Constitutional Personhood

*Zoë Robinson**

Abstract

Over the past decade, in a variety of high-profile cases, the Supreme Court has grappled with difficult questions as to the constitutional personhood of a variety of claimants. Of most note are the recent corporate constitutional personhood claims that the protections of the First Amendment Speech and Religion Clauses extend to corporate entities. Corporate constitutional personhood, however, is only a small slice of a broader constitutional question about who or what is entitled to claim the protection of any given constitutional right. Beyond corporations, courts are being asked to answer very real questions about a person's constitutional status: Do aliens have the right to bear arms? Do prisoners have the right to vote? Do children have a right to privacy? Yet, while commentators and the Supreme Court have examined the constitutional status of claimants independently, neither the Court nor scholars have examined the broader question of constitutional personhood.

This Article examines this critical question of constitutional personhood. In doing so, this Article traverses concerns that are at once both deeply practical and at the core of constitutional theory. This Article then traces the historical and theoretical developments of constitutional personhood across three classes of claimants who have most frequently and contentiously claimed the protections of the Constitution: corporations, aliens, and felons. These case studies demonstrate the difficulty in identifying when and under what conditions a class will be vested with constitutional personhood, with the Court vacillating in its approach to determining constitutional personhood both between and within the classes. Examining these claimant classes in the aggregate, this Article demonstrates that not only is a unified framework for answering questions of constitutional personhood desirable, but it is also constitutionally required. To that end, this Article proposes a unified approach to questions of constitutional personhood, where both the purpose of the right and fit of the claimant with that right are consistently considered.

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* Associate Professor of Law, DePaul University College of Law. J.D., The University of Chicago Law School; LL.B. (Hons), The Australian National University College of Law; B.A., The Australian National University; B.Mus., Queensland Conservatorium, Griffith University. This Article benefited greatly from presentations at Georgetown University Law Center, the University of Chicago Law School, and DePaul University College of Law. Thanks due to Will Baude, Micah Schwartzman, Chad Flanders, Nicholas Stephanopoulos, Adam Chilton, Josh Kleinfeld, Rob Smith, Barry Sullivan, Wendy Netter Epstein, Max Helveston, Monu Bedi, and David Franklin. I am grateful to Katherine Garceau and Joey Falk for outstanding research assistance.

INTRODUCTION

Nearly five years ago, in *Citizens United v. FEC*,[1] the Supreme Court revolutionized constitutional law when it declared "First Amendment protection extends to corporations."[2] Politicians, scholars, and commentators publically derided the Court's decision; in his 2010 State of the Union address President Barack Obama claimed that the decision "reversed a century of law that . . . will open the floodgates for special interests."[3] Unsurprisingly, when the Court

1 Citizens United v. FEC, 558 U.S. 310 (2010).

2 *Id.* at 342.

3 President Barack Obama, State of the Union Address (Jan. 27, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address. On the President's State of the Union remarks, see, for example, Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/29/us/politics/29scotus.html. For scholarly commentary on the Court's decision in *Citizens United* to extend First Amendment speech rights to corporations, see, for example, Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 584, 602 (2011) (claiming that *Citizens United* will lead to inconsistency and incoherence in campaign finance law); Justin Levitt, *Confronting the Impact of* Citizens United, 29 YALE L. & POL'Y REV. 217, 223 (2010) (recognizing the furor created by the decision and discussing its impact). *But see* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013)

held that corporations were persons capable of exercising religious liberty in the June 2014 decision of *Burwell v. Hobby Lobby*,[4] commentators exploded.[5] One political pundit proclaimed that the Court's recent corporate constitutional personhood decisions make the case for a Twenty-Eighth Amendment, definitively declaring that "corporations are not people."[6] A popular bumper sticker ironically states, "I'll Believe Corporations Are People When Texas Executes One."[7]

Yet, the recent examples of the Court's vesting of constitutional personhood in corporations are not unique. As fraught as the question of corporate constitutional personhood is, it is only a small slice of a broader question about who or what is entitled to claim the protection of any given constitutional right. Beyond corporations, courts are being asked to answer very real questions about a person's constitutional status: Do prisoners have the right to vote? Do illegal aliens have a right to bear arms? Do children have a right to privacy? Do members of the press have the right to withhold information about their sources?

Questions of constitutional personhood are not new. While the issue of constitutional personhood is certainly in the midst of a resurgence, debates over a variety of persons' capacity to claim the protection of the Constitution's rights have a long history.[8] Yet, while the issue of constitutional personhood is both a historic and contemporary

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(arguing that, once viewed through the lens of the Press Clause, the decision in *Citizens United* was incontrovertibly correct).

4 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

5 *Id.* at 2768–69, 2775 (avoiding the constitutional claim and holding that corporations were "persons" for the purposes of the Religious Freedom Restoration Act). On the constitutional claims, see Reply Brief for the Petitioners at 10–11, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-356), 2014 WL 975500, at *1 (claiming that the Affordable Care Act's application to for-profit corporations violates the First Amendment Religion Clauses). Although the Court ultimately decided the issue on the narrower statutory grounds, the litigation stands as an example of the potential of corporate constitutional personhood claims. *See* Micah Schwartzman et al., *The New Law of Religion*, SLATE (July 3, 2014, 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html (discussing the doctrinal impact of *Hobby Lobby*).

