LLCs can seek Fifth Amendment protection, however, is less settled given the gap in Supreme Court precedent.<sup>28</sup> Lower courts have been quick to analogize single-member LLCs—and LLCs in general—to corporations or partnerships,<sup>29</sup> and consequently have refused single-member LLCs—and LLCs in general—the constitutional right against self-incrimination.<sup>30</sup> However, from a business entity standpoint, treating single-member LLCs as corporations is an oversimplified solution with grave consequences.<sup>31</sup> Furthermore, from a constitutional standpoint, denying single-member LLCs this privilege impacts the sole owners in

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26. Greenfield, *supra* note 15.

27. See STEVEN M. SALKY & PAUL B. HYNES, JR., *THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION* 47 (2d ed. 2014) (“Commentators have questioned why a corporation has First Amendment, but not Fifth Amendment rights. However, given the current makeup of the Supreme Court, the ... difference between the right of a natural person to invoke [the] Fifth Amendment ... and the absence of such a right by an artificial entity is unlikely to change.”). However, Salky and Hynes’s viewpoint has not been universally accepted, and some scholars suggest that Fifth Amendment rights for corporations may be on the horizon. See, e.g., Peter J. Henning, *Treating Corporations as People*, N.Y. TIMES (May 26, 2015), <http://www.nytimes.com/2015/05/27/business/dealbook/treating-corporations-as-people.html> [<https://perma.cc/M8FG-3VGV>] (“Justice Anthony M. Kennedy may play a central role in pushing for reconsideration of the approach in the *Braswell* decision to the rights of an individual representing a corporation responding to a subpoena. He wrote a strong dissent in that case, arguing that the majority gave ‘the corporate agent fiction a weight it simply cannot bear.’ He wrote the majority opinion in the *Citizens United* decision, and ... a concurring opinion in the *Hobby Lobby* case.”).

28. See *infra* Part II.

29. See *infra* Part IV.A.

30. See, e.g., *United States v. Roe*, 421 F. App’x 881, 884-85 (10th Cir. 2011) (“[T]he district court held the Roes could not assert ... personal [Fourth and Fifth Amendment] rights to oppose summonses seeking materials from [their LLC], a collective entity. We take the district court’s view of the matter.”); *United States v. Lu*, 248 F. App’x 806, 807-08 (9th Cir. 2007) (“[T]he business records of Lu’s [single-member limited liability companies] are not protected by the Fifth Amendment, and the district court properly denied Lu’s motion to quash the subpoena.”).

31. See, e.g., Elizabeth S. Miller, *Are the Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing from Other Forms?*, 42 SUFFOLK U. L. REV. 617, 647 (2009). Miller notes that “the court’s recognition of the contractual freedom [of LLCs and LLC members] to deviate from the statutory provisions [applicable to corporations] and its careful attention to the language used in the [operating] agreement certainly reflect judicial best practices.” *Id.* If courts treat single-member LLCs as corporations, they deny the sole owners this contractual freedom.



a manner inconsistent with the spirit of the Fifth Amendment.<sup>32</sup> Oftentimes, the impetus for this denial is a lack of understanding of the single-member LLC's unique hybrid business structure.<sup>33</sup>

The unique business structure of the single-member LLC is best analogized to the churkendoose—"part chicken, turkey, duck and goose"—which Ben Berenberg introduced to the world in his 1946 children's book.<sup>34</sup> In 1977, with the advent of the LLC, Wyoming created a churkendoose business entity—"part corporation, part general partnership, part limited partnership."<sup>35</sup> As noted by Professor Kleinberger, this "churkendoose has revolutionized the law of business organizations, becoming the vehicle of choice for tens of thousands of ventures every month and causing the IRS to radically overhaul its approach to taxing business entities."<sup>36</sup> As touched upon previously, and as explained in further detail in Part III.A.3, the business structure of the single-member LLC gives its owners corporate-style limited liability, partnership-style taxation, and sole proprietorship-style freedom of ownership.<sup>37</sup> Furthermore, as gleaned from the introductory hypothetical, single-member LLCs and their natural owners are inextricably intertwined, creating a host of unique Fifth Amendment issues not present in the context of a traditional corporation.<sup>38</sup>

This Note focuses on the intersection between the single-member LLC and the Fifth Amendment. It argues that single-member LLCs should be permitted to independently invoke the Fifth Amendment because any holding to the contrary would jeopardize the single-member's constitutional right against self-incrimination. Part I provides a background on Fifth Amendment jurisprudence and the values thereby contradicted when single-member LLCs are denied Fifth Amendment protection. Part II summarizes the Supreme

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32. See *infra* Part I.

33. See *infra* Part III.A; see also *infra* Part III.B.1.

34. BEN ROSS BERENBERG, *THE CHURKENDOOSE: PART CHICKEN, TURKEY, DUCK AND GOOSE* (Dellwyn Cunningham illus., Wonder Books ed.) (1946).

35. See Daniel S. Kleinberger, *Sorting Through the Soup: How Do LLCs, LLPs and LLLPs Fit Within the Regulations and Legal Doctrines?*, *BUS. L. TODAY*, Nov/Dec. 2003, <http://www.americanbar.org/content/dam/aba/publications/blt/2003/11/sorting-through-the-soup-200311.authcheckdam.pdf> [<https://perma.cc/4ECA-GR6U>].

36. *Id.*

37. See *infra* Part III.A.3.

38. See *infra* Part III.B.

Court's collective entity doctrine and evolving framework. Part III explores the single-member LLC as a corporate form and concludes that this unique business entity falls under either the *Bellis* or *Braswell* Supreme Court exceptions to the collective entity doctrine.<sup>39</sup> Finally, Part IV addresses counterarguments as to why the single-member LLC should be treated as a collective entity—similar to the corporation—and refused Fifth Amendment rights. Ultimately, this Note argues that the only true solution to protecting the natural owner's constitutional right against self-incrimination is to independently extend the Fifth Amendment privilege to single-member LLCs.

### I. FIFTH AMENDMENT JURISPRUDENCE

The Fifth Amendment privilege against self-incrimination,<sup>40</sup> described succinctly in only fifteen words,<sup>41</sup> is deceptively complex. The Fifth Amendment can be asserted at any stage of civil, investigative, criminal, judicial, administrative, regulatory, or adjudicatory proceedings.<sup>42</sup> In *Murphy v. Waterfront Commission of New York Harbor*, Justice Goldberg provided the most comprehensive insight into the values and purposes of the Fifth Amendment privilege, as recognized by the Supreme Court:

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39. See *infra* Part III.

40. While the Fifth Amendment protection against self-incrimination is generally called a "privilege," some legal scholars believe the term "privilege" implies that the government may withdraw the protection at any time. See, e.g., Leonard W. Levy, *The Right Against Self-Incrimination: History and Judicial History*, 84 POL. SCI. Q. 1, 2-3, 3 n.9 (1969). Instead, these scholars prefer referring to Fifth Amendment protection as a "right" against self-incrimination. See, e.g., *id.*; see also David M. O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME LAW. 26, 31-32 (1978); Georganne R. Higgins, Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 OHIO ST. L.J. 351, 351 n.1 (1977). But see Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 683 n.6 (1982) (using the terms "privilege" and "right" interchangeably).

41. U.S. CONST. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself.").

42. See Hayes Hunt & Jonathan R. Cavalier, *Using the Privilege: Fifth Amendment Fundamentals for Corporations*; GC Mid-Atlantic, LEGAL INTELLIGENCER (Apr. 24, 2013), <https://advance.lexis.com/document/?pdmfid=1000516&crd=25d7c397-7ac9-4329-97aa-c3e22982fc94&pdworkfolderid=a187a023-24c9-4a40-9dfa-c129982aaedc&ecomp=8pvhk&earg=a187a023-24c9-4a40-9dfa-c129982aaedc&prid=6a029933-8989-4252-a9b5-027edc40bebb> [https://perma.cc/86NJ-WMHQ].

[The privilege against self-incrimination] reflects many of our fundamental values [such as] our unwillingness to subject those suspected of crime to ... self-accusation ...[;] our preference for an accusatorial ... system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment ... our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”<sup>43</sup>

In considering whether single-member LLCs should be permitted to exercise a right against self-incrimination, two of the aforementioned values are directly applicable: (1) preventing unfairness created when single-member LLCs are forced to turn over subpoenaed documents, thereby incriminating their sole owner and, inherently, themselves; and (2) preserving the accusatorial system of justice by forcing the government to obtain evidence and convictions without the assistance of the accused. The single-member's identity, and oftentimes livelihood, is wrapped up in the single-member LLC, and refusing to grant the entity a Fifth Amendment right is equivalent to denying the natural owner a constitutional privilege. Claiming that single-member LLCs are, like corporations, barred from invoking the Fifth Amendment constitutionally harms the natural individual's personal privilege, thereby directly implicating the Fifth Amendment.<sup>44</sup> In *Ullmann v. United States*, Justice Frankfurter noted that the “privilege against self-incrimination serves as a protection to the innocent as well as to the guilty, and ... should be given a liberal application.”<sup>45</sup> Recognizing a single-member LLC's independent Fifth Amendment right, therefore, will be a step in the right direction. Such a step moves the law toward realigning “the privilege [that] has never been given the full scope which the values it helps to protect suggest.”<sup>46</sup>

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43. 378 U.S. 52, 55 (1964) (quoting *Quinn v. United States*, 349 U.S. 155, 162 (1955)).

