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We the People: An Analysis of the Supreme Court's Jurisprudence Relating to Constitutional Personhood

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WE THE “PEOPLE”: AN ANALYSIS OF THE SUPREME COURT’S JURISPRUDENCE
RELATING TO CONSTITUTIONAL PERSONHOOD

by
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A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of
the requirements of the Sally McDonnell Barksdale Honors College.

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Abstract

This thesis studies the Supreme Court’s jurisprudence on the issue of constitutional personhood and its historical lack of clarity and uniformity. I focus on three groups of persons who historically and frequently bring claims of constitutional protection before the Court: aliens, children, and felons. Across these three classes of claimants, case analysis shows that the Court lacks a clear framework for answering questions of constitutional personhood, instead relying on an individualistic approach in their decision-making, rendering a defined understanding of constitutional personhood impossible. I argue that the Court’s current methods of decision-making produce inequality and second-class citizenship, and further, that it is necessary for the Supreme Court to adopt a defined approach to constitutional personhood claims moving forward. Constitutional law and the Supreme Court’s future decisions will become increasingly convoluted and baseless without modification to their individualized approach.
# TABLE OF CONTENTS

- **INTRODUCTION** 1
- **CHAPTER I: INTERPRETATIONS OF PERSONHOOD** 5
- **CHAPTER II: CASE STUDIES AND ANALYSIS** 12
  - A. ALIENS
  - B. CHILDREN
  - C. FELONS
- **CHAPTER III: FUTURE JURISPRUDENCE** 39
- **CONCLUSION** 46
- **TABLE OF CASES & BIBLIOGRAPHY** 47
Introduction

Even though the issue of constitutional personhood is almost always a foundational component of the cases brought before the Supreme Court, the Court has never directly answered the question: who is considered a “person” for the purposes of constitutional rights? Instead, the Court has treated each claim differently, evaluating on a case-by-case basis who should be granted the protections of the Constitution. In doing so, the Court has effectively created a sort of second-class personhood, a category for those “non-persons” who cannot easily receive constitutional protections. The Court continually interprets the Constitution as granting rights to some and not others, even though the majority of the rights outlined therein are by nature inclusive, referencing “people,” or in some cases, “citizens.” The Court’s fluid, inconsistent jurisprudence regarding constitutional personhood makes it nearly impossible for some persons to know whether or not a claim brought before the Court for constitutional protections will be affirmed or dismissed, and it presents new challenges for the Supreme Court looking ahead to future jurisprudence. Additionally, the Court’s lack of clear answers on constitutional personhood raises more questions about the scope of rights in the United States: Why are corporations

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1 Bravo, Karen E. “On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking.” North Illinois University Law Review (2011). https://ssrn.com/abstract=1860219. Bravo’s article identifies and analyzes the role of law in constructing personhood, and her research further applies that construction of personhood to the construction of human trafficking. Her research extends well beyond the study of human trafficking, however, to include how constructions of personhood apply to children, legal immigrants, undocumented migrants, and ex-convicts, among others. She further explores how legal literature has left personhood largely unexplained and begins to shed light on the implications of such a system.

2 Robinson, Zoë. “Constitutional Personhood.” The George Washington Law Review Vol. 84, No. 3 (May 2016): 605-667. http://www.gwlr.org/wp-content/uploads/2016/06/84-Geo.-Was.-L.-Rev.-605.pdf. Robinson’s work takes the issue of constitutional personhood and explores it as it relates to corporations, aliens, and felons, highlighting the need for a specific future approach by the Supreme Court in these cases. She argues that there is a deep need for reform in the Court’s handling of constitutional personhood claims and she advocates for a defined approach moving forward. Her work takes into consideration a variety of cases and examines the constitutional theory behind each decision.

3 U.S. Constitution preamble. (“[w]e the People”); id. art. I, § 2, cl. 1 (“the People”); id. amend. I (“right of the people”); id. amend. II (same); id. amend. IV (same); id. amend. IX (“the people”); id. amend. X (same); id. amend. XVII (same).
protected by the First Amendment, but some individuals are not? Why are some aliens considered constitutional persons, but others are not? Why do felons in some states permanently have their voting rights stripped away, even after completing their full sentence?

In an increasingly complex and changing world, constitutional personhood claims will also necessarily become increasingly complex and more frequent. Following President Trump’s Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States” in January 2017, local courts across the United States began (and continue) to field questions from those individuals concerned about their status as constitutional persons. However, in an American judicial system where the Supreme Court has routinely heard similar questions and yet has not developed a clear, uniform method of evaluating these claims, it becomes simple to divide the polity into classes: those protected by the Constitution, and those whose constitutional status is still undetermined. Indeed, the Supreme Court is routinely asked to decide a person’s constitutional status, and analysis of the Court’s decisions in the past highlights the need for a more defined, more transparent understanding of personhood as intended in the Constitution.

This thesis functions as a window into the history of the Supreme Court’s decision-making process in cases involving three separate groups of claimants who have historically fallen into the category of second-class citizenship created by the Court: aliens, children, and felons. All of these groups have seen constitutional personhood claims upheld and dismissed, with no clear reasoning provided by the Court other than a case-by-case, situational balancing act of constitutional rights. Since the Court has yet to acknowledge a “coherent body of doctrine or

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jurisprudential theory” on constitutional personhood, it is unclear who is entitled to bring claims of constitutional protection before the Court. The Court will continually leave some, as Robinson explains, “relegated to the sidelines of the Constitution.” Moreover, this thesis works to understand the question of constitutional personhood as it exists for different groups of people in the United States and show how the Supreme Court’s approach to the question of constitutional personhood is flawed, inconsistent, and in dire need of reform. Aliens, children, and felons represent a broader problem inherent in the Court’s application of constitutional rights and this thesis seeks to understand the nature of constitutional personhood as interpreted by the Court, as outlined in the Constitution, and as an essential component of the future of American jurisprudence.

In the first chapter, I examine competing understandings of personhood in existing literature, focusing particularly on the language of the Constitution and how it has been subsequently interpreted by the Court through history. Understanding the legal implications and varied interpretations of personhood serves as a foundation for the following chapters, in which I study a number of cases decided by the Supreme Court, first involving nonresidents, or aliens, and then residents, namely children and felons, and then look ahead to the future of constitutional personhood cases. Case studies and analysis of the Court’s handling of each case underscore the convoluted nature of the Court’s decision-making process and demand that the Court address constitutional personhood claims more directly in the future.

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5 Fagundes, Dave. “Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction.” Harvard Law Review Vol. 114, No. 6 (2001). [https://ssrn.com/abstract=921133](https://ssrn.com/abstract=921133). See also, Robinson, “Constitutional Personhood,” p. 609. Dave Fagundes takes on the task of exploring personhood as it exists under the law, and he relies on three substantive areas (corporations, American slavery, and fetal homicide statutes) and highlights how legal personhood interpretations play (or played, in the case of slavery) a significant role in each. He further argues that those varying interpretations can have detrimental social implications for the entity subject to diminished legal standing as a “person.”
In practice, the Court’s acknowledgment (or lack thereof) of personhood status can have detrimental impact to those communities seeking personhood and constitutional protections, and this thesis seeks to shed light on the impact of the Court’s inconsistent decision-making in a real, personal way. Research into the history of constitutional personhood in a variety of contexts necessarily raises questions about those whom it directly affects: What are the negative societal impacts if felons permanently lose the right to vote? How do cases involving the constitutional personhood of aliens affect immigration and immigration policy? While the scope of this thesis is limited and focuses primarily on understanding the Court’s historical interpretation of constitutional personhood, analysis of a variety of cases over time becomes necessary to understand the ways in which the Court’s reasoning has historically been flawed and the ways in which constitutional personhood serves as an important foundation for those second-class citizens moving forward.
Chapter I: Interpretations of Personhood

How do courts understand the legal nature of personhood? In order to understand the many ways in which the Supreme Court has interpreted constitutional personhood, it is necessary to examine “constitutional personhood” as a term in all of its legal complexity. Political scientist Alexander Wendt argues that there are different types of persons: psychological persons, that “possess certain mental or cognitive attributes,” legal persons, that “have rights and obligations in a community of law,” and moral persons, that “are accountable for actions under a moral code.” Common notions of “personhood” largely involve equating “person” with “human being,” but Wendt’s legal definition of “person” as a subject of law and community is the foundation for understanding constitutional personhood as interpreted by the courts. Legal personhood, then, has little to do with one’s physical condition as a human, but everything to do with legal recognition.