6 Jeff Clements, *The Case for a 28th Amendment*, U.S. NEWS & WORLD REP. (July 25, 2014, 8:00 AM), http://www.usnews.com/opinion/articles/2014/07/25/pass-the-28th-amendment-to-ensure-corporations-are-not-people.

7 *See, e.g.*, PEACE RESOURCE PROJECT, https://www.peaceproject.com/stickers/fullsize/ill-believe-corporations-are-people-when-texas-executes-one-bumper-sticker (last visited Mar. 8, 2016).

8 *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 272–73 (1990); Roe v. Wade, 410 U.S. 113, 156–58 (1973); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405–06, 413 (1857). For a discussion of the Court's constitutional personhood determinations in these cases, see *infra* notes 80–97, 194–204 and accompanying text.

issue, the Supreme Court has never squarely addressed the question.[9] Instead, the question of who or what holds any given constitutional right has been assessed on an ad hoc basis, right-by-right and claimant-by-claimant.[10] The result is that under the Court's jurisprudence, *the Constitution empowers different actors differently*. While a corporation might have a right to privacy, an alien may not. While resident aliens might have a right to vote, felons may not. While corporations might have a right to religious freedom, a child may not. And so on. In other words, the Court has vested different persons with different constitutional rights.

But from where does the disparate treatment derive? By and large the rights contained in the Constitution are inclusive, speaking only of "people"[11] or "person[s]"[12] or, more narrowly, "citizens."[13] Yet, despite the generally inclusive nature of most constitutional rights, the Court regularly limits the category of persons that qualify to claim the protection of any given constitutional right.[14] The basis on which the Court grants or denies constitutional personhood is fluid, and the Court's constitutional personhood jurisprudence lacks any clear or coherent framework for analyzing whether or when a claimant will be considered a constitutional person.[15] Both within the same class of claimant and as between different classes of claimants, "no coherent body of doctrine or jurisprudential theory exists" to determine who or what is a constitutional person.[16] Because the Court has vested different persons with different constitutional rights,[17] and on

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9 *See* Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 478 (2011).

10 *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 272–73; *Roe*, 410 U.S. at 156–58; *Scott*, 60 U.S. at 405–06, 413.

11 U.S. CONST. pmbl. ("[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).

12 *See, e.g.*, *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5.

13 *See, e.g.*, *id.* 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.

14 *See infra* Part II and accompanying notes (analyzing the Court's constitutional personhood jurisprudence).

15 *See infra* notes 326–57 and accompanying text (discussing the variety of interpretive factors the Court has employed to determine whether constitutional personhood has vested in the claimant).

16 Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001) (making the claim in the general context of defining a legal person) [hereinafter *What We Talk About*].

17 *See, e.g.*, Wilson v. United States, 221 U.S. 361, 383–84 (1911) (quoting Hale v. Henkel, 201 U.S. 43, 74–75 (1906)) (holding corporations are not rights holders for the purpose of the Fifth Amendment right against self-incrimination).

inconsistent grounds,[18] it is not readily determinable who is entitled to claim that the government has violated any given right. When and why some persons are relegated to the sidelines of the Constitution, then, remains amorphous.

Both the Court and scholars have all but overlooked the importance of a unified approach to the question of who or what is a constitutional person.[19] Despite the contemporary importance of the constitutional personhood status of corporations post-*Citizens United* and *Hobby Lobby*, as well as the constitutional status of aliens, children, felons, women, the environment, states, and other persons, there is limited study of the role and place of the critical question: who or what is a constitutional person?[20]

Given the importance of this threshold question, it is surprising that there has yet to be any serious attempt to examine the issue of when, and under what conditions, any person has, or should have, any given constitutional right.[21] This Article begins to fill this gap. This

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18 *See What We Talk About*, *supra* note 16, at 1747.

19 However, a small number of articles briefly touch on the broader question of constitutional personhood. *See, e.g.*, Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 62 (2005) ("[T]he [Supreme] Court has never established a test to determine what a constitutional person is . . . ."); Susanna Kim Ripken, Citizens United*, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law,* 6 U. ST. THOMAS J.L. & PUB. POL'Y 285, 301 (2012) ("The bottom line is that the Supreme Court has never developed a unified theoretical justification [of personhood] under the Constitution."); Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species,* 39 UCLA L. REV. 1425, 1445 (1992) ("[T]he Supreme Court has failed to develop a coherent theory of constitutional personhood."); *What We Talk About*, at 1754.

20 On the popular constitutional personhood debate, see, for example, Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections As People?*, 39 W. ST. U. L. REV. 203, 214, 216 (2012); John Eastman, *Symposium: No Free Lunch, But Dinner and a Movie (and Contraceptives for Dessert)?*, SCOTUSBLOG (July 17, 2014, 1:18 PM), http://www.scotusblog.com/2014/07/symposium-no-free-lunch-but-dinner-and-a-movie-and-contraceptives-for-dessert/; Christine Flowers, *Liberal Women Are Big Whiners in* Hobby Lobby *Ruling*, DAILY TIMES OPINION (July 21, 2014, 2:33 AM), http://www.delcotimes.com/opinion/20140719/christine-flowers-liberal-women-are-big-whiners-in-hobby-lobby-ruling; Micah Schwartzman & Nelson Tebbe, *Obamacare and Religion and Arguing off the Wall*, SLATE (Nov. 26, 2013, 2:32 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.html.