44. *See, e.g.*, *Mosteller*, *supra* note 25, at 50 n.149 (“If the denial of the privilege against self-incrimination to corporations is interpreted to mean also that the real persons who work within it lose their personal privilege, then the supporting structure and theory of the [F]ifth [A]mendment are directly implicated.”).

45. 350 U.S. 422, 427 (1956) (quoting *Maffie v. United States*, 209 F.2d 225, 227 (1st Cir. 1951)).

46. *Schmerber v. California*, 384 U.S. 757, 762 (1966).

## II. THE COLLECTIVE ENTITY DOCTRINE

Since 1906, the Supreme Court has categorically denied corporations the right against self-incrimination and, in doing so, has confined the Fifth Amendment to a personal sphere.<sup>47</sup> Yet, with the development of hybrid business entities, such as the single-member LLC, and with ever-evolving tax code considerations,<sup>48</sup> the Supreme Court has hinted at a less rigid adherence to corporate Fifth Amendment precedent in the context of more personal business entities.<sup>49</sup>

The Supreme Court first considered the Fifth Amendment in the business entity context in *Hale v. Henkel*.<sup>50</sup> Reasoning that a corporation is a “creature of the State” and, thus, must produce corporate records upon the state’s request, the Supreme Court held that a corporation may not invoke the Fifth Amendment to avoid producing incriminating documents.<sup>51</sup> The rationale for the Court’s holding rested on the corporation’s business structure: the corporation is “incorporated for the benefit of the public,” the corporation receives “certain special privileges,” and the corporation is not permitted to “refuse to show its hand when charged with an abuse of such privileges.”<sup>52</sup> Furthermore, natural representatives of the entity could not decline to turn over business records to authorities, at least initially, even if production would result in self-incrimination.<sup>53</sup> Over time, this concept evolved into the “collective entity

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47. See *Hale v. Henkel*, 201 U.S. 43, 69-70, 74 (1906); see also *In re Grand Jury Subpoena (John Doe, Inc.)*, 991 F. Supp. 2d 968, 976 (E.D. Mich. 2014) (“Mary Roe made a choice to incorporate [and] ... may not ... claim Fifth Amendment protection.”); *United States v. Maxey & Co., P.C.*, 956 F. Supp. 823, 829 (N.D. Ind. 1997) (“Mr. Maxey made the conscious decision to incorporate his tax preparation business rather than operate it as a sole proprietorship ... [and] is not entitled to ‘have his cake and eat it too’ [by asserting Fifth Amendment protection].”).

48. For example, in 1958 Congress created Subchapter S of the tax code, which permits small business corporations to avoid double taxation in exchange for various internal limitations. *The History and Challenges of America’s Dominant Business Structure*, S CORP. ASS’N, <http://s-corp.org/our-history/> [<https://perma.cc/4M93-7B2B>]. In 1996, the IRS created check-the-box regulations revolutionizing business entity classifications. See *infra* Part III.

49. See *infra* Part II.B.

50. 201 U.S. at 74-75.

51. *Id.* at 74.

52. *Id.* at 74-75.

53. See, e.g., *Wilson v. United States*, 221 U.S. 361, 384-85 (1911).

doctrine”<sup>54</sup> and grew to encompass various other forms of business entities, while slowly excluding various court-compelled actions by the entities’ human counterparts.<sup>55</sup>

*A. Evolution and Summary of the Collective Entity Doctrine*

Following *Hale*, the Court began to define the contours of the Fifth Amendment for various business entities and their respective owners. In *Hale*, the Court did not reach the question of whether the corporate officer defendant could refuse to produce the requested corporate records by asserting his personal Fifth Amendment privilege.<sup>56</sup> Importantly, corporate records must be distinguished from private records, the latter of which the Court has long held as protected under the Fifth Amendment.<sup>57</sup> In *Wilson v. United States*, the Court provided an answer to the question left unanswered in *Hale* and held that corporate officers may not assert their personal Fifth Amendment privilege in an attempt to shield a corporation’s records from authorities after receiving a subpoena request.<sup>58</sup>

The Supreme Court further expanded the *Hale* and *Wilson* holdings in *United States v. White* and concluded that an unincorporated labor union is a collective entity unprotected by the Fifth

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54. *Braswell v. United States*, 487 U.S. 99, 101 (1988). Some scholars refer to the “collective entity doctrine” as the “artificial entity doctrine” or “artificial entity exception.” See, e.g., Mosteller, *supra* note 25, at 49 n.147 (“[T]he artificial entities exception.”). However, the *Braswell* Court, in reiterating that corporations are barred from exercising the Fifth Amendment privilege, used both terms (“artificial entity” and “collective entity”) in the opinion. See *Braswell*, 487 U.S. at 101-02 (referring to the “collective entity doctrine”); *id.* at 110, 116 (using the phrase “artificial entity” instead). For the purpose of consistency, this Note refers to the doctrine as the “collective entity doctrine” throughout.

55. See *infra* Part II.A.

56. This question did not arise because the corporate officer was shielded by immunity. See *Hale*, 201 U.S. at 67-68.

57. See *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) (“[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited ... is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution.”).

58. 221 U.S. at 382 (“[T]he authority of government demands the examination of [corporate] books.”). Note that in *Wilson* the subpoena requesting corporate documents was addressed to the corporation. *Id.* at 364, 367-68. In *Dreier v. United States*, a companion case to *Wilson*, the Court reached the same conclusion when the subpoena was addressed to an individual corporate officer. See 221 U.S. 394, 400 (1911).

Amendment.<sup>59</sup> In so holding, the Court noted that it based its decision on the impersonal nature of the union and not on

any mechanical comparison of unions with corporations.... The test, rather, is whether ... a particular type of organization has *a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents*.... If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.<sup>60</sup>

Nonetheless, the Court compared the union to the corporation in some respects, noting that “[t]he union’s existence in fact ... is as perpetual as that of any corporation, not being dependent upon the life of any member,” and that “[t]he union engages in a multitude of business ... activities, none of which can be said to be the private undertakings of the members.”<sup>61</sup> In *White*, the Court also found that an individual who holds an entity’s documents in a representative capacity as custodian cannot employ the Fifth Amendment privilege to avert a subpoena for the organization’s documents.<sup>62</sup>

Post-*White*, the Fifth Amendment privilege of natural individuals was temporarily expanded,<sup>63</sup> but the Court continued to define the collective entity doctrine as preventing other business forms from invoking the Fifth Amendment.<sup>64</sup> In the 1957 *Curcio v. United States* decision, for example, the Court held that the secretary-treasurer of a local union could not be forced to orally testify as to the whereabouts of subpoenaed records.<sup>65</sup> The Court reasoned that the natural custodian could not be compelled to “disclose the contents of his own mind [by] ... convict[ing] himself out of his own mouth,” an act that is “contrary to the spirit and letter of the Fifth Amendment.”<sup>66</sup>

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59. 322 U.S. 694, 701-02 (1944).

60. *Id.* at 701 (emphasis added).

61. *Id.* at 701-02.

62. *See id.* at 705.

63. *See infra* notes 67-69 and accompanying text.

64. *See infra* notes 73-76 and accompanying text.

65. 354 U.S. 118, 128 (1957).

66. *Id.*

Seventeen years later, in *Bellis v. United States*, the Court decided that a three-person partnership possessed no Fifth Amendment right.<sup>67</sup> The Court emphasized, once again, that the Fifth Amendment privilege protects only the “*natural* individual” from compulsory self-incrimination through testimony or production of personal records.<sup>68</sup> Nonetheless, the Court hinted at the fact that “[t]his might be a different case if it involved a *small family partnership* or if there were some other *pre-existing relationship of confidentiality* among the partners.”<sup>69</sup> After stating this proposition, the Court cited *United States v. Slutsky*, a 1972 New York district court case in which a two-person partnership *was permitted* to invoke the Fifth Amendment in response to a subpoena requesting production of business records.<sup>70</sup> In citing *Slutsky*, it is unclear whether the Supreme Court implicitly approved the extension of Fifth Amendment rights to a business entity intimate enough to embody the personal interests of its owners, and lower courts are divided on the issue.<sup>71</sup> Part III.B.2 of this Note argues that the rationale of the *Bellis* exception derivatively supports extending Fifth Amendment protection to single-member LLCs.<sup>72</sup>

Ultimately, the Court in *Bellis* reached its holding under the collective entity doctrine.<sup>73</sup> To provide some guidance as to whether an “artificial” person falls under the umbrella of “collective entity”—and, therefore, cannot invoke the Fifth Amendment—the *Bellis* decision cited several nonexclusive factors for courts to consider: (1) the entity’s status as incorporated or unincorporated if the entity is owned by a single individual;<sup>74</sup> (2) the entity’s identity

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67. See 417 U.S. 85, 93 (1974).