As such, the language of the Constitution invests some protections explicitly to specific groups while others are left largely open to interpretation. At its broadest, the Constitution protects “the people” or “the People,” and a “Person” or “Persons,” with these references appearing twenty-two times throughout the body of the Constitution, four times in the Bill of Rights, and twenty-three more times in the Amendments. Additionally, some rights outlined in the Constitution extend specifically to the “Citizen” or “Citizens,” or even the “natural born

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6 Wendt, Alexander. “The State as Person in International Theory.” Review of International Studies Vol. 30 (2004). http://kittenboo.com/blog/wp-content/uploads/2006/09/published/5-wendt.pdf. Wendt’s article focuses largely on international theory and personhood, claiming that, in the field of international relations and political science, scholars often describe nations as “actors” or “persons,” and in doing so, prescribe them the same qualities as human beings. Wendt further highlights the attributes that should be attributed to both states and human beings, and his definitions of “personhood” have translated easily into other fields, such as law, philosophy, and sciences.

7 See Robinson, “Constitutional Personhood.”

8 U.S. Constitution. Preamble–Article VII.
Some subsequent rights-based Amendments limit constitutional protection to citizens only (i.e. the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments in respect to voting rights). Sometimes, as Robinson notes, constitutional rights are even further limited a specific group of constitutional persons. For example, the Sixth Amendment’s right to a “speedy and public trial” specifically protects “the Accused,” making the protections of the Sixth Amendment applicable in a specific, defined situation. Similarly, the First Amendment includes protections for “the Press” and Article III offers rights for “the Owner” in prohibiting the quartering of soldiers without the owner’s consent. However, not all constitutional protections are as explicitly understood; some constitutional rights remain ambiguous, leaving the persons who can claim their protections open to interpretation. Naturally, then, the Constitution limits who (or what) can claim constitutional personhood and its protections and leaves the question of constitutional personhood begging to be answered. Indeed, “every constitutional claim requires not only that someone violate a constitutional restriction, but also that the person bringing the claim is constitutionally empowered to vindicate that violation.”

Thus, the question of constitutional personhood necessarily serves as a foundation of every constitutional claim brought before the Court. Although the scope of this thesis does not include in-depth analysis of corporate personhood cases, the Supreme Court’s decisions in Citizens United v. Federal Election Commission in 2010 and the more recent Burwell v. Hobby Lobby in 2014 are important to understanding the fluid nature of constitutional personhood as

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9 See, e.g., U.S. CONST. art. I, § 2, cl. 2; id. art. II, § 1, cl. 5; id. art. IV, § 2, cl. 1; id. amend. XI; id. amend. XIV, § 1; id. amend. XIX; id. amend. XXIV, § 1; id. amend. XXVI, § 1; art. II, § 1, cl. 5.
10 U.S. CONST. amend. VI. (“the accused”). See also Robinson, “Constitutional Personhood,” 615.
11 See id. amend. III (“the owner”).
interpreted by the Court. In *Citizens United*, the Supreme Court held in a 5-4 decision that the government could not constitutionally restrict independent political expenditures by a nonprofit corporation. Here, the Court extended First Amendment freedom of speech protections to corporations, and the principles articulated by the Court in *Citizens United* have since been applied to for-profit corporations, labor unions, and other associations. In extending First Amendment rights to corporations, the Court effectively argued for a broad interpretation of constitutional personhood, arguing that corporations are “people” for the purposes of certain rights. This controversial decision necessarily complicates the question of constitutional personhood for the modern Court, and without a clear definition in use, personhood remains ambiguous.

In deciding *Burwell v. Hobby Lobby*, the Court primarily determined whether the Religious Freedom and Restoration Act (RFRA) exempts from the Affordable Care Act’s (ACA) contraception mandate those companies whose owners oppose the contraception on religious grounds. RFRA states that “[the] Government shall not substantially burden a person’s exercise of religion,” thus making the central issue before the Court one of constitutional personhood. In upholding the religious freedom of Burwell, Justice Alito in the majority opinion explained that “no conceivable definition of [‘person’] includes natural persons and nonprofit corporations, but not for-profit corporations,” effectively expanding Court’s understanding of constitutional personhood and holding to a definition of “personhood” outlined in the Dictionary Act of 1871.

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The Dictionary Act of 1871 instructs courts to apply all federal statutes definitions of certain common words, including “person,” and basic rules of grammatical construction “unless context indicates otherwise.” Further, the Act states that “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Courts have taken the Dictionary Act and applied it inconsistently since it was created, with some courts hardly referencing it at all to others employing it as a guide; however, recent Supreme Court cases about the personhood of corporations take the Act’s definition of “personhood” and apply it broadly, extending to corporations the same constitutional protections as individuals.

This broad understanding of “person” spills over into cases across the board and perpetuates the inconsistency in the Court’s interpretations of constitutional personhood, but this interpretation of personhood is not new. Columbia law professor John Coffee explains that corporate entities date all the way back to medieval times, explaining that “the Catholic Church [was] probably the first entity that could buy and sell property in its own name.” Indeed, the legal personhood of a corporation “would allow people to put property into a collective ownership that could be held with perpetual existence,” allowing those rights to extend beyond one person’s lifespan or inheritance. Beyond the medieval age, corporate protections were the backbone of economic development in the United States and elsewhere; however, corporations

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17 Totenberg, Nina. "When Did Companies Become People? Excavating The Legal Evolution." NPR. July 28, 2014. [http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution](http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution). Totenberg focuses on corporations in her analysis of constitutional personhood, but her analysis serves this thesis by examining the evolution of the legal system, arguing that it has become more convoluted and difficult to understand. Corporations serve as a picture through which the fluidity of constitutional personhood can be viewed.
18 See Totenberg, “When Did Companies Become People? Excavating The Legal Evolution.”
are not mentioned anywhere in the Constitution, making the courts responsible for determining the legal standing of and rights afforded to corporations. Historian Eben Moglen notes that, at the beginning of the United States, “the only right given to corporations was the right to have their contracts respected by the government,” but by the 1800s at the dawn of industrialization, corporations saw a greater need for making money, thus forcing the courts to begin thinking about the ability of corporations to claim constitutional protections moving forward.19

When corporate lawyers initially started pushing for equal treatment following the passing of the Fourteenth Amendment, they were not fighting for First Amendment religious and speech protections like they are in modern America. Rather, they sought equal treatment under state tax laws and other arenas that would benefit them financially. Over time, the Supreme Court has extended more and more rights to corporations out of the Bill of Rights, including the protection against unwarranted search and seizure; however, corporations were never given any sort of free speech protections until recently with Citizens United. In fact, in 1907, Congress passed the Tillman Act, banning corporate involvement in federal election campaigns in the wake of a corporate corruption scandal involving prior presidential candidates.20 The Act held as rule until the 1978 Supreme Court case First National Bank of Boston v. Bellotti, where the Court held for the first time the corporations have a First Amendment right to spend money on state ballot initiatives.21 Despite the Bellotti ruling, corporations were still limited in their influence of federal elections until Citizens United in 2010, which reversed nearly a century of legal precedent on corporate constitutional personhood and created much of the controversy that still

19 ibid.
20 The Tillman Act of 1907 (34 Stat. 864) (January 26, 1907).
pervades modern discussions of personhood. On one side, proponents of the *Citizens United* decision explain that nobody is saying that “corporations are living, breathing entities, or that they have a soul,” but that they are advocating for the protections of the individuals who choose to associate in that way.\(^\text{22}\) On the other side, critics of *Citizens United* argue that individuals can express their political opinions and donate money freely on their own, that a corporation is not necessary to facilitate political speech. Historian Eben Moglen again criticizes the Court, arguing that we are “using constitutional rules to concentrate corporate power in a way that’s dangerous to democracy.”\(^\text{23}\)

Understanding the complicated history of corporate personhood and the Court’s seemingly unprecedented divergence from it highlights the necessity for transparency and reform in constitutional personhood cases across the board. Indeed, no legal question has sparked more recent controversy than whether corporations are people, and yet even here, just like in cases involving aliens, children, and felons, the Court has been inconsistent and unclear.\(^\text{24}\) In two recent cases, *Horne v. Department of Agriculture* in 2013 and *City of Los Angeles v. Patel* in 2015, the Court upheld certain constitutional rights for the claimants, which were mixtures of individuals and business associations, yet made no distinction or clarification about whether corporations should have the same constitutional protections as individuals. In both of these cases, the Court focused on the nature of the rights in question, not the identity or status of the

\[^{22}\text{See Totenberg, “When Did Companies Become People? Excavating The Legal Evolution.”}\]
\[^{23}\text{See Totenberg, “When Did Companies Become People? Excavating The Legal Evolution.”}\]
Today, as it stands, corporations have seen a dramatic expansion of constitutional rights, but the Court has never directly addressed whether corporations ought to be entitled to the same rights as other constitutional persons. Regardless of political opinion about the constitutional personhood of corporations, the Court has neglected to explain when and why those rights can be extended to them. This thesis seeks to take the example of the Supreme Court’s inconsistency and lack of transparency in corporate personhood cases and apply it to other classes of claimants. Cases of aliens, children, and felons, while not as highly contested or publicized as cases like *Citizens United* and *Burwell v. Hobby Lobby*, present the same problems inherent in the Court’s decision-making and rest on a foundation of inconsistency in constitutional interpretation.