21 The Author first noted this point in the context of defining constitutional religious institutions in Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 185 (2014). Scholars have, however, examined the constitutional status of classes of claimants individually. For example, there is a rich and growing body of literature on the constitutional rights of corporations post-*Citizens United* and *Hobby Lobby*, as well as a deep trend of immigration scholars examining the constitutional rights of aliens. *See, e.g.*, David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003)

Article explores the question of constitutional personhood by tracing the historical and theoretical developments of constitutional personhood across three groups of claimants: corporations, aliens, and felons.[22] These three classes represent those persons who have most consistently, frequently, and indeed, contentiously, claimed the protections of constitutional rights. While scholars have engaged with the Court's determinations of the constitutional status of each of these groups independently, this Article views these three groups as examples from which to analyze the broader question.[23] That is, the concern of this Article is not the constitutional personhood of corporations, aliens, or felons, per se. Instead, each class represents a slice of the Court's approach to the broader question of constitutional personhood. These case studies demonstrate that the Court's approach to the question of constitutional personhood is substantively flawed and vulnerable to attack. The case studies show that both within and between the classes of claimants, the Court has vacillated in its approach to answering the personhood question, relying variously on the right's text, history, purpose, or some unstated conception of constitutional membership.

Aggregating the individual strands of jurisprudence into a broader framework, this Article claims that a unified approach to the personhood question is not only possible, but essential for constitutional legitimacy. Consequently, this Article argues that it is critical to at least preliminarily outline a path forward that will provide a transparent and consistent baseline for constitutional personhood determinations going forward. In considering the difficult question of how to best identify constitutional persons, this Article proposes taking a functional approach and extending constitutional personhood to those

("Are foreign nationals entitled only to reduced rights and freedoms? The difficulty of the question is reflected in the deeply ambivalent approach of the Supreme Court, an ambivalence matched only by the alternately xenophobic and xenophilic attitude of the American public toward immigrants."); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1657 ("While the Court has significantly expanded corporate rights, it has not grounded these expansions in a coherent concept of corporate personhood."); Susanna Kim Ripken, *Corporate First Amendment Rights After* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 252 (2011); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1387–89 (2014) (examining the application of the Speech Clause outside of the United States). *But see* Rivard, *supra* note 19, at 1447 ("[A] threshold question for determining whether one is entitled to constitutional rights is whether one is a constitutional person.").

22 *See infra* Part II (outlining the historical and theoretical developments of the constitutional personhood of corporations, aliens, and felons).

23 *See supra* note 21; *infra* Part II.

persons that fulfill the purpose of the right in question.[24] Arguably, a functional approach is flexible enough to permit the courts to address the panoply of claimants and rights, yet sufficiently constraining to ensure consistency across all classes of claimants.

In doing so, this Article traverses concerns that are at once both deeply practical and at the core of constitutional theory. At the periphery of the constitutional community exist classes of persons that are perennially litigating claims in the federal courts. This Article's articulation and analysis of constitutional personhood, then, is in play at the very core of constitutional rights litigation. Yet, questions of constitutional personhood go beyond aiding judicial determinations in case-by-case constitutional litigation and cut to the heart of what it means to belong to the American polity. When the Court declares that an alien is not a constitutional person for one or more rights, for example, the Court is expressing a judgment about the value of that class of claimant.[25] In this way, judicial determinations of constitutional personhood are expressive in function. They reflect normative judgments about status and entitlement to membership, and put the Court at the frontline of determinations of the boundaries of the constitutional community.[26] In a broader sense, then, recognition or nonrecognition as a constitutional person can affect the status and capacity of a person to function within the polity.[27]

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24 *See infra* notes 374–82 and accompanying text (outlining a unified approach for constitutional personhood determinations).

25 Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000) ("The thesis is that law influences behavior independent of the sanctions it threatens to impose, that law works by what it says in addition to what it does."); *see also* Ripken, *supra* note 21, at 249 ("Law makes important statements about the intrinsic and relative value of things. In the context of corporate personhood, for example, the law communicates who counts as a legal person and tells us whether corporations hold the same place as individuals under our legal system." (footnote omitted)). *Compare* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998) ("Rights therefore serve as tools courts use to evaluate the social meanings and expressive dimensions of governmental action."), *with* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1378 (2000) ("'Expressivism' is the standard name within moral philosophy for a particular metaethical position. Metaethics is the branch of moral philosophy that concerns the nature of morality.").

26 *See* Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 474–75 n.29 (2011); Pildes, *supra* note 25, at 754; Ripken, *supra* note 21, at 252 ("From [the] perspective [of those seeking to abolish corporate personhood-status], the legal doctrine of corporate personhood sends the message that corporations count as persons in our society, that they possess the worth of a person under our law, and that they deserve the same rights and respect natural persons are accorded in a civilized world.").