68. *Id.* at 89-90 (emphasis added).

69. *Id.* at 101 (emphasis added) (internal citations omitted).

70. See *id.* (citing *United States v. Slutsky*, 352 F. Supp. 1105 (S.D.N.Y. 1972)).

71. Compare, e.g., *People v. Lynch*, 404 N.E.2d 814, 816-17 (Ill. App. Ct. 1980) (holding that the development of the Fifth Amendment privilege and the *Slutsky* case do not provide for a “family partnership” exception to the requirement that organizational entities are required to respond to subpoenas requesting the production of documents), with, e.g., *United States v. Greenleaf*, 546 F.2d 123, 128 (5th Cir. 1977) (recognizing the “small family partnership” exception, but concluding that the defendant partnership did not qualify for the exception).

72. See *infra* Part III.B.2.

73. See *Bellis*, 417 U.S. at 88, 92, 101.

74. See *id.* at 89-90 (recognizing the existence of the argument for considering the distinction between incorporated and unincorporated entities when owned by a single



as independent of its individual members;<sup>75</sup> and (3) the entity's documents as records of the organization rather than the individual.<sup>76</sup>

### 1. *Incorporated Versus Unincorporated Persons*

The Court in *Bellis* drew a line between incorporated and unincorporated business entities with a single owner.<sup>77</sup> Highlighting that legitimate government regulation of organizations would be severely undermined if the *incorporated* entity itself could claim the Fifth Amendment privilege, the Court specified that incorporated “artificial” persons with single owners were “collective entit[ies]” for Fifth Amendment purposes.<sup>78</sup> In making this distinction, the Court carefully emphasized that the size of the incorporated entity was immaterial because “[i]t is well settled that no [Fifth Amendment] privilege can be claimed by [the collective entity] ... *regardless of how small the corporation may be.*”<sup>79</sup>

### 2. *Independent Institutional Identity*

In identifying organizations that constitute collective entities, the Court in *Bellis* considered whether the entity in question was “an established institutional identity independent of its individual [members],” in contrast to “merely a loose, informal association of

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individual, but declining to adopt that argument); *see also id.* at 103-04 (Douglas, J., dissenting) (arguing that the majority should have treated the partnership as “an aggregate of individuals and not as a separate entity” (quoting *Tax Review Bd. v. Shapiro Co.*, 185 A.2d 529, 533 (Pa. 1962))). Other courts have interpreted *Bellis* as having “[drawn] a line between incorporated and unincorporated persons.” *See, e.g.*, Charles W. Stotter, *Sole Proprietor’s Invocation of Fifth Amendment Privilege Rejected in Response to Grand Jury Subpoena*, A.B.A. SECTION OF LITIG. COM. & BUS. (May 27, 2015), <https://apps.americanbar.org/litigation/committees/commercial/practice.html> [<https://perma.cc/Q4CJ-5ZRW>] (citing *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255 (3d Cir. 2015)). As previously discussed, this Note draws from *derivative* findings in *Bellis* for identifying the framework to determine whether an artificial person falls under the umbrella of the collective entity doctrine. *See supra* note 12. Thus, although the majority opinion in *Bellis* did not *adopt* this incorporated-unincorporated distinction, for the purposes of this Note it is sufficient that the Court at least *considered* such a distinction.

75. *See Bellis*, 417 U.S. at 95.

76. *See id.* at 97-100.

77. *See id.* at 89-90.

78. *See id.* at 90, 92.

79. *Id.* at 92, 100 (emphasis added).



individuals.”<sup>80</sup> Additionally, the Court determined that although small, the partnership in *Bellis* did possess an “institutional identity independent of its individual partners.”<sup>81</sup> The partners had chosen a formal partnership business structure for the purpose of establishing a law firm because it allowed for equal rights to control and manage the firm, and it enabled the law firm to file a separate partnership return for federal tax purposes.<sup>82</sup> This analysis is a crucial collective entity doctrine factor; the Court in *Bellis* noted that when entities “represent organized institutional activity ... [they are] preclude[d from] any claim of Fifth Amendment privilege with respect to the [entity’s documents].”<sup>83</sup>

### *3. Strict Maintenance of Business Records Not Constituting Personal Papers*

A collective entity is discernible by the fact that the entity maintains a “distinct set of organizational records.”<sup>84</sup> Each of the entity’s members must have control and access to the records, the records must be held in a representative capacity, and the records must not contain personal documents.<sup>85</sup> In *Bellis*, for example, the Court concluded that the partners maintained the partnership records in a representative capacity, as the records reflected the revenues and expenses of the entire firm, including not only their individual business activities, but also the financial transactions of the other partners.<sup>86</sup>

Legal scholar Thomas Koffer termed the Supreme Court between the *Hale* and the *Bellis* decisions as the “Bull Court” because during that time the Court truly helped the collective entity doctrine “take stock.”<sup>87</sup> After *Bellis*, and in the wake of *Fisher v. United States*<sup>88</sup>

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80. *Id.* at 92, 93, 95.

81. *See id.* at 95.

82. *See id.* at 95-97.

83. *Id.* at 93.

84. *Id.* at 92, 93.

85. *See id.* at 93.

86. *See id.* at 97-98.

87. Thomas J. Koffer, Note, *All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in In Re Three Grand Jury Subpoenas Duces Tecum* Dated January 29, 1999, 46 VILL. L. REV. 547, 554 (2001).

88. 425 U.S. 391, 392, 396 (1976) (concluding that the privilege against self-incrimination was inapplicable to subpoenaed records prepared by the defendant’s accountants because the

and *United States v. Doe*,<sup>89</sup> both of which called into question the seemingly settled collective entity doctrine, Koffer appropriately rebranded the Court as the “Bear Court.”<sup>90</sup> During this time period, the Court’s focus shifted from the collective entity doctrine to “a new course of Fifth Amendment analysis”<sup>91</sup> that considered whether the act of producing subpoenaed noncorporate documents would implicate the Fifth Amendment.<sup>92</sup> Then, over a decade after the *Bellis* decision, the collective entity doctrine was “resurrected”<sup>93</sup> in *Braswell v. United States*.<sup>94</sup>

*B. The Open Issue: The Availability of the Fifth Amendment Privilege for Single-Member LLCs Post-Braswell*

In *Braswell*, the Court held that the president of a corporation who was also the corporation’s sole shareholder was not permitted to refuse surrendering the corporation’s business records upon receipt of a federal grand jury subpoena.<sup>95</sup> In so holding, the Court rejected the contention that the agent’s mere production of records involved testimonial self-incrimination.<sup>96</sup> At the same time, the

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documents’ contents were not privileged).

89. 465 U.S. 605, 617 (1984) (holding that the production of a sole proprietorship’s business records was protected by the Fifth Amendment, but the content of the records was not).

90. Koffer, *supra* note 87, at 560.

91. *Braswell v. United States*, 487 U.S. 99, 109 (1988).

92. Koffer, *supra* note 87, at 561. The terms “Bull Court” and “Bear Court” are patchwork definitions borrowed from the terms “bull market” and “bear market” used in the investing world. A “bull market” describes a stock market typified by rising market share prices and a strong economy, while a “bear market” refers to a stock market in which share prices are downward trending for a sustained period of time. *Digging Deeper into Bull and Bear Markets*, INVESTOPEDIA, <http://www.investopedia.com/articles/basics/03/100303.asp> [https://perma.cc/DGA4-VBQY].

93. Koffer, *supra* note 87, at 564.

94. *See Braswell*, 487 U.S. at 109.

95. *See id.* The Supreme Court stated:

Artificial entities such as corporations may act only through their agents ... and 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. Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.

*Id.* at 110 (internal citation omitted).

96. *See id.* at 110-12, 114-15.