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25 See Winkler, “The U.S. Supreme Court’s Cultivation of Corporate Personhood.”
Chapter II: Case Studies and Analysis

Analysis of the Supreme Court’s record in dealing with questions of constitutional personhood allows an unbiased examination of the trends present in their decisions and provides a foundation for future jurisprudence under more unified, transparent decision-making criteria. The following case studies serve to paint the larger picture of how the Court has historically dealt with questions of constitutional personhood in order to begin identifying those trends and aid in the development of a framework for future cases. While many cases only deal with constitutional personhood in part, the Court has expressly dealt with the issue of constitutional personhood at least twice, first in 1857 with *Dred Scott v. Sandford* and again in 1973 with *Roe v. Wade*. In *Dred Scott*, the Court addressed whether or not Scott, or any black person, had the right to sue in federal court, and the Court held that blacks could never be citizens of the United States, nor could they ever be “member[s] of the political community formed and brought into existence by the Constitution…and…entitled to all the rights…guaranteed by that instrument.”26 In his opinion, Chief Justice Roger Taney explained that

…[blacks] are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subdued by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.27

Indeed, Taney’s decision highlights the Court’s belief that blacks, by virtue of the color of their skin, were so far inferior to white citizens that they possessed no rights and no protections under the Constitution. The Court’s decision in 1857 with *Dred Scott v. Sandford* expressly addressed

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the question of constitutional personhood in the majority’s claim that black men were a
“subordinate and inferior class of beings,” thereby limiting federal citizenship to effectively
apply only to white men.  

Decades later in *Roe v. Wade*, the State of Texas claimed that a fetus is a “person” for the
purposes of the Fourteenth Amendment’s Due Process Clause. Thus, in their decision, the
Court necessarily engaged the question of constitutional personhood as it applied to unborn
babies. In doing so, they counted the number of times the word “person” appears in the
Constitution, with specific argument that “in nearly all these instances, the use of the word is
such that it has application only postnatally,” leading the Court to hold that the term “person”
constitutionally does not include the fetus. Unlike *Dred Scott v. Sandford* and *Roe v. Wade*
where the Court fleshed out the question of constitutional personhood and provided an express
interpretation, most cases are much more complicated and convoluted. Indeed, while the Court
decided relatively clearly in 1857 that black people were not considered “people” for
constitutional purposes, and in 1973 that unborn children were not “people” either, the scope and
nature of constitutional personhood claims has always been broad and diverse, particularly in
cases involving alien claimants, felon claimants, and increasingly, children. Since the Court
rarely deals with the question of constitutional personhood explicitly, an analysis of the Court’s
jurisprudence and a chart of the trajectory of those decisions becomes necessary to understand
how constitutional personhood has evolved, and thus how it can be codified in the future.

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28 The Court’s ruling in *Dred Scott* was effectively overturned with the adoption of the Fourteenth Amendment in 1868; however, *Dred Scott v. Sandford* still remains as a moment in the history of the Court where constitutional personhood was addressed directly, and denied for the claimant.
A. Aliens

The question of constitutional personhood for aliens—both within and outside the United States, documented and undocumented—has taken center stage in modern American politics. Indeed, in the wake of President Trump’s controversial immigration ban and as thousands of undocumented persons and unaccompanied minors continue to cross into the United States from Latin America, the lower courts are continually being asked to determine what, if any, rights these persons have under the U.S. Constitution. Immigration scholar Linda Bosniak looks at the Court’s constitutional personhood jurisprudence and notes that while the Court has never withdrawn personhood in its entirety, they have repeatedly “diminished [personhood] in its effect, evaded, effaced, diluted, displaced.” She further argues that “[dilution] is the real risk to constitutional personhood for non-citizens and for some citizens, as well…not outright removal but depreciation.” The Supreme Court has yet to establish a uniform definition for alien constitutional personhood claims; however, in a significant number of cases, as Bosniak explains, the rulings have involved a watered-down version of personhood. As a result, this dilution of constitutional personhood has created multiple sets of constitutional rights, where the only difference between the rights is a difference in their scope.


32 Bosniak, Linda S. “Persons and Citizens in Constitutional Thought.” International Journal of Constitutional Law Vol. 8, No. 1 (2010): 9-29. https://ssrn.com/abstract=1578394. Bosniak’s article poses the idea that “citizenship and personhood are opposing concepts,” arguing that personhood should not be considered the basis for constitutional subject status because of the multiplicity of questions it raises rather than answers. Her work is critical of the idea of constitutional personhood and explains that the concept “promises much more than it can deliver.”

become, “What are the criteria for deciding whether a given class of persons should have rights of the same or of a different scope from persons of another group or class?”

The 1886 Supreme Court case *Yick Wo v. Hopkins* was the first case where the Court held that a law could be race-neutral on its face, but administered in a prejudicial manner, which then became a violation of the Equal Protection Clause of the Fourteenth Amendment. Following the rise of Chinese immigration to California beginning in 1850, tensions with Americans grew, culminating in the Chinese Exclusion Act of 1882. The Act was the first of many pieces of legislation directed at preventing Chinese immigrants from entering the United States, and California’s implementation of the Act involved requiring Chinese immigrants to obtain certain permits in order to work, which proved to be impossible, and prevented Chinese immigrants from gaining citizenship through naturalization. As a result of the severe work regulations in California, many immigrants began to operate laundry facilities; however, in 1880, San Francisco passed an ordinance requiring those people operating laundry facilities in wooden buildings to obtain a permit. Only one permit out of two hundred was granted to a Chinese-operated laundry facility, while nearly every other non-Chinese applicant received a permit without issue. Yick Wo, a laundry facility owned by the Chinese immigrant Sang Lee, continued in operation, and as a result, Lee was fined ten dollars for violating the San Francisco ordinance. Sang Lee sued for a writ of habeas corpus after imprisonment following refusal to pay the fine.

The Supreme Court unanimously decided that the application of the San Francisco statute in question was discriminatory despite being race-neutral on its face. The Court further explained

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34 See Robinson, “Constitutional Personhood.”
that, even though most of the Chinese immigrants who were impacted by the ordinance were not American citizens, they were still entitled to equal protection under the Fourteenth Amendment. In Matthews’ opinion, he denounced the law as a “blatant attempt to exclude Chinese from the laundry trade in San Francisco,” and, as a result, struck down the law and dismissed all charges against other laundry owners who had been targeted.\(^{38}\) Interestingly, the precedent established by *Yick Wo v. Hopkins* had little standing moving forward in the Court’s jurisprudence regarding discriminatory laws; indeed, *Yick Wo* was never applied to Jim Crow laws in the South, and the Court seemed to disregard it entirely when developing the “separate but equal” doctrine in *Plessy v. Ferguson* only ten years later. Not until the 1950s did the Warren Court use the principle established in *Yick Wo* to strike down attempts by southern states to prevent the political participation of blacks.\(^{39}\)

Ten years after *Yick Wo*, the claimant in *Wong Wing v. United States* argued that the statute that required aliens who were unlawfully present in the United States to be “imprisoned at hard labor for a period not exceeding one year” violated provisions of the Fifth and Sixth Amendments, and the Court agreed. In 1892, Wong Wing and three others were sentenced to hard labor at the Detroit House of Labor and deportation under the Chinese Exclusion Act.\(^{40}\) The Court found that the Fifth and Sixth Amendments to the U.S. Constitution do not allow “imprisonment at hard labor” for non-citizens convicted of illegal entry to or presence in the United States without a jury trial. The Court further voided the imprisonment provisions of the

\(^{38}\) *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).