27 Linda Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69

To this end, this Article proceeds in four parts. Part I begins by defining constitutional personhood and identifying the relevant constitutional provisions that give rise to questions about a litigant's constitutional status. Part II examines the Court's constitutional personhood jurisprudence, tracing the historical and theoretical developments in the Court's personhood jurisprudence through the lens of a number of diverse constitutional persons, specifically corporations, aliens, and prisoners. Parts III and IV comprise the analytic core of this Article. Part III situates the constitutional personhood debate in constitutional and political theory. This Article argues that the Court's constitutional personhood jurisprudence reflects normative determinations about membership in the American polity. As such, Part III claims that it is critical to begin to think about a transparent and consistent approach to questions of constitutional personhood going forward. To that end, Part IV proposes the beginnings of a unified, functional framework for determining constitutional personhood that focuses on the purpose of the right at issue, and measures the fit of the claimant with that purpose in order to determine whether constitutional personhood should vest.

I. THE OPEN QUESTION OF CONSTITUTIONAL PERSONHOOD

To begin with, what exactly is constitutional personhood? Broadly, the term "personhood" has many connotations.[28] Philosophers, for example, have long struggled with questions of moral personhood and determinations of who or what should be included in—or excluded from—the concept of a person to whom moral agency attaches.[29] Yet, while the terms "person" and "personhood" generally

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N.Y.U. L. REV. 1047, 1111 (1994) (arguing that status as a constitutional person is a determinant of rights and burdens in the American polity).

28 *See* Edward Heath Robinson, *An Ontological Analysis of States: Organizations vs. Legal Persons*, 5 APPLIED ONTOLOGY 109, 117–18 (2010) (discussing legal personhood); Alexander Wendt, *The State as Person in International Theory*, 30 REV. INT'L STUD. 289, 294 (2004) (claiming that there are three 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").

29 *See, e.g.*, Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L.J. 369, 375–76 (2007) (discussing moral personhood); Jens David Ohlin, Note, *Is the Concept of the Person Necessary for Human Rights?*, 105 COLUM. L. REV. 209, 213–14 (2005) (discussing the attributes necessary for personhood); *see also* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207, 210–11, 215 (1979). *Compare* Eva Feder Kittay, *At the Margins of Moral Personhood*, 116 ETHICS 100, 100 (2005) (arguing "that such intrinsic psychological capacities as rationality and autonomy" are not necessary for moral personhood), *with* Jeff McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 PHIL. & PUB. AFF. 3, 31–35 (1996) (arguing that human beings with cognitive impairments are

denote a human being, "the technical legal meaning of a 'person' is a subject of legal rights and duties."[30] Legal personhood, then, determines who or what is entitled to legal recognition.[31] Importantly, the "person" to whom the law extends can be either natural—referring to human beings—or juridical—referring to an entity that is not a human being, but for which the law extends some legal protections, for example corporations.[32]

Constitutional personhood refers to a specific form of legal personhood that denotes a person's status as a constitutional rights holder, entitled to the protective auspices of the rights contained in the U.S. Constitution.[33] Discussions of constitutional personhood are

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not moral persons), *and* JEFF MCMAHAN, THE ETHICS OF KILLING: PROBLEMS AT THE MARGINS OF LIFE 253–54 (2002) (stating that the killing or death of persons that are not moral persons has less significance than the killing or death of a designated moral person).

30 Lawrence B. Solum, *Legal Theory Lexicon 027: Persons and Personhood*, LEGAL THEORY LEXICON (Mar. 14, 2004) http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_2.html (citing JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gary ed., 2d ed. 1921)); *see also* Richard Tur, *The 'Person' in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 116, 116–27 (Arthur Peacocke & Grant Gillett eds., 1987) (summarizing the legal construction of "person" across multiple areas of the law); Berg, *supra* note 29, at 388–405 (discussing legal personhood in the context of embryos, fetuses, nonhuman animals, and artificial intelligence); Stephen C. Hicks, *On the Citizen and the Legal Person: Toward the Common Ground of Jurisprudence, Social Theory, and Comparative Law as the Premise of a Future Community, and the Role of the Self Therein*, 59 U. CIN. L. REV. 789, 808–21 (1991); Daniel N. Hoffman, *Personhood and Rights*, 19 POLITY 74, 74–78 (1986) (outlining the fraught issues that defining "personhood" raises); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1238–39 (1991) (discussing the concept of legal personhood in the context of artificial intelligence).

31 *See* Ngaire Naffine, *Who are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346, 346–50 (2003) (reviewing the jurisprudence concerning the definition of legal personhood); *What We Talk About*, *supra* note 19, at 1746 ("[T]he law of the person raises the fundamental question of who counts for the purpose of law.").

32 Berg, *supra* note 29, at 372–74 (discussing the distinction between natural and juridical persons). "Juridical persons are also referred to as 'artificial,' 'juristic,' and 'fictitious/fictional' persons." *Id.* at 373 n.24 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819)); *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) ("[a] corporation is an artificial being"); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563–65 (1987) (describing corporations as "legal fictions").