Court recognized the tension between the articulated agency rationale for upholding the collective entity doctrine and the personal self-incrimination of the agent of the collective entity.<sup>97</sup> The Court declared that the agent's act of production is "deemed one of the corporation and not the individual," and, therefore, the government "may make no evidentiary use of the 'individual act' against the individual."<sup>98</sup>

Although the *Braswell* holding cemented the notion that natural individuals possessing corporate business records in a representative capacity may not seek Fifth Amendment protection to avoid producing subpoenaed documents,<sup>99</sup> the Court left two crucial questions unanswered. First, does *Braswell* apply to former employees of an entity that falls under the collective entity umbrella?<sup>100</sup> Second, does *Braswell* apply to single-member LLCs? In footnote eleven of the majority opinion, the Court explicitly left "open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the *sole employee and officer* of the corporation, that the jury would *inevitably conclude that he produced the records*."<sup>101</sup> The remainder of this Note focuses on how the appropriate response to this second unanswered question involves more than just the "custodian" personally, but also the single-member LLC independently, as the single owner's business structure of choice.

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97. *See id.* at 109-11. Under agency law, one person (the agent) acts on behalf of another (the principal), and, through a mutual manifestation of consent, the agent's actions are imputed onto the principal. WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS 2 (Robert C. Clark et al. eds., 9th ed. 2015)). The Court in *Braswell* employed agency law in the context of the collective entity doctrine to hold that the corporate custodian is an agent of the corporation, and, thus, the custodian's act of production was not a personal act, but rather an act of the corporation. *See Braswell*, 487 U.S. at 118.

98. *Braswell*, 487 U.S. at 118.

99. *See id.* at 110 (quoting *United States v. White*, 322 U.S. 694, 699 (1944)).

100. An analysis of how lower courts are answering this first question is beyond the scope of this Note. For three scholars' works answering this question, see SALKY & HYNES, *supra* note 27, at 48-50, and Koffer, *supra* note 87, at 565-66.

101. *Braswell*, 487 U.S. at 118 n.11 (emphasis added).

### III. THE SINGLE-MEMBER LLC

Since their emergence in the 1990s, LLCs have become the most popular form of business entity, surpassing the corporation as the new “king of the hill.”<sup>102</sup> In 2007, for example, for every new corporation formed in America, nearly two LLCs were created.<sup>103</sup> And over the past twenty years, the number of LLCs in the United States has grown ten-fold, from approximately 120,000 in 1995, to well over one million today.<sup>104</sup> Although all states currently permit single-member LLCs, this was not always the case.<sup>105</sup> The following discussion in this Part discusses the LLC’s rise to prominence.

#### A. *The Origin and Business Features of the Single-Member LLC*

##### 1. *Background on the LLC as a Business Entity*

The creation of the LLC business entity was a reaction to a need.<sup>106</sup> The desired result was a business structure that provided owners with limited liability while allowing for pass-through taxation similar to a partnership.<sup>107</sup> To fulfill this need, states drafted LLC statutes and the IRS revamped its regulations.<sup>108</sup>

The Alaska Legislature introduced, and subsequently rejected, the first LLC statute in 1975.<sup>109</sup> Two years later, Wyoming accomplished what Alaska attempted to achieve, passing the first LLC

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102. Rodney D. Chrisman, Essay, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 *FORDHAM J. CORP. & FIN. L.* 459, 460, 462 (2010).

103. *See id.* at 460, 475.

104. *The History and Challenges of America’s Dominant Business Structure*, *supra* note 48 (summarizing the results of a fifty-state historical survey).

105. *See generally* 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES, app. 4-4 Westlaw (database updated December 2016).

106. *See* Allan W. Vestal & Thomas E. Rutledge, *Disappointing Diogenes: The LLC Debate That Never Was*, 51 *ST. LOUIS U. L.J.* 53, 55 (2006).

107. *See id.* at 55, 59.

108. *See id.* at 55.

109. *See id.* at 56.

statute.<sup>110</sup> In 1982, Florida adopted the second LLC statute.<sup>111</sup> The remaining forty-eight states were hesitant to follow suit, however, given the uncertain tax treatment of the emerging business entity at the time.<sup>112</sup> It was not until 1997, after the IRS issued its check-the-box regulations, that all fifty states adopted LLC statutes.<sup>113</sup> These statutes either implicitly or expressly<sup>114</sup> permit single-member LLCs; however, in operation, some statutory provisions “only make practical sense ... in the context of multi-member LLCs.”<sup>115</sup>

*2. State LLC Acts, the Revised Limited Liability Company Act,  
and the Revised Prototype LLC Act*

As LLCs became more and more prevalent, the Uniform Law Commission (ULC) recognized the need for uniform legislation and introduced the first Uniform Limited Liability Company Act (ULLCA) in 1995.<sup>116</sup> In 2006 the ULC promulgated the 2006 Revised Uniform Limited Liability Company Act (Re-ULLCA) containing comprehensive default rules that allow for LLCs to operate without complex agreements.<sup>117</sup> Almost ten years later, the Re-ULLCA has been adopted in only nineteen jurisdictions: Alabama, California, Connecticut, District of Columbia, Florida, Idaho, Iowa, Illinois, Minnesota, Nebraska, New Jersey, North Dakota, Pennsylvania,

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110. *See id.*

111. *See id.*

112. *See* GUIDE TO LIMITED LIABILITY COMPANIES 3 (Maurice M. Cashin et al. eds., 5th ed. 1999).

113. *See id.* at 4. Under the new check-the-box regulations, LLCs could now select their classification for tax purposes as sole proprietorships and partnerships—which are permitted pass-through taxation—or as corporations. Treas. Reg. § 301.7701-3 (2006).

114. *Compare, e.g.,* VA. CODE ANN. § 13.1-1002 (2016) (“Limited liability company ... means an entity that is an unincorporated organization.”), *with, e.g.,* DEL. CODE ANN. tit. 6, § 18-101(6) (2016) (“‘Limited liability company’ ... means a limited liability company formed under the laws of the State of Delaware and having 1 or more members.”), *and* MASS. GEN. LAWS ANN. ch. 156C, § 2 (2016) (stating that an LLC is “an unincorporated organization formed under this chapter and having 1 or more members”).

115. *See* John A. Pearce II & Ilya A. Lipin, *The Uncertain Viability of a Single Member Limited Liability Company as a Choice of Entity*, 9 HASTINGS BUS. L.J. 423, 428 (2013).

116. *Why States Should Adopt RULLCA*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20RULLCA> [<https://perma.cc/UBJ3-N8G7>].

117. *See id.*

South Carolina, South Dakota, Utah, Vermont, Washington, and Wyoming.<sup>118</sup> The American Bar Association (ABA) also issued a model LLC act in 2011—the Revised Prototype LLC Act.<sup>119</sup>

Most LLCs are formed pursuant to the LLC statute of the state considered to be the LLC’s principal place of business.<sup>120</sup> That being said, larger multimember LLCs that conduct more complex business transactions tend to form elsewhere—businesses select Delaware most frequently as the state of incorporation.<sup>121</sup> While some differences exist between various state LLC statutes, overall the majority of LLC statutes are relatively similar.<sup>122</sup>

Disregarding tax law for the moment, under state corporate laws, LLCs are hybrid statutory creations with their own legal identity.<sup>123</sup> The LLC’s equity interest owner—that is, the person who has been admitted to LLC membership as a party to the entity’s formation—is referred to as a “member.”<sup>124</sup> The LLC’s own members ordinarily make the LLC’s business activities and management decisions (member-managed LLCs); however, members may delegate these duties to managers (manager-managed LLCs).<sup>125</sup> Single-member LLCs and small multimember LLCs predominately are member-

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118. See ALA. CODE §§ 10a-5a-1.01 to -12.05 (2016); CAL. CORP. CODE §§ 17701.01-17713.13 (West 2016); CONN. GEN. STAT. §§ 34-100 to -242 (2016); D.C. CODE §§ 29-801.01 to -810.01 (2016); FLA. STAT. ANN. §§ 605.0101-1108 (2016); IDAHO CODE §§ 30-6-101 to -1104 (2016); 805 ILL. COMP. STAT. 180/1-1 to 180/60-1 (2016); IOWA CODE §§ 489.101-489.1304 (2016); MINN. STAT. §§ 322C.0101-322C.1205 (2016); NEB. REV. STAT. §§ 21-101 to -197 (2016); N.J. STAT. ANN. §§ 42:2C-1 to 2C-94 (West 2016); N.D. CENT. CODE §§ 10-32.1-01 to -101 (2016); 15 PA. CONS. STAT. §§ 8901-8998 (2016); S.C. CODE ANN. §§ 33-44-101 to -1208 (2016); S.D. CODIFIED LAWS §§ 47-34A-101 to -1207 (2016); UTAH CODE ANN. §§ 48-3a-101 to -1405 (West 2016); VT. STAT. ANN. tit. 11, §§ 4001-4163 (2016); WASH. REV. CODE §§ 25.15.006-.905 (2016); WYO. STAT. ANN. §§ 17-29-101 to -1105 (2016); see also *Limited Liability Company (2006) (Last Amended 2013)*, UNIFORM L. COMM’N, [http://www.uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20\(2006\)%20\(Last%20Amended%202013\)](http://www.uniformlaws.org/Act.aspx?title=Limited%20Liability%20Company%20(2006)%20(Last%20Amended%202013)) [https://perma.cc/G93M-A7CR]. The jurisdictions cited herein are the jurisdictions that had implemented the Re-ULLCA, amended or otherwise, as of the writing of this Note.