\(^{40}\) *Wong Wing v. United States*, 163 U.S. 228 (1896).
Chinese Exclusion Act, thereby establishing that non-citizens subject to criminal proceedings are entitled to the same constitutional protections as citizens. The Court, using principles established in *Yick Wo v. Hopkins*, explained that the Fifth and Sixth Amendments applied to “all persons within the territory of the United States…even aliens…”\(^4\) Additionally, the Court has since recognized that the Sixth Amendment right to effective assistance of counsel includes, in the cases of alien defendants, “the right to be informed of the immigration-related consequences of entering a guilty plea,” making the case for equal constitutional footing regardless of alienage status.\(^4\)

However, the Court has not always taken the side of the claimant seeking constitutional personhood and protection. In the 1943 case *Hirabayashi v. United States*, the Court held that the application of curfews against a specific group of people was constitutional when the United States was at war with the country from which that group originated.\(^4\) Following Executive Order 9066 (which came as a response to the 1941 attacks on Pearl Harbor), President Roosevelt authorized military commanders to subject Japanese Americans to curfew before eventually being moved into internment camps. Gordon Hirabayashi, convicted of violating the curfew, appealed to the Supreme Court, where the Court upheld the curfew order. Interestingly, the Court recognized in the *Hirabayashi* case that “distinctions between citizens solely based because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,” and yet still upheld the conviction of Hirabayashi and the enforcement of discriminatory curfew and internment laws. Here, the Court acknowledged the

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\(^4\) *Wong Wing v. United States*, 163 U.S. 228 (1896).
\(^4\) See *Padilla v. Kentucky*, 559 U.S. 356 (2010) (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”).
law’s creation of a distinction between persons, even realizing the dangers such a division poses to a nation like the United States. Yet, they refused to rule in a way that abolished that distinction or made the law more transparent.

Aside from a few outliers in the late 1800’s like Yick Wo and Wong Wing, the Court’s jurisprudence historically has treated alien constitutional personhood claims individualistically, allowing claims from some persons while diluting those of others based on circumstance or status. The Supreme Court’s 1950 decision in Johnson v. Eisentrager decided that U.S. courts had no jurisdiction over German war criminals held in a U.S.-administered prison in Germany. In May 1945, the German High Command surrendered, thereby ending the European Theater of World War II; however, German prisoners detained in China by an American military commission were convicted of violating the laws of war by continuing to engage in military activity following the surrender of Germany. The prisoners claimed that their trial, conviction, and imprisonment in an American-occupied part of Germany violated Articles I and III, the Fifth Amendment, and other provisions of the U.S. Constitution, laws of the United States, and provisions laid out at the Geneva Conventions. The U.S. government argued that the prisoners, as non-resident enemy aliens in wartime, had no access to U.S. courts. Further, they argued that the prisoners had no right to a writ of habeas corpus in a U.S. court, and that the Constitution did not grant protection from military trial and punishment to an alien enemy in the service of a government at war with the United States.\footnote{Johnson v. Eisentrager, 339 U.S. 763 (1950).}

In their ruling, the Supreme Court held that extraterrestrial, non-resident aliens were not classified as constitutional “persons” for the purposes of Fifth Amendment rights and
protections, specifically because the prisoners had “no territorial connection to the United States” and that they were “alien enemies.” Moreover, the Court underscored that the claimants were not denied constitutional protections simply because of their status as aliens, but rather that it was their combination of alienage status and enemy status during a time of war that rendered them unable to claim the protections of the Fifth Amendment. Additionally, the Court noted that aliens are “accorded a generous and ascending scale of rights as [they] increase [their] identity with [American] society,” thereby establishing the necessity of participation in a political community as a foundation for constitutional protection. The Court wrote that “even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens,” and further explained that “if the [Fifth] Amendment invest[ed] enemy aliens…with immunity from military trial, it [would put] them in a more protected position than our own soldiers.” Indeed, the Court’s decision in Johnson v. Eisentrager introduced an idea that would govern future alienage constitutional personhood cases, that a person’s involvement in the political community of the United States (or lack thereof) could determine his or her eligibility to claim rights protections under the Constitution.

Decades later, when the Supreme Court was asked to address the applicability of the Fourth Amendment’s Search and Seizure Clause to aliens, the Court held that Fourth Amendment protections did not apply to searches and seizures by United States agents of property owned by a non-resident alien in a foreign country. The 1990 case United States v. Verdugo-Urquidez

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45 See Robinson, “Constitutional Personhood.”
46 See Robinson, “Constitutional Personhood.”
created new questions for future jurisprudence and expanded upon the ideas established in *Johnson v. Eisentrager* in 1950. Rene Martin Verdugo-Urquidez, a Mexican citizen and drug-lord known to be involved in the 1985 torture and murder of DEA agent Enrique Camarena Salazar, was arrested and extradited to the United States. DEA agents received authorization from the Mexican government to conduct a search of Verdugo-Urquidez’s home, where they found documents believed to be the defendant's records of his marijuana shipments. However, when the United States government sought to introduce the records as evidence in court, the defendant argued that they were obtained without warrant, violating the Fourth Amendment’s protections against unlawful searches and seizure, and thus could not be allowed in the trial. The Supreme Court disagreed, ruling that the Fourth Amendment’s protections did not apply where United States agents searched and seized property located in a foreign country owned by a nonresident alien in the United States.50

Chief Justice Rehnquist’s opinion argued that “the people” whom the Fourth Amendment was intended to protect were “the people of the United States,” and that Verdugo-Urquidez’s “legal but involuntary presence” on U.S. soil as a result of his arrest failed to create a “sufficient relationship with the U.S. to allow him to call upon the Constitution for protection.” If there was a violation of the defendant’s rights, the Court claimed, it had occurred in Mexico, not the United States.51 Justices Brennan and Marshall dissented, contending that the framers intended the Fourth Amendment to apply to any action undertaken by the federal government, thereby prohibiting any agent of the federal government to conduct a search unless regulated by the Fourth Amendment. Justice Blackmun also dissented, arguing that when a foreign national is

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charged with a violation of U.S. criminal law, he is being treated as one of the governed. The multiplicity and diversity of the Justice’s opinions in *United States v. Verdugo-Urquidez* further established the connected ideas of community and personhood as laid out in *Eisentrager* years earlier. Rehnquist’s majority opinion highlights the dilution of constitutional personhood to the point of creating separate classes of people, in which one group receives the constitutional protection in question while the other does not. The Court held that the Fourth Amendment “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community,” which necessarily raises questions regarding constitutional rights on a broader scale. With this decision, the Court effectively endorsed a reading of the Constitution in which “the people” can be interpreted as “members of a political community,” or as “the citizens.”

*United States v. Verdugo-Urquidez* further complicated the question of constitutional personhood rather than clarify it; the Court now had to also consider if the Constitution, under their interpretation, compelled the reading of “the people” as to mean “the citizens” in practice.

Similarly to aforementioned cases decided during times of war, the Court’s landmark decision in 2004 in *Rasul v. Bush* dealt with the constitutional rights of foreign nationals held in Guantanamo Bay. When Congress passed the Authorization for Use of Military Force Against Terrorists on September 14, 2001, President George W. Bush gained broadened powers to prosecute a “Global War on Terror” in response to the attacks on September 11, 2001, and a couple of months later, Bush signed a military order, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” which aimed to detain and try enemy combatants.

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52 See Robinson, “Constitutional Personhood.”
without Congressional oversight or judicial review. Rasul, a British citizen captured during the United States invasion of Afghanistan, was taken to Guantanamo Bay, where he claimed the Taliban had captured him and forced him to take up arms. The Center for Constitutional Rights filed a petition in 2004 to challenge the government’s practices in Guantanamo Bay, namely indefinite detention, refusal of right to counsel, right to trial, or knowledge of charges; later, Rasul petitioned for a writ of habeas corpus to review the legality of his detention. Initially, the District Court, citing *Johnson v. Eisentrager*, ruled that U.S. courts had no jurisdiction in Guantanamo Bay, and that as a result, foreign nationals held there could not be given a trial in the U.S. Following an appeal, Rasul’s case came before the Supreme Court, where the initial decision from the District Court was overturned. The Court held that detainees (including foreign nationals held in Guantanamo Bay) had a statutory right to petition federal courts for habeas review under the Due Process Clause, marking a divergence from the precedent established in *Johnson v. Eisentrager* several decades earlier. Thus, the Court’s jurisprudence in cases of aliens has sometimes supported the constitutional personhood claims of the alien, and other times, has ruled that the alien has no standing.