33 *See* Krannich, *supra* note 19, at 62; Ripken, *supra* note 21, at 301; *What We Talk About*, *supra* note 19, at 1754 ("[T]he various theories of the person that American courts can deploy permit virtually any result . . . . These different approaches have raised the question whether the Court's corporate personhood jurisprudence is purely result oriented."); Rivard, *supra* note 19, at 1446 (stating that "a constitutional person is one who is protected by the Constitution" and examining the specific question of whether transgenic humanoid species can and should be designated constitutional persons). Note the dual character of constitutional rights—i.e., individual rights or structural limitations—does not impact this analysis; under either characterization there must be a subclass of litigants who are entitled to hold the government accountable. On the dual

complicated at the outset by the nonuniform rights protections afforded by the Constitution.[34] That is, on its terms, the Constitution protects many different parties, including, but not limited to "persons."[35] The concept of constitutional personhood, then, involves a need for careful definition of multiple categories of potential constitutional claimants, which collectively can be described as constitutional personhood.[36]

At its broadest point, the rights contained in the Constitution protect "the people" or "the People,"[37] and a "Person" or "Persons."[38] Throughout the original Constitution, these references appear twenty-two times.[39] In the Bill of Rights Amendments, the terms appear four more times, and another twenty-three in the remaining Amendments.[40] More narrowly, the rights in the Constitution extend to a "Citizen" or "Citizens,"[41] and more specifically, a "natural born Citizen."[42] While the Bill of Rights Amendments make no mention of citizens for the purposes of designating rights holders, subsequent rights-based amendments do limit rights-holding status to citizens. For example, the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments refer to the rights of citizens with respect to voting rights.[43]

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character of constitutional rights, see, for example, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 5 (1998); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991); Su, *supra* note 21, at 1389.

34 Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 300 (1990) ("[T]he Constitution does not uniformly describe the parties it protects."); Krannich, *supra* note 19, at 90 ("The problem presented by the corporate entity is particularly striking in constitutional law, for 'the Constitution does not uniformly describe the parties it protects.'").

35 *See* Blumberg, *supra* note 34, at 300–01.

36 *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 3–5 (1996) (exploring the boundaries of the Constitution and the limits as to whom the Constitution applies); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 17 (2002) (noting historically rooted questions regarding geographical limitations to, and the popular scope of, the Constitution's application).

37 *See supra* note 11.

38 *See, e.g.*, *supra* note 12. A brief version of this analysis appeared in Robinson, *supra* note 21, at 202–04 (undertaking a brief textual analysis of constitutional personhood for the purpose of identifying constitutional religious institutions).

39 U.S. CONST. pmbl.–art. VII.

40 For the purposes of this Article, a "constitutional right" is defined to include all Amendments to the Constitution and those rights contained in Article I, Sections 9 and 10.

41 *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.

42 *Id.* art. II, § 1, cl. 5.

43 *See, e.g.*, Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869) (stating that the term "citi-

More narrowly still, constitutional rights are limited to a specific and limited category of constitutional persons.[44] In the rights-bearing provisions, reference is made to three specific rights holders. The Sixth Amendment right to a "speedy and public trial"[45] by jury specifically references "the Accused,"[46] rendering this right a limited constitutional right for persons in specific, constitutionally-defined circumstances. Similarly, "the Owner" is referenced once in the rights-bearing provisions in Article III, prohibiting the quartering of soldiers without the owner's consent.[47] In addition, although somewhat debatable, the First Amendment restricts government abridgement of the freedom of "the Press."[48]

Finally, some constitutional rights have no textually-designated rights holder.[49] Instead, these provisions are silent as to who can claim their protections. In most instances the context is clear as to whom the rights holder is intended to be. For example, the Eighth Amendment's prohibition on "excessive bail," "excessive fines," and "cruel and unusual punishment" by its context applies to those accused and convicted of a crime.[50] Similarly, Article I, Section 10's prohibition on bills of attainder and ex post facto laws on its terms gives rise to a right to those affected by any laws enacted contrary to the constitutional terms.[51]

This textual bifurcation between different categories of potential constitutional claimants establishes an analytic predicate: the Constitution empowers certain textually demarcated persons to vindicate constitutional violations.[52] Faced with a constitutional challenge, it is

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zen" applies only to natural persons); April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 164 (1996) (discussing the exclusion of noncitizens from the political sphere); Hon. Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution,* 88 N.Y.U. L. REV. 801, 803–05 (2013) (discussing the constitutional personhood of aliens).

44 *See infra* notes 45–51 and accompanying text.

45 U.S. CONST. amend. VI.

46 *Id.* ("the accused").

47 *See id.* amend. III ("the owner").

48 *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028–29 (2011); *see also* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 78–79 (1975) (claiming that the freedom of the press is an exclusive right); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 626–27 (1979) (arguing that the Press Clause should not be interpreted as an exclusive right).

49 *See, e.g.*, U.S. CONST. art. I, § 9; *id.* art. I, § 10; *id.* amend. I; *id.* amend. VII; *id.* amend. VIII; *id.* amend XIII.