119. Thomas E. Rutledge, *The Alphabet Soup of Unincorporated Business Law: What Is Happening with LLCs, LPs, LLPs, GPs, LLLPs, Co-ops & BTs and Dealing with (R)UPA, (RER)ULPA, ULCAA, UNETA, MITA, & META*, American Law Institute Continuing Legal Education Course Materials, VCWA0217 ALI-CLE 1 (Feb. 17, 2015).

120. See Jens Dammann & Matthias Schündeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis*, 55 J.L. & ECON. 741, 773 (2012).

121. See *id.*

122. See MANCUSO, *supra* note 6, at 8.

123. See GUIDE TO LIMITED LIABILITY COMPANIES, *supra* note 112, at 16.

124. See, e.g., VA. CODE ANN. § 13.1-1002 (2016).

125. See MANCUSO, *supra* note 6, at 7.

managed.<sup>126</sup> LLC members can be natural persons or artificial entities.<sup>127</sup> Finally, whether an operating agreement is required to create a single-member LLC differs from state to state.<sup>128</sup> Some states are silent as to this requirement, while others expressly maintain that the operating agreement must be in writing.<sup>129</sup>

The LLC serves as an attractive entity choice compared to the five legal and tax entity options traditionally available to business owners: “sole proprietorships, partnerships, limited partnerships, C corporations ... and S corporations.”<sup>130</sup> Parts III.A.3 and III.A.4 of this Note broadly summarize the key benefits and disadvantages of LLCs and, in particular, of single-member LLCs.

### *3. Benefits of a Single-Member LLC*

The benefits of a single-member LLC entity structure are numerous.<sup>131</sup> The limited liability status is perhaps the most attractive aspect of this entity structure as it prevents members from becoming personally liable for the LLC’s debts.<sup>132</sup> Furthermore, LLCs allow for contractual freedom and a flexible management structure, and the lack of complexity involved in creating LLCs encourages interstate expansion.<sup>133</sup> From a tax perspective, LLCs are unique because LLCs may elect a “disregarded entity” federal income tax classification that allows for federal taxation of business profits at individual rates.<sup>134</sup> In the same vein, this “disregarded entity” tax

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126. See *id.*; see also *Difference Between Member-Managed and Manager-Managed LLC*, LLC U. (July 11, 2016), <https://www.llcuniversity.com/member-managed-llc-or-manager-managed-llc/> [<https://perma.cc/FLG7-CEJZ>] (“An LLC with 1 member is a Member-Managed LLC, unless they hire someone else to run the business.”).

127. See Jeffrey A. Maine, *Linking Limited Liability and Entity Taxation: A Critique of the ALI Reporters’ Study on the Taxation of Private Business Enterprises*, 62 U. PITT. L. REV. 223, 258 n.160 (2000).

128. See *supra* note 122 and accompanying text.

129. Compare MINN. STAT. §§ 322b.10-.18 (2016) (silent as to the requirement of an operating agreement for the formation of an LLC), with N.Y. LTD. LIAB. CO. LAW § 417 (McKinney 2016) (“[T]he members of a limited liability company shall adopt a written operating agreement.” (emphasis added)).

130. See MANCUSO, *supra* note 6, at 6.

131. See, e.g., *id.*; see also Pearce & Lipin, *supra* note 115, at 426-27.

132. See Pearce & Lipin, *supra* note 115, at 425, 427.

133. See *id.* at 424, 427.

134. Single-member LLCs owned by nonnatural individuals are treated differently. See Maine, *supra* note 127, at 258 n.160 (“If the SMLLC is corporate-owned, activities are treated



status allows for the LLC's losses to be allocated entirely to the members who invested cash in the LLC, instead of being allocated on a pro rata basis to each member as required in the S corporation context.<sup>135</sup> As such, LLCs prove to be very attractive wealth-management vehicles for wealthy individuals.<sup>136</sup> Furthermore, as single-member LLCs may avoid paying transfer taxes on property,<sup>137</sup> and as single-member LLCs permit tax-free in kind distributions,<sup>138</sup> this choice of business entity allows for effective tax planning. Finally, as LLCs may be owned by natural people and artificial entities, such as corporations, agencies, and partnerships,<sup>139</sup> LLCs are a suitable entity choice for a wide audience, ranging from individuals seeking to be sole owners, like Julie, the theoretical bakery owner, to businesses financed by corporate investors,<sup>140</sup> such as FCA US LLC, better known as Chrysler.<sup>141</sup>

#### 4. Disadvantages of a Single-Member LLC

Despite the attractiveness of the single-member LLC, this entity structure also presents some risks that members must consider.<sup>142</sup> For example, single-member LLC owners are often unable to take advantage of the extremely appealing limited liability status be-

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in the same manner as a branch or division.”); *see also* Jerald David August, *Federal Income Taxation of Single Member Entities: “Tax Nothings,”* American Law Institute Continuing Legal Education Course Materials, VCWG0630 ALI-CLE 1 (June 30, 2015) (“Where a corporation, for example, forms a single member LLC, the general default rule is that the assets and liabilities of the LLC are, for federal tax purposes, owned by the corporation as a ‘branch’ or a ‘division of a business,’ i.e., the corporate taxpayer.”).

135. *See* Seidenfeld *supra* note 6.

136. *Id.*

137. *See* Kleinberger & Bishop, *supra* note 8, at 2-3 (“Suppose that a person becomes a member of a limited liability company and in connection with that event contributes land to the LLC (so as to “pay for” the membership)... [W]hen the LLC has only one member, under the statutes of some states it is possible to reframe the arrangement to avoid the transfer tax.”).

138. *See Comparison of C Corp, S Corp and LLC Entity Types*, COOLEY GO, <https://www.cooleygo.com/compare-business-entities-chart/> [<https://perma.cc/JM84-HT3C>].

139. MANCUSO, *supra* note 6, at 7.

140. *See* Seidenfeld, *supra* note 6.

141. *See Our Company*, FCA FIAT CHRYSLER AUTOMOBILES (2016), <http://www.fcanorthamerica.com/Company/AboutUs/Pages/AboutUs.aspx> [<https://perma.cc/JFQ8-GJ74>] (clarifying for consumers that Chrysler, Dodge, Jeep, Ram, Mopar and SRT are registered trademarks of FCA US LLC).

142. *See* Pearce & Lipin, *supra* note 115, at 428.



cause they personally secure the LLC's debt in order to obtain bank loans, and thus expose themselves to personal liability in the event of default.<sup>143</sup> Also, despite the numerous benefits on the federal level, single-member LLCs may still remain subject to state level income tax.<sup>144</sup> Additionally, although state statutes are often flexible in terms of LLC ownership, the LLC is not a viable choice of entity for businesses backed by venture capital (VC) funds,<sup>145</sup> as the VC funds would jeopardize the tax-exempt status of their partners if the VC funds were to invest in an LLC.<sup>146</sup> Furthermore, on a legal note, single-member LLCs not owned by attorneys cannot represent themselves in court<sup>147</sup> and single-member LLCs are not bankruptcy remote entities.<sup>148</sup> Overall, single-member LLCs exist in an uncertain legal environment due to the surprising absence of case law and statutory guidance available to this novel business entity.<sup>149</sup>

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143. *See id.*; *see also* Susan Kalinka, *The Louisiana Limited Liability Company Law After "Check-the-Box"*, 57 LA. L. REV. 715, 735 (1997) ("A member of an LLC ... can become liable for the LLC's debts ... by offering a personal guarantee.... The liability ... is incurred, not in the member's capacity as a member of the LLC, but in the member's capacity as a guarantor.").

144. *See, e.g., Limited Liability Companies*, CAL. TAX SERV. CTR., [http://www.taxes.ca.gov/Income\\_Tax/limliacobus.shtml](http://www.taxes.ca.gov/Income_Tax/limliacobus.shtml) [<https://perma.cc/55C3-2N94>] ("Limited liability companies may qualify and make an election under the investment club provisions. However, such an election does not exempt them from the limited liability company annual tax.").

145. *See, e.g., Venture Capital Funds*, INVESTOPEDIA, <http://www.investopedia.com/terms/v/vcfund.asp> [<https://perma.cc/3BRF-K9EP>] (defining "venture capital funds" as "investment funds that manage the money of investors who seek private equity stakes in startup and small- to medium-sized enterprises with strong growth potential").

146. *See* Seidenfeld, *supra* note 6.