Alien constitutional personhood claims are necessarily among the most complicated and diverse in American jurisprudence, and the Court’s decisions historically rely on a variety of assumptions and distinctions between groups of claimants. For example, in 1950 with *Johnson v.*

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55 Dworkin, Ronald. "What the Court Really Said." The New York Review of Books. August 12, 2004. [http://www.nybooks.com/articles/2004/08/12/what-the-court-really-said/](http://www.nybooks.com/articles/2004/08/12/what-the-court-really-said/). Dworkin discusses the absurdity of President Bush’s post-9/11 power to jail people that he accused of terrorist connections without providing them access to lawyers and without any possibility of review by courts. He argues that the Supreme Court, in deciding against President Bush, effectively asserted that the Constitution does not permit the government to hold suspected enemy combatants or terrorists indefinitely without charging and convicting them of crimes, etc. (see also precedent established in *Johnson v. Eisentrager* in 1950).
Eisentrager, the Court decided to gauge a claimant’s level of involvement with and connection to his or her “political community” as a means of determining the validity of his or her personhood claim. As a result, the Court necessarily implied that aliens are excludable from the political community, and that the states’ governments have a constitutional right to “define” their political community in that way.\(^{56}\) For the Supreme Court, “a [s]tate’s historical power to exclude aliens from participation in its democratic political institutions [is] part of the sovereign’s obligation ‘to preserve the basic conception of a political community.’”\(^{57}\) For the alien claimant in modern American law, a deep-rooted connection to one’s community has become a necessary precursor to claiming constitutional personhood and the protections afforded to other classes under the Constitution. Moving forward, the Court will necessarily be asked to clarify, and likely jettison, the assumptions upon which their alien constitutional personhood decisions rest.

B. Children

The Convention on the Rights of the Child of 1989 defined “child” as “any human person who has not reached the age of eighteen years,” and created an outline for those basic rights to be guaranteed to children, including physical protection, food, education, health care, criminal laws appropriate for the age and development of the child, equal protection of civil rights, and freedom from discrimination.\(^{58}\) For decades, however, interpretations about children’s rights have vacillated, but as one author explains, “[Children], owing to their particular vulnerability


and their significance as the future generation, are entitled to special treatment generally, and, in situations of danger, to priority in the receipt of assistance and protection.”\(^{59}\) Despite the far-reaching scope of the international community’s efforts to guarantee rights for children, by law, children do not have autonomy and are unable to make decisions for themselves in any jurisdiction anywhere in the world.\(^ {60}\) The movement for children’s rights has necessarily raised questions about the ways in which adults abuse and exploit children, often resulting in poverty, poor education, and child labor.\(^ {61}\)

In the same way that the constitutional personhood of aliens is unclear, so is the constitutional personhood of children. Cases involving children highlight the historical conflict between constitutional rights and the desire of the government to shield children from harm.\(^ {62}\) The Supreme Court has long held that the Fourteenth Amendment guarantees the right of parents to direct the upbringing and education of their children, but the individual rights of children have yet to be addressed directly.\(^ {63}\) In order to accurately assess the Supreme Court’s jurisprudence in cases regarding children moving forward, it is essential to understand the caselaw established by \textit{In re Gault} in 1967 and the doctrine \textit{in loco parentis}. In 1967, the Court held that juveniles accused of crimes must be afforded the same due process rights as adults guaranteed by the Sixth Amendment, including the right to timely notification of the charges, the right to confront witnesses, the right against self-incrimination, and the right to counsel.\(^ {64}\) In June 1964, a sheriff


\(^{64}\) In re Gault, 387 U.S. 1 (1967).
in Arizona arrested then fifteen-year-old Gerald Gault without notifying his parents following a complaint from Gault’s neighbor, Ora Cook, about receiving an inappropriate phone call. Gault was taken to the Children’s Detention Home where he claimed that his friend, not he, had made the phone call to Ora Cook. Despite this explanation, Gault remained in custody for several more days, and upon his release, his mother received what would be the only notification of the date and time for “further hearings on Gerald’s delinquency,” where the judge would sentence him to the State Industrial School “for the period of his minority, unless sooner discharged by the due process of law.”65 However, if Gault had been convicted as an adult, the punishment would have been far less severe: a maximum prison sentence of two months and a fine of no more than $50.

At Gault’s trial, Ora Cook, his accuser, was not present. The Court made no transcript of the hearings and the witnesses who testified were not sworn. Since Arizona law in the 1960’s did not allow for appeals in juvenile cases, Gault’s parents submitted a petition to the Arizona Supreme Court for a writ of habeas corpus. After the Arizona Supreme Court dismissed their petition, they appealed to the United States Supreme Court, claiming that the Arizona Juvenile Code that had convicted Gault was unconstitutional because it (a) did not require that either the accused or his parents be notified of the specific charges against him; (b) did not require that the parents be given notice of hearings; and (c) allowed no appeal. Moreover, they argued that the Juvenile Court’s handling of Gault’s hearing constituted a denial of Gault’s due process rights. Ultimately, the Supreme Court agreed with the Gaults and held almost unanimously that Gault’s sentence to the State Industrial School was a violation of the Sixth Amendment since he had been denied the right to an attorney, had not been notified formally of the charges brought against him,

65 In re Gault, 387 U.S. 1 (1967).
had not been informed of his right against self-incrimination, and was not given the opportunity to confront Ora Cook, his accuser. *In re Gault* important because it highlights the differences between children and adults under the law and illustrates how the Supreme Court has, in some instances, supported the rights of minors.

Moreover, the doctrine *in loco parentis*, which translates from Latin to mean “in the place of a parent,” references the legal responsibility of a person or organization to assume some of the functions of a parent, particularly educational institutions or non-biological parents. In the case of schools, *in loco parentis* allows colleges and schools to act in the best interests of the students as they see fit, except where such action is deemed to violate the students’ civil liberties. Before the Elementary Education Act of 1870, the English school Cheadle Hulme School, which was established as a school to educate and care for orphans, adopted *in loco parentis* as its motto, marking the first time the expression was used with legal standing in the educational field. The first major limitation to this doctrine in the United States came in 1943 with the Supreme Court case *West Virginia State Board of Education v. Barnette*, where the Court ruled that students cannot be forced to salute the American flag at school. In modern America, *in loco parentis* applies primarily to primary and secondary educational institutions rather than colleges and universities, largely due to the decision in the 1961 case *Dixon v. Alabama*. Here, the United States Court of Appeals for the Fifth Circuit found that Alabama State College could not expel students without due process, summarily ending the influence of *in loco parentis* on college campuses.

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Many of the cases brought before the Supreme Court regarding the constitutional personhood and subsequent protections of children involve their status as students. In 1969, *Tinker v. Des Moines Independent Community School District* defined the constitutional rights of students in U.S. public schools. In 1965, John Tinker (then 15 years old) and his siblings decided to wear black armbands to school in protest of the Vietnam War and in support of the Christmas Truce called for by Senator Robert Kennedy. Before the students could wear the armbands to school, the principals of the Des Moines schools created a policy that would penalize children wearing the armbands. When Tinker and his siblings wore the armbands anyway, they were suspended from school. The Iowa Civil Liberties Union and the ACLU took suit all the way to the Supreme Court, where the Court held that the school administrators had not demonstrated a valid reason for this regulation of free speech. Fortas, in his majority decision, explained that the school “must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Since the school did not provide a compelling reason for infringing upon the First Amendment rights of its students, the Court found that the wearing of armbands in protest “did not cause disruption” and that it “represented constitutionally protected symbolic speech.”

*Tinker v. Des Moines Independent Community School District* was the first case where the Court established standards for protecting the free speech rights of public school students, thereby affirming their status as constitutional “persons,” and the Tinker test is still

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used by courts today to determine whether a school's disciplinary actions violate students' First Amendment rights.\textsuperscript{71}

While the Supreme Court has generally considered children constitutional persons for the purposes of First Amendment protections, the Court has not always affirmed the constitutional personhood of children. For example, \textit{Ingraham v. Wright} upheld the disciplinary corporal punishment policy of Florida's public schools.\textsuperscript{72} In 1970, James Ingraham, then in eighth grade, was accused of failing to promptly leave the stage of the school auditorium when asked to do so by his teacher. As a result and despite Ingraham’s insistence that the accusation against him was false, the principal and his assistants held Ingraham down and paddled him several times. The punishment was so severe that Ingraham suffered a hematoma and was instructed by physicians to rest at home for nearly two weeks.\textsuperscript{73} Ingraham and his parents sued the Florida school for “cruel and unusual punishment,” but lost initially, because the court held that the U.S. Constitution’s prohibition against cruel and unusual punishment did not apply to the corporal punishment of children in public schools.\textsuperscript{74} The Supreme Court declined to consider the Ingraham’s appeal, and subsequent cases involving substantive due process and corporal punishment in public schools have yet to offer much protection for students. Here, the Court addressed constitutional personhood as it relates to students in public schools and the Eighth Amendment’s protection against cruel and unusual punishment. The Court has repeatedly ruled


\textsuperscript{72} Ingraham vs. Wright, 430 U.S. 651 (1977).