50 U.S. CONST. amend XIII.

51 U.S. CONST. art. I, § 10.

52 *See, e.g.*, Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship*

logical to expect that the initial judicial inquiry would be the antecedent question whether the claimant is *entitled* to raise the constitutional violation at all.[53] On its terms, the Constitution presumes some kind of identity-based distinction among potential rights holders.[54] Each right is crafted to limit not only the substantive protections enshrined in the clause, but also the person to whom its protective auspices extend.[55] A claim that a constitutional right has been violated, then, assumes that the litigant is entitled to raise a claim against the alleged rights-transgressor.[56]

It is not surprising that the Constitution selectively vests rights depending on the nature of the claimant. The substantive protections of constitutional rights are aimed at limiting transgressions of particular and often specific actions on the part of the government.[57] That the Constitution limits who (or what) can claim protection from any constitutional transgression is naturally linked to the fact that constitutional rights themselves are calibrated to certain behavior.[58] The scope of a right and its related right-holder are intrinsically linked and directed to preventing governmental actors acting in a certain manner against a certain class of persons.[59]

All this is to say that the Constitution itself demands an answer to the "who" question; every constitutional claim requires not only that

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and the Right To Bear Arms, 85 N.Y.U. L. REV. 1521, 1532–33 (2010); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates,* 27 WM. & MARY L. REV. 11, 13 (1985). On the structure of judicial review, see HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 14–17, 89–91 (1st ed. 1953); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1006 (2011) [hereinafter Rosenkranz, *Objects*]; Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1212–24 (2010) [hereinafter Rosenkranz, *Subjects*].

53 Nicholas Rosenkranz makes the claim that, "[i]f one were approaching constitutional law for the first time, one might have expected every constitutional judicial opinion to begin with the alleged constitutional culprit, the subject of the claim"; that is, who is *violating* the Constitution. *See* Rosenkranz, *Subjects*, *supra* note 52, at 1214. However, this Article argues that this claim fails to account for those persons *entitled to challenge the actions of the constitutional culprit*. On theories of rights, see generally THEORIES OF RIGHTS (Jeremy Waldron ed., 6th ed. 1984).

54 Gulasekaram, *supra* note 52, at 1532–33.

55 *See id.*

56 *See id.* at 1534–35.

57 *See, e.g.*, Rosenkranz, *Objects*, *supra* note 52, at 1006; Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons Learned from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995) ("[O]ur Constitution's provisions, even when they don't say so expressly, limit only some appropriate level of *government*." (footnote omitted)).

58 *See supra* note 52 and accompanying text; Rosenkranz, *Subjects*, *supra* note 52, at 1224–26 (asking "when" a Constitutional right is violated).

59 *See* Tribe, *supra* note 57, at 219.

someone violate a constitutional restriction, but also that the person bringing the claim is constitutionally empowered to vindicate that violation.[60] That is, it is essential to answer the question of *who* is entitled to raise a question that her constitutional right has been violated prior to any further judicial review.[61]

And here is where much of the confusion lies over the issue of constitutional personhood. The "who" question of constitutional adjudication is almost always painted as one of constitutional standing, where the question is "who are [the] proper parties to a constitutional case?"[62] Yet the question of a litigant's rights-holder status—her constitutional personhood—is not answered by the doctrine of constitutional standing.[63] Any characterization of constitutional personhood as one of standing conflates two related, but ultimately analytically distinct, inquiries.

The basic standing doctrine stipulates that in order to satisfy Article III's case or controversy requirement—the "irreducible constitutional minimum" of standing—a plaintiff must "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision."[64] The standing doctrine aims to capture those litigants that demonstrate a "personal stake" in the suit.[65] More specifically, the standing doctrine attempts to disaggregate those litigants

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60 *See* Rosenkranz, *Objects*, *supra* note 52, at 1006; Rosenkranz, *Subjects*, *supra* note 52, at 1246 (together arguing that the critical predicate questions of judicial review are both the identity of the subject of the constitutional provision and the object of the constitutional provision).

61 *See* Rosenkranz, *Subjects*, *supra* note 52, at 1247.

62 *Id.* (emphasis omitted) (discussing William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988)); *see also* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) ("Absent a sufficient likelihood that he will again be [seized] in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional."); United States v. Salvucci, 448 U.S. 83, 85 (1980) ("Today we hold that defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.").

63 *Cf.* Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 136 (2014) (standing can be a "useful guide" to understand rights-holder status, but the Supreme Court has not framed the issue in respect to constitutional personhood).

64 Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471–72 (1982)); *see also* U.S. CONST. art. III, § 2. The standing doctrine has been subject to strong criticism; see, for example, Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting) ("[C]onstitutional standing [is] a word game played by secret rules."); Fletcher, *supra* note 62, at 221 ("The structure of standing law in the federal courts has long been criticized as incoherent."); Rosenkranz, *Subjects*, *supra* note 52, at 1247.