147. *See id.*

148. *See In re A-Z Elecs., LLC*, 350 B.R. 886, 888 (Bankr. D. Idaho 2006) (holding that a single-member LLC becomes property of its owner's Chapter 7 bankruptcy estate, allowing creditors to pursue its assets for recovery); *In re Desmond*, 316 B.R. 593, 595 (Bankr. D.N.H. 2004) (concluding that a single-member LLC becomes property of its owner's Chapter 11 bankruptcy estate, allowing creditors to pursue its assets for recovery); *In re Albright*, 291 B.R. 538, 540, 541 (Bankr. D. Colo. 2003) (holding that a single-member LLC is not a bankruptcy-remote entity because the bankruptcy trustee obtains control and management rights of a single-member LLC and, thus, has the authority to sell a single-member LLC's assets and distribute the proceeds to the creditors of a single-member LLC's owner); *Olmstead v. FTC*, 44 So. 3d 76, 78 (Fla. 2010) (concluding that a judgment creditor is not limited to a charging order to collect from the debtor's assets held in his single-member LLC, as the single-member LLC's assets are subject to the claims of its owner's non-member creditors).

149. *See infra* Part III.B.

*B. The Independent Fifth Amendment Right of the Single-Member LLC*

The unique business, statutory, and tax features of single-member LLCs, and LLCs in general, have not only created distinctive business benefits and disadvantages, but have also created challenges for courts. Even the entity name “limited liability company” has resulted in confusion.<sup>150</sup> Several courts, for example, “have referred to an LLC as a limited liability corporation, ... to LLC members as shareholders,” and, to complicate matters further, one court “referred to an LLC’s members as limited liability partners.”<sup>151</sup> Because state LLC statutes typically borrow heavily from corporate and partnership statutes, the inclination of courts to rely on legal precedent involving familiar business entities when faced with cases involving LLCs is unsurprising, but problematic.<sup>152</sup> Courts’ strict adherence to principles of corporate or partnership law has resulted in holdings improper in relation to single-member LLCs.<sup>153</sup> As Professor Elizabeth Miller noted, “[t]he very manner in which corporate and partnership principles are combined in the LLC context leads to some unique questions that may dictate unique answers.”<sup>154</sup> One of these unique answers must be a single-member LLC’s right to invoke Fifth Amendment protection.<sup>155</sup>

*1. The Hybrid Business Features of the Single-Member LLC Are Problematic for the Collective Entity Doctrine*

Under the collective entity doctrine, only natural persons are protected from compulsory self-incrimination under the Fifth Amendment.<sup>156</sup> Nonetheless, in *Bellis* and *Braswell*, the Supreme

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150. See Kleinberger, *supra* note 35, at 15.

151. See *id.*; see also *In re Auspech, Inc. v. Wireless Digital Grp., LLC*, No. 13-21757-CIV, 2014 WL 12571405, at \*3 (S.D. Fla. Apr. 30, 2014) (“Saxx Mobile ... [known as Wireless Digital Group, LLC] did not designate any limited liability partners.”); *In re Bayou Hedge Fund Inv. Litig.*, 472 F. Supp. 2d 534, 537 (S.D.N.Y. 2007) (“Defendant Hennessee Group LLC ... is a New York limited liability corporation.”).

152. See Miller, *supra* note 31, at 647.

153. See *id.* at 641-44 (highlighting the disparate impact on single-member LLCs in relevant case law).

154. *Id.* at 619.

155. *Cf. id.*

156. See *supra* Part II.

Court left open the possibility of extending Fifth Amendment protection to distinct business entities.<sup>157</sup> Specifically, in footnote eleven of *Braswell*, the Court explicitly doubted “whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example, that he is the *sole employee and officer* of the corporation, that the jury would *inevitably conclude that he produced the records*.”<sup>158</sup> The personal structure of the single-member LLC lends itself to questioning the applicability of the collective entity doctrine. The interconnectedness between the natural owner and the single-member LLC is best exemplified by analyzing the contractual and financing relationships between these parties. As most single-member LLCs are member-managed,<sup>159</sup> the only two parties to the single-member LLC operating agreement are the sole owner and the single-member LLC, thus linking the natural person and the entity for legal, tax, and business purposes. From a financing perspective, the business structure of the single-member LLC grants the sole owner the option of insulating herself from the single-member LLC’s liabilities in the event of default.<sup>160</sup> However, oftentimes single-member LLC owners choose to waive limited liability and act as personal guarantors of the single-member LLC’s debt in order to obtain bank loans.<sup>161</sup> As such, in many respects the single-member LLC is linked to the identity of the natural owner, casting doubt on whether this form of business entity falls, or should fall, under the collective entity doctrine.

## 2. *The Single-Member LLC in Light of the Bellis Exception*

Despite limiting the Fifth Amendment to “its historic function of protecting only the natural individual,”<sup>162</sup> the Court in *Bellis* noted that “[t]his might be a different case if it involved a *small family partnership* ... or ... if there [were] some *other pre-existing relation-*

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157. See *supra* Part II.

158. *Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988) (emphasis added).

159. See *supra* notes 125-29 and accompanying text.

160. See *Pearce & Lipin*, *supra* note 115, at 428.

161. See *id.*

162. *Bellis v. United States*, 417 U.S. 85, 89 (1974).

ship of confidentiality among the partners.”<sup>163</sup> The Court then cited to *United States v. Slutsky*, a case out of the Southern District of New York holding that a two-man partnership could rely on the Fifth Amendment as a safe haven.<sup>164</sup> In *Slutsky*, the district court determined that “[w]hile partnership ownership [was] shared, it [was], nonetheless, personal and, consequently, the business records of [the] partnership [were] really the personal records of each of the partners.... [Furthermore, the partners had] give[n] their personal attention to the day-to-day business activities of the partnership.”<sup>165</sup> The *Bellis* exception provides the exact rationale as to why single-member LLCs should be permitted to invoke the Fifth Amendment.

The *Bellis* exception can be broken down into two independent prongs: (1) a business structure prong and (2) a confidentiality prong. The single-member LLC easily meets the confidentiality prong. An individual who establishes a single-member LLC, of which, as the name implies, he or she is the sole owner, clearly has an expectation that her business, financial, and legal decisions will remain private. Furthermore, in jurisdictions in which a formal operating agreement for single-member LLCs is required, the formal agreement only lists two parties to the agreement: the single-member LLC and its sole member.<sup>166</sup> It is difficult to imagine a more confidential business relationship than the one that exists between the sole owner and the single-member LLC.

In terms of the first prong—the business structure prong—several district courts have allowed small partnerships to claim a Fifth Amendment privilege on the basis of *small partnership* structure alone. In *In re Subpoena Duces Tecum*, when granting a small partnership Fifth Amendment rights, a California district court stated that the partnership’s sole purpose was to “conduct the personal business of the partners ... [and while] some partnerships, which have a large number of partners ... might ... take on the habilaments [sic] of an association or corporation ... certainly this small family partnership [did] not reach such a stature.”<sup>167</sup>

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163. *Id.* at 101 (emphasis added) (internal citations omitted).

164. 352 F. Supp. 1105, 1108 (S.D.N.Y. 1972).

165. *Id.* at 1107-08.

166. *See, e.g.*, VA. CODE ANN. § 13.1-1023 (2016).

167. 81 F. Supp. 418, 421 (N.D. Cal. 1948).

Furthermore, in *In re Grand Jury Subpoena Duces Tecum (Doe)*, the Eastern District of New York permitted a husband-wife partnership to invoke the Fifth Amendment.<sup>168</sup> There the court adamantly determined that

the *Bellis* Court contemplated that individual owners of the proverbial “Mom and Pop” stores would continue to enjoy the protection of the Fifth Amendment even though they elected to conduct business as a partnership. If the *Bellis* Court intended to hold that no partners could ever invoke the Fifth Amendment with respect to partnership records, it could easily have said so.<sup>169</sup>

In cases involving LLCs, many lower courts have used a “compare and contrast” approach when attempting to place the LLC under a preexisting business entity category.<sup>170</sup> While this approach has not yielded consistent results, numerous courts have concluded that an LLC is “not a corporation.”<sup>171</sup> This determination is especially true for the single-member LLC: it is more personal in scope than a corporation, and there is no clear legal, business, or tax distinction between the single-member LLC and its sole owner. The rationale behind the *Bellis* small partnership exception<sup>172</sup> is equally applicable to the single-member LLC and weighs in favor of extending Fifth Amendment protection to this uniquely personal business entity.

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168. 605 F. Supp. 174, 178 (E.D.N.Y. 1985).