\textsuperscript{73} United States Court of Appeals, Fifth Circuit; 498 F.2d 248, paragraph 29, July 29, 1974.

\textsuperscript{74} Ingraham vs. Wright, 430 U.S. 651 (1977).
in favor of public schools, thereby diminishing the constitutional protections afforded to students, effectively establishing children as “non-persons” for the purposes of certain rights.

Additionally, the 1985 case New Jersey v. T.L.O. offers another example of the Court’s diminishing the constitutional personhood of children.\textsuperscript{75} The case asked the Court to address the constitutionality of a search of a public high school student for contraband after she was caught smoking. A teacher at a high school in New Jersey discovered then freshman T.L.O. and her friends smoking cigarettes in the school’s restroom. Upon being taken to the principal’s office, T.L.O. had her purse searched, where the principal found cigarettes, a small amount of marijuana, rolling papers, and other paraphernalia, in addition to two letters than implicated T.L.O. in dealing marijuana. She was expelled from the school and fined $1,000 for the dealing and use of illicit drugs.\textsuperscript{76} When taken to the Supreme Court, the Court’s decision required consideration of the balance between an individual’s right to privacy and the school’s interest in maintaining order and discipline; the Court ultimately held that the school had “reasonable suspicion” to search T.L.O.’s purse, and that the drug-related evidence was in “plain view” during the search, which serves as an exception to the warrant requirement of the Fourth Amendment. Interestingly, in his concurrence, Justices Powell and O’Connor argued that in addition to the majority opinion, they believed that “students in primary and secondary educational settings should not be afforded the same level of protection for search and seizures as adults and juveniles in non-school settings.”

In 2009, the Court held in Safford Unified School District v. Redding that a strip search of a middle schooler violated the Fourth Amendment where the school lacked reasonable

\textsuperscript{75} New Jersey v. T.L.O., 469 U.S. 325 (1985).
\textsuperscript{76} New Jersey v. T.L.O., 469 U.S. 325 (1985).
suspicion for the search. Officials at Safford Middle School in Arizona received a report that 13-year-old Savana Redding provided prescription-strength ibuprofen and naproxen to a classmate. As a result, they searched her belongings and, having believed that Redding might have hidden contraband under her clothing, had her strip to her underwear, “pull her bra out to the side and shake it,” and “pull out the elastic on her underpants.” During the search, the officials found nothing and neglected to contact Redding’s parents. Justice Souter, in his majority opinion, wrote that the strip search did violate Redding’s Fourth Amendment rights, but that the school officials who had done it were entitled to qualified immunity because the search’s unconstitutionality was not established at the time of the violation. Here, the Court took a step towards defining constitutional protections for minors, but still diminished its decision by granting qualified immunity to the ones who violated the rights guaranteed by the Constitution.

The Court’s decisions relating to children (or more specifically, students) in schools marks an entire area of jurisprudence where the constitutional personhood of the student is diminished in a way that it otherwise would not be for adults or non-students. The child’s status as a student, the Court has ruled, is enough to warrant the abridgment of certain rights, much in the way the Court evaluates and decides cases brought by alien claimants, and as discussed later, felons. While the Court interprets cases involving schools and students traditionally in favor of the school, the approach to other cases involving children is different, especially in cases of abuse. In 1989, the Court held in DeShaney v. Winnebago County that a state government agency's failure to prevent child abuse by a custodial parent does not violate the child's right to liberty for the purposes of the Fourteenth Amendment. In 1980, a divorce court had given

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custody of 1-year-old Joshua DeShaney to his father, Randy DeShaney. Three years later, following a police report of child abuse and a hospital visit, the Department of Social Services obtained a court order to keep the boy in the hospital’s custody. Three days later, the juvenile court dismissed the case and returned the boy to his father’s custody. For several years, the Department of Social Services routinely reported that Randy DeShaney was not complying with their agreement, and in March of 1984, Randy DeShaney beat Joshua so severely that he fell into a life-threatening coma; brain surgery further revealed hemorrhages caused by “traumatic injury to the head inflicted over a long period of time.” Joshua lived, but is expected to spend the rest of his life in an institution for the profoundly retarded. Randy DeShaney was tried and convicted of child abuse and spent less than two years in prison.

Joshua’s mother filed a lawsuit claiming that by failing to intervene and protect him from violence about which they knew or should have known, the agency violated Joshua’s right to liberty without the due process guaranteed to him by the Fourteenth Amendment. The Court held that the Department of Social Services’ actions were not found to violate Joshua DeShaney’s due process rights, explaining that the DSS was not obligated to protect him from harm. In his dissent, Justice Blackmun famously compared the DeShaney case to Dred Scott, saying that in both cases, the Court upheld an injustice by choosing a restrictive interpretation of the Constitution.\textsuperscript{79} Blackmun’s dissent serves as an important window into the Court’s decision-making process; like many dissents, Blackmun explicates the fault of the Court in its interpretation, comparing it to one of the worst cases in the Court’s history and pointing out the injustice done in the denial of constitutional personhood rights for Joshua DeShaney.

\textsuperscript{79} DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).
While DeShaney did not receive constitutional protections in 1989, the 1944 case *Prince v. Massachusetts* shows a time when the Court did uphold the constitutional rights of children. A Jehovah’s Witness woman, Sarah Prince, was convicted for violating child labor laws for bringing a 9-year-old girl, Betty Simmons, to preach on the streets downtown. Here, Prince argued that the state’s child labor laws violated her Fourteenth Amendment rights to exercise her religion and her equal protections rights. In a narrow decision, Justice Rutledge explained that the government has broad authority to regulate the actions and treatment of children, further arguing that “parental authority is not absolute” and can be permissibly restricted if doing so is in the interests of a child’s welfare. He also wrote that while children share many of the same rights as adults, they face different potential harms from similar activities. Here, the Court took into consideration Betty Simmons’s status as a child and applied the Constitution in a way that protected her constitutional personhood, denying Prince’s claim against Massachusetts child labor laws. The constitutional personhood of children is largely situational as interpreted by the Court, but generally, the Court has not upheld the constitutional personhood of children aside from the same protections afforded to adults in court (i.e. right to trial by jury, knowledge of charges, counsel, etc.). Like aliens and felons, the question of constitutional personhood for children is still undetermined.

**C. Felons**

Unlike the cases previously discussed regarding the constitutional personhood of aliens and children, felon cases typically involve a claimant who previously and unquestionably held a constitutional right and has since had that right stripped away because of conviction as a felon, namely the right to vote. Indeed, felony disenfranchisement is relatively common in the United
States where the laws regarding felons and voting are known as some of the most punitive in the world. In the Second section of the Fourteenth Amendment, the Supreme Court has routinely held that the Constitution implicitly permits the states to adopt this type of rule “for participation in rebellion, or other crime,” leaving felon-citizen voting rights entirely up to the states. While felons are currently able to vote in most states, some states like Florida, Iowa, and Kentucky continue to permanently bar those convicted of a felony from voting, and requirements across other states are varied. For example, some states like Mississippi, Alabama, Tennessee, and Nevada permanently disenfranchise some people with criminal convictions, unless the government approves of individual rights restoration. Other states like Louisiana, Texas, Alaska, and Georgia restore voting rights to felons upon completion of sentence, including prison, parole, and probation. Still others like Illinois, Indiana, Utah, and Oregon restore voting rights automatically after release from prison, and others like Maine and Vermont allow felons to vote even while they are in prison.