65 Camreta v. Greene, 131 S. Ct. 2020, 2028 (2011).

who have constitutional permission to bring an action to vindicate a previously violated right.[66]

The question of standing undertakes an entirely different inquiry than presented when we ask the question: is this claimant a constitutional rights holder? At base, standing is about who can vindicate the violation of a right, not who holds the right.[67] While status as a constitutional rights holder is likely a necessary predicate for standing where a constitutional rights violation is claimed, the converse is not accurate. That is, standing is not a necessary predicate for constitutional personhood.[68] Take the case of *See v. City of Seattle*,[69] where a corporate claimant argued that the Fourth Amendment prevented Seattle's fire inspectors from entering its commercial premises.[70] It seems clear that the corporation could satisfy the constitutional standing test: it suffered an injury (the searching of their commercial premises), that injury was traceable to the government's policy of fire inspections, and an injunction preventing future searches would remedy the injury.[71] Yet, the Court held the Fourth Amendment's Search and Seizure Clause inapplicable to corporations on the basis that the corporation was not entitled to the protections of the claimed right.[72] That is, a constitutional personhood does not vest in corporations for the purpose of the Fourth Amendment's Search and Seizure Clause.[73]

In addition, the converse is true: a person may not meet the standing requirements, yet still be a designated rights holder for any given constitutional right.[74] For example, a Catholic citizen of the United States has the right to the free exercise of her religion.[75] She is a constitutional rights holder for the purposes of the First Amendment's Free Exercise Clause.[76] However, unless the government somehow violates her religious liberty, she will not satisfy the Article

66 *See Lujan*, 504 U.S. at 577–78.

67 *See* CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT 35–44 (3d ed. 2010).

68 *Id.* at 35–36.

69 See v. City of Seattle, 387 U.S. 541 (1967). For a discussion of the case, see *infra* notes 144–46 and accompanying text.

70 *Id.*

71 *Id.* at 541–42.

72 *Id.* at 546; *see* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 629–30 (1990) (discussing the modern period of corporate constitutional personhood).

73 Mayer, *supra* note 72, at 629–30.

74 *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

75 *See* U.S. CONST. amend. I.

76 *See* Robinson, *supra* note 21, at 187 (describing constitutional personhood in the specific context of the First Amendment Religion Clauses).

III standing requirements.[77] Of course, the Catholic citizen of the United States whose religious liberty has not been violated will be unlikely to bring a claim in federal court.[78] But the point remains: compared to the question of constitutional personhood, standing captures both too little and too much, and fails to describe the Court's constitutional personhood decisions. Constitutional personhood, then, is analytically distinct from standing, asking instead whether the claimant is *entitled* to claim the protections of the right.

Yet, from the initial observation that identifying constitutional personhood is a requirement antecedent to merits review, a second observation follows: for the most part, the persons empowered by the Constitution to vindicate rights violations are broadly inclusive and textually indeterminate.[79] This indeterminacy helps explain why disputes about constitutional personhood have both persisted in and vexed the members of the Court.

With this indeterminacy in mind, what remains is to consider how the Court has approached questions of constitutional personhood. Part II begins to answer this question by analyzing the Court's approach to this antecedent question across three classes of litigants.

II. Constitutional Personhood in the Supreme Court

This Part has three core goals. First, as noted above, this Part charts the trajectory of the Court's approach to questions of constitutional personhood through the lens of three classes of persons claiming to be constitutional rights holders: corporations, aliens, and felons. These three groups were chosen for their diversity, as well as the long tradition of claimants from these classes arguing that they are constitutional rights holders. The Court's treatment of claims evidences an individualistic approach to questions of constitutional personhood, both as between the different classes of claimants and within the same claimant class.[80] Second, examining the Court's jurisprudence in its various temporal and identity-based contexts provides the foundations for Part III's claim that the Court's current approach to constitutional personhood is unsatisfactory. Finally, foreshadowing the purposive approach this Article takes to questions of constitutional personhood

77 *Bennett*, 520 U.S. at 162.

78 *See* Stone, *supra* note 67, at 36.

79 *See* Henkin, *supra* note 52, at 12 (commenting that "the Constitution provides virtually no guidance for [the] resolution" of constitutional personhood claims).

80 *See, e.g.*, West, *supra* note 48, at 1048 (discussing the Court's lack of doctrinal uniformity in the context of the Press Clause).

in Part IV, this Part has the goal of beginning to identify and tease out those common factors that drive the Court's personhood decisions. This jurisprudential overview, then, provides the essential background for developing a workable framework for constitutional personhood determinations going forward.[81]

Before turning to the specific case studies, it turns out that the Court has expressly addressed the question of constitutional personhood in at least two of its most high profile cases, *Dred Scott v. Sandford*[82] and *Roe v. Wade*.[83] In *Roe v. Wade*, the State of Texas, supported by a number of amici, argued that a fetus is a "person" for the purposes of the Fourteenth Amendment's Due Process Clause.[84] In addressing the question posed, the Court engaged in a brief, one paragraph structural analysis of whether a fetus is a "person" for Fourteenth Amendment purposes. It did so by counting the number of times the term "person" appears in the Constitution, concluding that "in nearly all these instances, the use of the word is such that it has application only postnatally."[85] The Court said that this structural-textual analysis, coupled with historic practice of permissive access to abortion in the nineteenth century,[86] "persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[87] For the Court, this brief statement was all that was necessary to deal with the antecedent question of whether the unborn can claim constitutional personhood.[88]

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81 This is a common analytical approach for scholars of constitutional rights holders. *See, e.g.*, Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 33 (2014) (analyzing case law to determine aspects of corporate personhood); Robinson, *supra* note 21, at 185; West, *supra* note 48, at 1047–48 (discussing personhood determination of the press).