169. *Id.*

170. *See, e.g.,* *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 705 (4th Cir. 2010) (holding that an LLC is an unincorporated association under the Class Action Fairness Act); *JMTR Enters., L.L.C. v. Duchin*, 42 F. Supp. 2d 87, 94 (D. Mass. 1999) (“[T]here is no justification for treating [an LLC] as a corporation”); *CFM Buckley/North, LLC v. Bd. of Assessors of Greenfield*, 902 N.E.2d 381, 384 (Mass. 2009) (“[An LLC] is not a corporation.”); *RCN-BecoCom, LLC v. Comm’r of Revenue*, 820 N.E.2d 208, 216 (Mass. 2005) (holding that a statute applying to corporations did not apply to LLCs); *Hurwitz v. Padden*, 581 N.W.2d 359, 364 (Minn. Ct. App. 1998) (holding that LLC dissolution follows partnership principles). For more cases describing the LLC as a hybrid business entity, see also *Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 383 (D. Del. 2000); *Ruggio v. Vining*, 755 So. 2d 792, 795 n.2 (Fla. Dist. Ct. App. 2000); *Gee v. Bullock*, C.A. No. 96-2223, 1996 WL 937009, at \*4 (R.I. Super. Ct. Nov. 16, 1996).

171. *See, e.g., CFM Buckley/North L.L.C.*, 902 N.E.2d at 384 (“[An LLC] is not a corporation.”); *see also JMTR Enters., L.L.C.*, 42 F. Supp. 2d at 94 (“[T]here is no justification for treating a LLC [as] a corporation.”); *RCN-BecoCom, LLC*, 820 N.E.2d at 216 (holding that a statute applying to corporations does not apply to LLCs).

172. *See supra* Part II.A.

### 3. *The Fifth Amendment Rights of the Single-Member LLC* *Post-Braswell*

In *Braswell*, the Court explicitly left open the possibility that Fifth Amendment protection may be available to a business entity with a single custodian, “*employee and officer*” because in that scenario a jury [would] *inevitably conclude that [the sole owner] produced the records.*<sup>173</sup> The single-member LLC falls squarely within this exception.

While the Court did not provide a rationale for its statement in footnote eleven of the majority opinion,<sup>174</sup> Supreme Court precedent and the IRS’s treatment of the single-member LLC lead to the conclusion that the single-member LLC and its sole owner are so inextricably intertwined that they are indistinguishable.<sup>175</sup> As such, denying Fifth Amendment rights to the single-member LLCs is akin to refusing an individual the constitutional privilege against self-incrimination.

In *Bellis*, the Court announced the following collective entity doctrine factors: (1) the entity’s status as incorporated or unincorporated if a single individual owns the entity;<sup>176</sup> (2) the entity’s identity as independent of its individual members;<sup>177</sup> and (3) the entity’s documents as records of the organization rather than the individual.<sup>178</sup> The first factor clearly weighs against application of the collective entity doctrine to the single-member LLC as LLCs are unincorporated business entities.<sup>179</sup> In terms of the second factor, single-member LLCs do not possess independent institutional identities.<sup>180</sup> These business entities have no individuality and separateness from their single-member owners. Therefore, any business

173. *Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988) (emphasis added).

174. *See id.*

175. *See supra* Part III.A.3.

176. *See Bellis v. United States*, 417 U.S. 85, 89-90 (1974). As previously discussed, this Note draws from *derivative* findings in *Bellis* for identifying a framework used to determine whether an artificial person falls under the umbrella of the collective entity doctrine. *See supra* note 12. Thus, although the majority opinion in *Bellis* did not *adopt* this incorporated-unincorporated distinction, for the purposes of this Note it is sufficient that the Court at least *considered* such a distinction. *See also supra* note 74 and accompanying text.

177. *See Bellis*, 417 U.S. at 95.

178. *See id.* at 97-100.

179. *Cf. id.* at 89-90; *id.* at 103-04 (Douglas, J., dissenting).

180. *See id.* at 95 (majority opinion).

records are also personal to the single-member owner and are clearly granted Fifth Amendment protection.<sup>181</sup> Under *Boyd v. United States*, “a compulsory production of the *private* books and papers of the owner of goods sought to be forfeited ... is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution.”<sup>182</sup> To any jury reviewing documents subpoenaed from a single-member LLC, it would be obvious that the single-member had produced the subpoenaed records.<sup>183</sup> Therefore, the single-member would be legally exposing herself to a scenario similar to the one depicted in footnote eleven of the *Braswell* opinion—that is, a situation which is in direct violation of the Fifth Amendment.<sup>184</sup>

The IRS’s federal income tax treatment of the single-member LLC as a “disregarded entity” further sheds light on the entanglement between the single-member LLC and its owner. Under the IRS check-the-box regime, a single-member LLC that does not elect to be classified as a corporation for federal tax purposes (and thus does not file Form 8832) is considered, under default regulation, to be a disregarded entity—that is, “disregarded as separate from its owner.”<sup>185</sup> As a disregarded entity, a single-member LLC is treated as though it does not exist for federal income tax purposes.<sup>186</sup> The single-member LLC’s revenues and expenses “pass through” the

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181. *See id.* at 97-100.

182. *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) (emphasis added).

183. *Cf. id.*

184. *See Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988).

185. *Single Member Limited Liability Companies*, IRS (June 12, 2015), <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Single-Member-Limited-Liability-Companies> [<https://perma.cc/JDP3-YSAN>]; *see also* Treas. Reg. § 301.7701-2(a), 2(c), 3(b). For state law purposes, states are not bound by federal tax classifications of a business structure and may classify business entities as they see fit. *See Vestal & Rutledge, supra* note 106, at 63-64. Many states, however, choose to adopt the federal tax classification. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-1107 (West 2016) (“[A] limited liability company ... shall be classified as a partnership unless classified otherwise for federal income tax purposes, in which case the limited liability company shall be classified in the same manner as it is classified for federal income tax purposes.”).

186. *See* Carter G. Bishop, *Through the Looking Glass: Status Liability and the Single Member and Series LLC Perspective*, 42 SUFFOLK U. L. REV. 459, 470 (2009) (“Although partnership income and losses pass through to an entity’s owners, a partnership is nevertheless recognized as a separate entity for purposes of determining its taxable income and making tax elections. A disregarded entity, in contrast, is completely ‘transparent.’” (footnote omitted)).



single-member LLC and are reported on the owner's *individual* federal income tax return (Form 1040) on Schedule C, E, or F.<sup>187</sup> As such, all of the single-member LLC's federal tax reporting forms and informational returns contain the individual owner's social security number or employer identification number.<sup>188</sup> Additionally, for single-member LLCs that elect taxation as a disregarded entity, there are no taxable gains or deductible losses that result from contributions or distributions because the IRS ignores these transactions completely.<sup>189</sup> Between 2002 and 2006, the majority of single-member LLCs in the United States were taxed under this default disregarded entity regulation.<sup>190</sup>

In the legal realm, Supreme Court precedent further crystallizes the interconnectedness between business entities, such as the single-member LLC, and business owners through a constitutional lens. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court noted that extending constitutional or statutory rights to artificial entities serves "to provide protection for human beings.... When rights, whether constitutional or statutory, are extended ... the purpose is to protect the rights of ... people."<sup>191</sup> In order to protect the single-members, Fifth Amendment rights against self-incrimination must extend to single-member LLCs either under the *Bellis* exception,<sup>192</sup> the *Braswell* exception,<sup>193</sup> or both. From an identity perspective, a financial perspective, a tax perspective, and, oftentimes, from a legal perspective, the single-member LLC is, inherently, one and the same as the sole owner.

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187. See *Single Member Limited Liability Companies*, *supra* note 185.

188. *Id.*

189. See *id.*

190. Chrisman, *supra* note 102, at 486-87.

191. 134 S. Ct. 2751, 2768 (2014).

192. See *Bellis v. United States*, 417 U.S. 85, 95, 97-100 (1974).

193. See *Braswell v. United States*, 487 U.S. 99, 118-19 n.11 (1988).



## IV. COUNTERARGUMENTS

Affording single-member LLCs Fifth Amendment protection may be controversial in the modern era of white-collar crime, and may be perceived as placing a roadblock between authorities and incriminating business records.<sup>194</sup> Although this Note advocates for extending Fifth Amendment rights to single-member LLCs, there are, of course, valid criticisms and concerns. This Part addresses prominent concerns such as the applicability of the collective entity doctrine to the LLC entity structure. Additionally, this Part considers the viability of alternative solutions, such as resorting to immunity or appointing an innocent agent of the LLC.

*A. The Corporate Aspects of the Single-Member LLC Trigger the Collective Entity Doctrine*

As case law defining the rights of LLCs is still unsettled, several courts have likened LLCs to corporations.<sup>195</sup> For example, a New York district court in *Exchange Point LLC v. SEC* held that members of an LLC were similar to shareholders of a corporation.<sup>196</sup> With this analogy in mind, the court prohibited a single-member LLC from invoking the Right to Financial Privacy Act in an attempt to quash a subpoena that had been sent to the LLC's bank.<sup>197</sup>

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194. In his *Braswell* dissent, Justice Kennedy argued that interference with the government's power to conduct white-collar crime investigations involving business entities should not be a concern of the court. *Id.* at 129 (Kennedy, J., dissenting) ("There are at least two answers.... The first, and most fundamental [response to the majority's white-collar crime concerns], is that the text of the Fifth Amendment does not authorize exceptions premised on such rationales. Second, even if it were proper to invent such exceptions, the dangers prophesied by the majority are overstated.").