Every year, millions of American citizens are denied the right to vote due to felony disenfranchisement, and among those denied the right to vote because of felon-status, people of color make up an overwhelming majority. Indeed, in the United States, punitive felony disenfranchisement laws disproportionately affect black and Hispanic communities where people are routinely “arrested, convicted, and subsequently denied the right to vote,” with research...

showing that, in some minority communities, as much as 10% of the population are unable to vote as a result of felony disenfranchisement.\textsuperscript{83} Indeed, felon disenfranchisement laws have a long history and are based on the idea that “those who violate society's rules should not be allowed to help set them.”\textsuperscript{84} As Christopher Uggen, professor at the University of Minnesota explains, “The message that comes across to them is: Yes, you have all the responsibilities of a citizen now, but you’re basically still a second-class citizen because we are not permitting you to be engaged in the political process.”\textsuperscript{85} While many states have changed their laws on felon voting rights, felons frequently bring claims of constitutional personhood before the Court, claiming overwhelmingly the right to vote as citizens protected by the Constitution, and the Court has consistently held that felony disenfranchisement laws do not violate the Constitution. Felons, then, present the complicated questions of when and why constitutional personhood can be retroactively removed from a person. One scholar notes that “[t]here are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice.”\textsuperscript{86}

In 1974, the Court held in \textit{Richardson v. Ramirez} that convicted felons could be barred from voting with no violation to the Fourteenth Amendment.\textsuperscript{87} A group of convicted felons in

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{83}] Bowers, Melanie M and Robert R. Preuhs. “Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Non-felons.” \textit{Social Science Quarterly} Vol. 90, No.3: 722–743 (September 2009). \url{http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6237.2009.00640.x/abstract}. Bowers and Preuhs argue that felon disenfranchisement policies not only prohibit ex-felons from voting, but also diminish the political influence of those groups who are disproportionately affected by felon disenfranchisement laws. Their study tests the role of socialization on political participation to see whether or not probability of voting is reduced by strict felon disenfranchisement laws, and they conclude that it is.
\item[	extsuperscript{85}] \textit{ibid.}
\item[	extsuperscript{86}] See Robinson, “Constitutional Personhood,” 640-642.
\item[	extsuperscript{87}] \textit{Richardson v. Ramirez}, 418 U.S. 24 (1974).
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California who had completed their sentences brought a class action suit against California’s Secretary of State challenging the state’s constitutional provision that permanently barred anyone convicted of an “infamous crime” from voting. In most voting rights cases, the state is required to show that the voting restriction is a necessary component of a “compelling state interest,” and that the disenfranchisement of felon-citizens is the means to achieve their objectives. Thus, in *Richardson v. Ramirez*, the plaintiffs argued that the state of California had no “compelling interest” in denying them their voting rights, and the California Supreme Court agreed that the provision was unconstitutional. However, on appeal, the U.S. Supreme Court ruled that the state “does not have to prove that its felony disenfranchisement laws serve a compelling state interest.”

In its decision, the Court highlighted Section 2 of the Fourteenth Amendment which exempts felony voting restrictions from the higher level of scrutiny generally given to cases involving voting rights restrictions. The Court emphasized the part of Section 2 specifying “participation in rebellion, or other crime” as a justification to distinguish felony disenfranchisement from other forms of voting rights infringements, which must be precluded by a compelling state interest.

While most felon claims brought before the Supreme Court involve restrictions on voting rights, felons also commonly bring claims of Fourth Amendment protections before the Court, like in the 2006 case *Samson v. California*. Here, the Court held that suspicion-less searches of parolees are lawful under California law, and that the search in question was reasonable under the Fourth Amendment because it was not “arbitrary, capricious, or harassing.”

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question came to the Supreme Court earlier in *United States v. Knights*, where the Court also held that condition of release did not allow a released prisoner the full expectation of privacy generally afforded to constitutional persons under the Fourth Amendment.91 In *Samson v. California*, a police officer witnessed Donald Curtis Samson walking down the street, recognized him as a parolee and, having heard that Samson “might have a parolee at large warrant,” proceeded to search Samson due to his status as a parolee. According to California Penal Code, one of the conditions of parole is the agreement to “search and seizure by a parole officer…at any time of the night or day, with or without a search warrant or with or without cause.”92 The officer who searched Samson found a plastic bag with methamphetamine, which led to the arrest and conviction of Samson for possessing methamphetamine. Despite Samson’s efforts to suppress the evidence obtained during the suspicion-less search, the jury convicted him and sentenced him to seven years in prison, with the Court explaining that the search was not “arbitrary or capricious.”93

In addition to the diminished rights of felons to vote and maintain a certain level of privacy, felons see a variety of civil rights afforded to Americans without a felony on their record stripped away or diluted, such as the right to bear arms, and various public social benefits in the United States. Indeed, most states require firearms dealers to conduct background checks prior to selling guns, and many states hold bans on felons purchasing or owning firearms, especially those felons who have been convicted of a violent crime. Additionally, felons are barred from employment in certain fields by virtue of felon-status, including employment with the U.S.

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92 California Penal Code Section 3067(a).
 Armed Forces, law enforcement, and education, and many other employers still screen applicants based on prior felony conviction.94 Richardson v. Ramirez, Samson v. California, and the standing body of state and national disenfranchisement laws represent an area of jurisprudence where the Court has decided that the constitutional rights of a certain group of persons can be diluted without violating the Constitution. The contemporary understanding of the right to vote is that it extends to “citizens,” which means that felon-citizens are regularly disenfranchised. Indeed, like aliens and children, felons make up a class of persons with diminished constitutional personhood, and the Supreme Court has yet to define constitutional personhood in a way that would prevent the constitutional rights of felons from being reduced. As it stands, constitutional personhood can mean one thing for one person and another thing entirely for someone else. Analysis of the Court’s jurisprudence regarding these three groups of persons (aliens, children, felons) offers a clearer picture of how the Court addresses questions of constitutional personhood. The Supreme Court takes claims of constitutional personhood and protections on a case-by-case basis, focusing on the nature of the claimant in each case rather than relying on a unified framework or explicit answer to the question, “What is a constitutional person?”

An alien-claimant’s status as an alien will necessarily impact his or her standing before the Court, historically resulting in the outright denial or dilution of constitutional protections. A child-claimant’s success in claiming constitutional personhood necessarily depends on the child’s age and whether or not the child is bringing suit against his or her school, in which case the Court historically favors the school above the personhood of the child. A felon-claimant’s constitutional personhood is perhaps the most unclear; despite status an American citizen, and in

most cases, despite the completion of his or her sentence, parole, and probation, the Court frequently allows the states to determine for themselves the constitutional personhood of the felon-citizen. Here, the Court rules that the previous act of committing a crime is sufficient to take away constitutional protections that had previously been unquestionably held. While this chapter explicates only a handful of the cases heard by the Supreme Court regarding constitutional personhood, these case analyses lay the foundation for a future framework and highlight the urgent need for the Court to develop a unified, transparent framework for future jurisprudence. More broadly, the claims of aliens, children, and felons demonstrate that the Court has not yet considered constitutional personhood as a general whole for which a constitutional framework is required. If the Court continues in its practice of individualized, status-based analysis of claims, the law and precedent will become increasingly convoluted, baseless, and impossible to understand as one singular body of law.
Chapter III: Future Jurisprudence

After studying cases and trends from a variety of Courts and claimants, this chapter seeks to identify the commonalities that exist between all three classes and begin to understand the real-world impact of the Court’s disaggregated approach to constitutional personhood claims before looking ahead to the need for more unified jurisprudence. The Supreme Court’s rulings in alien and immigration cases necessarily have far-reaching impacts for United States immigration policy and politics. In 2012, former President Barack Obama began working to provide relief and assistance to undocumented immigrants in the United States. First, he allowed undocumented immigrants brought into the United States at a young age to apply for temporary reprieve from deportation. Then, in 2014, Obama expanded the policy to include the undocumented parents of U.S. citizens. Obama’s broad immigration policy would have offered relief to two categories of aliens: the parents of children who are citizens or legal permanent residents, which comprises about 3.6 million people, and those immigrants who were brought here illegally as children, affecting nearly 1.5 million others. In a 4-4 ruling in 2016, the Supreme Court (and Mitch McConnell’s Republican blockade) effectively blocked Obama’s immigration program, and recent debate about immigration policy highlights the political nature of the constitutional personhood of non-citizen aliens.

The Obama administration lamented the ruling, claiming that “for more than two decades now our immigration system…has been broken, and the fact that the Supreme Court wasn't able

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96 ibid.
to issue a decision…doesn’t just set the system back even further, it takes us further from the country that we aspire to be.”

Legal experts and former Obama administration officials highlight the far-reaching impact of the Supreme Court’s ruling by looking ahead to the potential shutdown of former President Obama’s original program Deferred Action for Childhood Arrivals (or DACA). The politicization of alien personhood is further understood through President Trump’s Executive Order temporarily barring immigration from six predominantly Muslim countries: Iran, Libya, Somalia, Sudan, Syria and Yemen. In the flurry of legal challenges that Trump’s immigration order has faced, plaintiffs claim that the government cannot act arbitrarily or without supportive evidence, arguing that the government has provided no evidence that citizens from the targeted countries posed a unique threat to the United States. The politicization of immigration and alien personhood has necessarily been perpetuated by the Court. With no firm grounds to understand the constitutional personhood of aliens and immigrants, and no basis on which to determine their constitutional rights, the future of immigration policy and restrictions on entry to the United States rests in the hands of public opinion. If the Supreme Court moved away from their claimant-specific approach and adopted a transparent, universal interpretation of constitutional personhood, immigration policy would necessarily become more streamlined and less political.

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The constitutional personhood of children is not as political in nature as alien personhood, but the claimants would still benefit greatly from a unified framework moving forward. The constitutional rights of children, their parents, and schools are regularly challenged, and the Supreme Court has yet to provide justification for its unequal treatment of children seeking constitutional personhood outside of the small existing body of doctrine, including *in loco parentis*, which applies or does not apply depending on the institution. Additionally, the Supreme Court’s continued disenfranchisement of felon-citizens has impacted and will continue to impact the election process, and likely the results of future elections. The Supreme Court has provided no justification for the dilution of the rights of former felons, even those who have successfully completed their sentence, parole, and probation, other than the vested rights of the states to decide their own voter laws. The impact of the Court’s failure to recognize felons as constitutional persons, despite their continued status as citizens, has widespread, detrimental consequences for the democratic process. In the United States, most states prohibit felons from voting. The only two states that allow it are Maine and Vermont, which also happen to be the two states with the highest white populations. Thirteen states and the District of Columbia allow parolees to vote, four states allow those on probation to vote, and nineteen states once release is final. However, twelve states bar felons from voting permanently if they fail to meet certain requirements, and the people overwhelmingly affected by those laws are minorities. A report from the Sentencing Project highlights this disproportionate impact, showing that 2.5% of the voting age population were made ineligible to vote by felon voting laws in 2010, with 28% of all

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those stopped from voting by felon restrictions being African American. In numbers, 137,478 of African-Americans in Alabama, 107,758 in Mississippi, and 145,943 in Tennessee are kept from voting; in Tennessee, over 40% are black, and that percentage is above 50% in Alabama and Mississippi.

A study of felon voting patterns from 1972 to 2000 found that, on average, about three out of four felons who would vote if given the chance would vote for the Democratic nominee for president. In the 2000 presidential race, felon-voters would have doubled Al Gore’s margin in the national vote and would have had significant ramifications for the state-level vote in several states, most notably Florida and Virginia, where the election is always competitive and where some of the most strict felon voting laws still preside. Indeed, in Florida, all ex-felons must wait at least five years before asking an executive board for the right to vote, and more violent offenders must wait seven years. Virginia's Republican governor recently loosened its rules, but all ex-felons must still pay outstanding fines to the courts and some must still wait five years before re-applying. If felons had been able to vote in the 2000 election (and every other election for that matter), American history might look different. Al Gore likely would have won Florida’s Electoral College votes in 2000, thus giving him the election. While several variables

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102 See Enten, “Felon voting rights have a bigger impact on elections than voter ID laws.”

103 Uggen, Christopher and Jeff Manza. “Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States.” American Sociological Review Vol. 67, No. 6. Dec. 2002. http://as.nyu.edu/docs/IO/3858/Democratic_Contraction.pdf. The same authors of the Sentencing Project’s report argue here that the high number of disenfranchised felons presents challenges to the “cornerstone of democratic governance,” which is universal suffrage. Uggen and Manza consider the political impact of felon disenfranchisement laws and examine whether or not the costs are worth the benefits of such a political system, ultimately coming to the conclusion that there are detrimental impacts on the democratic election process.
make it impossible to determine for certain how different the past would look if ex-felons could vote, laws prohibiting felons and ex-felons from voting have major ramifications for the democratic process, including the continued disenfranchisement of minorities in the South. The Supreme Court’s continued protection of states’ rights over the rights of a group of citizens will necessarily perpetuate a flawed democratic process in which one group of citizens enjoys full rights by nature of having never committed a crime, and the other group who sees constitutional protections stripped away because of their status.

Taking into account the real-world, far-reaching consequences of the Supreme Court’s jurisprudence regarding constitutional personhood, a unified framework for the future is necessary to prevent continued disenfranchisement, political confusion, and dilution of constitutional rights for specific groups of persons. Across all three classes of claimants, the predominant disconnect in the Court’s decision-making has been a change in initial focus: in some cases, the Court focuses on the right being claimed rather than the individual claiming it, and in other cases, the reverse. For example, in *Richardson v. Ramirez* the Court took on the task of interpreting the Fourteenth Amendment before applying it to the felons who were claiming the Amendment’s protections. The Court engaged in the same analysis for alien cases in both *Wong Wing v. United States* and *Yick Wo v. Hopkins*. However, in other cases like *Johnson v. Eisentrager*, the Court denied constitutional personhood based on the claimant’s status as an enemy and an alien without regard to the nature of the right being claimed. Here, the Court also superimposed its own idea about territorial connection as a necessary component of personhood without articulating the constitutional justification for doing so. Felons have also routinely been

104 See Robinson, “Constitutional Personhood.”
denied constitutional rights based on their status as felons without any consideration of the right at issue. Over time, the Supreme Court has vacillated in its approach to questions of constitutional personhood, sometimes regarding the right in question as the foundation, and other times deferring to the nature of the individual claiming constitutional protection. As Robinson notes, “this erratic approach indicates the absence of a theoretically unified approach” to those cases resting on the question of constitutional personhood.¹⁰⁵

In effect, the Court’s approach to constitutional personhood has created different classes of persons under the Constitution without justification. For constitutional legitimacy and for the legitimacy of the Supreme Court itself in the future, the Court must adopt an approach that can be easily understood and referenced for future cases involving constitutional personhood claims. In the wake of modern decisions like *Citizens United* and *Burwell v. Hobby Lobby*, the Court will increasingly face challenges to other constitutional rights violations for a variety of claimants. Many questions are already being asked of the Court: Do aliens and felons have the right to bear arms? Do corporations have a right to privacy? To date, the Court has no functional way of answering these questions and will likely revert to its historical trend of picking either the right in question or the status of the claimant without justifying the approach. If the Supreme Court moved to adopt a constitutionally-founded, unified method for determining these questions ahead of time, the outcome will be less political, more transparent, and will create a precedent for the future that is less vulnerable to criticism and negative repercussions. Such action would ensure that any claimant in the future, whether an alien, a corporation, a child, an animal, an artificial agent, a man, a woman, or even the environment, will be consistently, constitutionally and

¹⁰⁵ See Robinson, “Constitutional Personhood.”
justifiably considered as a constitutional person (or not) based on one system of decision-making.
Conclusion

The question of constitutional personhood is unique because of its lasting relevance. The historical foundation and the future importance of such claims requires that the Supreme Court consider it and find innovations in constitutional law to adapt to a changing environment. By looking at a variety of cases over time and examining how the Court has dealt with questions of constitutional personhood throughout history, both far-off and modern, the Court’s inconsistencies are clearly seen. Case studies offer a picture of how the Court’s approach to determining constitutional personhood is, at best, unclear and, at worst, encouraging of inequity. A unified approach to these questions moving forward is necessary to stave off illegitimacy and prevent the rise of more inequality before the law. The Court has historically shown flexibility when considering questions of constitutional personhood; however, the negative impacts, the confusion, and the political consequences of that flexibility highlight the need for a concrete, consistent, and transparent solution for the future. In modern discussions about constitutional personhood, a legitimate Supreme Court with a functional decision-making rationale is essential to the continued success of the democratic republic.
Table of Cases
(in order of appearance)

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dred Scott v. Sandford</td>
<td>60 U.S. 393 (1857)</td>
</tr>
<tr>
<td>Roe v. Wade</td>
<td>410 U.S. 113 (1973)</td>
</tr>
<tr>
<td>Yick Wo v. Hopkins</td>
<td>118 U.S. 356 (1886)</td>
</tr>
<tr>
<td>Wong Wing v. United States</td>
<td>163 U.S. 228 (1896)</td>
</tr>
<tr>
<td>Hirabayashi v. United States</td>
<td>320 U.S. 81 (1943)</td>
</tr>
<tr>
<td>Sugarman v. Dougall</td>
<td>413 U.S. 634 (1973)</td>
</tr>
<tr>
<td>In re Gault</td>
<td>387 U.S. 1 (1967)</td>
</tr>
<tr>
<td>West Virginia State Board of Education v. Barnette</td>
<td>319 U.S. 624 (1943)</td>
</tr>
<tr>
<td>Dixon v. Alabama</td>
<td>294 F. 2d 150</td>
</tr>
<tr>
<td>Ingraham v. Wright</td>
<td>430 U.S. 651 (1977)</td>
</tr>
<tr>
<td>DeShaney v. Winnebago County Department of Social Services</td>
<td>489 U.S. 189 (1989)</td>
</tr>
</tbody>
</table>
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