195. In *Meyer v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*, for example, the Oklahoma Court of Appeals determined that a statute prohibiting corporations, but not partnerships, from obtaining liquor licenses was applicable to LLCs. 890 P.2d 1361, 1362-64 (Okla. Civ. App. 1995). The touchstone for the court's analysis was limited liability. *Id.* The court noted that the statute's purpose was to ascribe personal liability for noncompliance, and this goal would be thwarted if an LLC could obtain the license, while its members evaded any liability. *Id.* at 1363-64.

196. 100 F. Supp. 2d 172, 175 (S.D.N.Y. 1999).

197. *See id.* at 177. The Right to Financial Privacy Act only permits a "person," defined by statute as an individual or a partnership of five or fewer individuals, from challenging the disclosure of financial records to the government. 12 U.S.C. § 3401(4) (2012).

For Fifth Amendment purposes, numerous circuit and district courts alike have taken a similar approach and have treated LLCs like corporations, thereby triggering the collective entity doctrine.<sup>198</sup> This Note suggests that simplistic equating of single-member LLCs to corporations is inappropriate for Fifth Amendment purposes. In analyzing the three collective entity factors announced by the Supreme Court in *Bellis*, discussed earlier in Part III.B, single-member LLCs most strikingly fail the independent institutional identity requirement.<sup>199</sup> The IRS and courts similarly have recognized that the identity of single-member LLCs is inextricably intertwined with the identity of its sole owner.<sup>200</sup> Grouping single-member LLCs under the collective entity umbrella denies the sole owners the constitutional right against self-incrimination, and thus violates a well-established personal privilege. While “[a]t times the law may treat unlikes as if they were alike ... it surpasses understanding when a [uniquely personal business entity] is treated the same as ... a giant corporation or ... union.”<sup>201</sup>

### *B. The Use Immunity Solution*

In his *Braswell* dissent, Justice Kennedy proposed granting use immunity as a solution to providing authorities with sought-after business records without implicating the Fifth Amendment.<sup>202</sup> Justice Kennedy believed that “use immunity can be granted without impeding the investigation. Where the privilege is applicable, immunity will be needed for only one individual, and solely with

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198. See, e.g., *United States v. Roe*, 421 F. App’x 881, 884 (10th Cir. 2011) (holding, in a nonprecedential disposition, that LLC members could not assert their personal Fifth Amendment privileges to combat LLC IRS summonses); *United States v. Lu*, 248 F. App’x 806, 808 (9th Cir. 2007) (holding, in a nonprecedential decision, that a single-member LLC could not seek Fifth Amendment protection to avoid turning over business records requested by the grand jury); see also *SEC v. Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 907 (N.D. Ill. 2013); *Orbit Irrigation Prods., Inc. v. Sunhills Int’l, LLC*, No. 1:10-cv-00113-RJS-EJF, 2012 WL 5397608, at \*1 (N.D. Utah Nov. 2, 2012); *SEC v. Ryan*, 747 F. Supp. 2d 355, 361-62 (N.D.N.Y. 2010); *Expert Janitorial v. Williams*, No. 3:09-CV-283, 2010 WL 2854295, at \*4-5 (E.D. Tenn. July 19, 2010); *United States v. Payment Processing Ctr., LLC*, 443 F. Supp. 2d 728, 734 (E.D. Pa. 2006).

199. See *supra* Part III.B.

200. See *supra* Part III.B.

201. *Bellis v. United States*, 417 U.S. 85, 104 (1974) (Douglas, J., dissenting).

202. *Braswell v. United States*, 487 U.S. 99, 130 (1988) (Kennedy, J., dissenting).

respect to evidence derived from the [custodian's] act of production itself."<sup>203</sup> While on the surface this proposition appears to be effective, use immunity would not sufficiently protect the natural person associated with a single-member LLC.

A grant of use immunity protects the custodian from the authorities' use of any unknown business documents, unless authorities are able to discover the existence of said documents through an independent source.<sup>204</sup> If authorities were able to do so successfully, then the natural person would not be shielded from self-incrimination because the contents of the business records could be used against her in current and future proceedings.<sup>205</sup> Furthermore, from an originalist perspective, the Fifth Amendment does not make reference to the use immunity.<sup>206</sup>

There is a palpable "dichotomy between the privilege against self-incrimination and the ... inquest's craving for evidence .... Immunity is ill-suited for the task of reconciliation."<sup>207</sup> In fact, relying on immunity to escape possible Fifth Amendment violations may run contrary to constitutional principles and the propensity for an accusatorial, as opposed to an inquisitorial, justice system in the United States.<sup>208</sup> Rather, this Note has repeatedly emphasized that in the context of single-member LLCs, affording the entity itself an independent Fifth Amendment privilege is the only true answer to securing the constitutional rights of the natural owner.

### C. *United States v. Kordel and the Appointment of an Innocent Agent*

Arguably, *United States v. Kordel* may be interpreted as a conceivable solution to Fifth Amendment concerns in the context of single-member LLCs.<sup>209</sup> In *Kordel*, the Supreme Court held that if a corporate entity is issued a subpoena implicating the Fifth Amendment rights of a corporate officer, the corporation has the

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203. *Id.*

204. *See* Mosteller, *supra* note 25, at 48.

205. *See id.*

206. ALFREDO GARCIA, *THE FIFTH AMENDMENT: A COMPREHENSIVE APPROACH* 153 (2002).

207. *Id.* at 155.

208. *See* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964); GARCIA, *supra* note 206, at 152.

209. *See* 397 U.S. 1 (1970).

responsibility of “appoint[ing] an agent who could, without fear of self-incrimination, furnish such requested information.”<sup>210</sup>

Although in the context of the single-member LLC no “inside” agent exists that could accomplish the task set out in *Kordel*, theoretically the sole owner could hire and direct an attorney representing the single-member LLC to respond to the subpoena on behalf of the entity. Yet, this too is not a viable solution. Appointment of an “outsider” is infeasible, as the sole owner’s instruction to the innocent agent would itself be testimonial.<sup>211</sup> At that point, any jury would unavoidably construe the surrendered documents as having been provided by the LLC’s sole member, a concern that falls squarely within *Braswell*’s footnote eleven exception.<sup>212</sup>

#### CONCLUSION

The single-member LLC is a hybrid entity that combines the most appealing characteristics of corporations, partnerships, and sole proprietorships into a single business form.<sup>213</sup> Given the single-member LLC’s unique elements, courts should be mindful that some contexts require a variation of the considerations and principles applied to other business entities. The application of the Fifth Amendment is one such context. This Note advances the notion that courts must permit single-member LLCs to independently invoke Fifth Amendment protection. Support for this proposition is found both derivatively and explicitly in Supreme Court precedent, in which the Court hinted at two possible exceptions to the collective entity doctrine.<sup>214</sup> The distinctly personal and confidential nature of the business makes the *Bellis* exception applicable to single-member LLCs.<sup>215</sup> Similarly, the deductions the jury could formulate from the

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210. *Id.* at 8 (quoting *United States v. 3963 Bottles, More or Less, Enerjol Double Strength*, 265 F.2d 332, 336 (7th Cir. 1959)).

211. Mitchell Lewis Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 457-58 (1987).

212. See *Braswell v. United States*, 487 U.S. 99, 118 n.11 (1988). Indeed, in dicta in *Kordel*, the Supreme Court recognized, but did not provide a solution for, situations in which “no one can answer to the interrogatories addressed to the corporation without subjecting himself to a ‘real and appreciable’ risk of self-incrimination.” *Kordel*, 371 U.S. at 8-9.

213. See *supra* notes 34-36 and accompanying text.

214. See *supra* Part II.

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

single-member's act of producing subpoenaed business records suggests that the *Braswell* exception encompasses this hybrid entity as well.<sup>216</sup> Only by affording single-member LLCs Fifth Amendment rights can sole owners, such as the theoretical bakery owner, Julie, rest assured that their right against self-incrimination remains intact.

*Lila L. Inman\**

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216. See *Braswell*, 487 U.S. at 118 n.11.

\* J.D. Candidate 2017, William & Mary Law School; B.S. 2011, University of Virginia. I would like to thank the *William & Mary Law Review* editors, particularly Emily Carapella, Trevor Vincent, and John Nelson, for their contributions in editing this Note for publication. Foremost, I would like to thank my husband, Scott Inman, my mother, Lila Jividen, my two sisters, Maria Jividen and Angela Jividen, and my grandmother, Liela Lombardo, for their unwavering love, support, and encouragement throughout the publication process and beyond.