82 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 405–06 (1857) (holding that constitutional personhood did not vest in African Americans). On the import of the *Dred Scott* decision generally, see, for example, MARK A. GRABER, *Dred Scott* and the Problem of Constitutional Evil 3–4 (Maeva Marcus et al. eds. 2006); Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13, 24 (2011); Allen R. Kamp, *The Birthright Citizenship Controversy: A Study of Conservative Substance and Rhetoric*, 18 TEX. HISP. J.L. & POL'Y 49, 53 (2012).

83 Roe v. Wade, 410 U.S. 113, 156 (1973); *see* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 14 (2013) (discussing fetal constitutional personhood).

84 *Roe*, 410 U.S. at 156; Brief for Appellee, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134281, at *8, *31.

85 *Roe*, 410 U.S. at 157.

86 *Id.* at 158 ("[O]ur observation . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

87 *Id.*

88 *Id.*

The Court also faced the issue of constitutional personhood in the infamous *Dred Scott v. Sandford* decision.[89] There the Court addressed the question whether Scott, or any black person, had the right to sue in federal court as a citizen of any state.[90] The Court answered with a resounding "no."[91] Engaging in a limited version of originalism, 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."[92] With little analysis, Chief Justice Taney declared 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 subjugated 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.[93]

According to Taney, blacks were "so far inferior, that they had no rights which the white man was bound to respect."[94] It is trite to say that the Court's analysis of constitutional personhood for African Americans in the *Dred Scott* decision has been universally rejected.[95] Indeed, the decision and its exclusion of African Americans from constitutional personhood precipitated the Civil War and, eventually, the Civil War Amendment to the Constitution, expressly declaring African Americans constitutional persons, at least in some regards.[96]

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89 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

90 *Id.* at 406.

91 *See id.* at 404.

92 *Id.* at 403.

93 *Id.* at 405–06.

94 *Id.* at 407.

95 GRABER, *supra* note 82, at 16 ("[T]he *Dred Scott* decision was a 'self-inflicted wound' that almost destroyed the Supreme Court."); Austin Allen, *Rethinking* Dred Scott*: New Context for an Old Case*, 82 CHI.-KENT L. REV. 141, 141 (2006) ("Almost everyone despises *Dred Scott v. Sandford*."); Farber, *supra* note 82, at 24.

96 On *Dred Scott* and citizenship see, for example, Gulasekaram, *supra* note 52, at 1553–54 ("By abolishing slavery and expanding the racial inclusiveness of citizenship, the Reconstruction Amendments had the consequence of allowing, at least in theory, newly minted black citizens to bear arms."); Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 271 (1997); *see also* Pratheepan Gulasekaram, *Guns and Membership in the American Polity*, 21 WM. & MARY BILL

With limited express guidance from the Court on the question of constitutional personhood, this Article turns to examine the Court's grants and denials of constitutional personhood across a specific subset of constitutional claimants.[97] In doing so, the goal is to begin to compile a composite of how the Court deals with questions of constitutional personhood in order to identify the dominant themes and to begin to develop a framework for future cases.

A. Corporations

While the term "corporation" does not appear in the Constitution,[98] over the past 100 or so years the Court has interpreted the Constitution such that corporations are constitutional persons for an extensive array of constitutional rights.[99] Working chronologically from the First Amendment, currently corporations are constitutional persons for the purposes of the First Amendment Free Speech and Free Press Clauses.[100] Corporations are also constitutional persons for the purposes of the Fourth Amendment's protection against unreasonable searches and seizures,[101] as well as a limited form of the Fourth Amendment's right to privacy.[102] Corporations are constitutional persons for the Fifth Amendment's prohibitions against double jeopardy,[103] as well as takings.[104] However, the Court expressly dis-

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RTS. J. 619, 622 (2012) ("Even in present day, over twenty states and the federal government maintain alienage restrictions in their firearms statutes, differentiating between citizens and noncitizens for certain aspects of firearm purchase and possession.").

97 The case studies do not purport to be a comprehensive overview of the caselaw in each of the three areas; rather, the case studies draw on the core relevant cases that illuminate the Court's discussion of rights-holder status (i.e., constitutional personhood).

98 *See* Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. TRANSNAT'L L. & POL'Y, 197, 201 (2007) ("[T]he term 'corporation' does not appear in either the U.S. Constitution or the Bill of Rights."); Mayer, *supra* note 72, at 579 ("The Constitution does not mention corporations."); Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909 (2011) ("'Corporations' do not appear in the text of the Constitution.").

99 For a discussion on the historic understanding of corporate constitutional rights, see Mayer, *supra* note 72; Pollman, *supra* note 21; Beth Stephens, *Are Corporations People? Corporate Personhood Under the Constitution and International Law*, 44 RUTGERS L.J. 1 (2013).

100 First Nat'l Bank of Bos. v. Bellotti*,* 435 U.S. 765, 795 (1978); Grosjean v. Am. Press Co., 297 U.S. 233, 244, 249–51 (1936); Miller, *supra* note 98, 910–11 (similarly summarizing the constitutional rights of corporations).

101 Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978).

102 *See* Miller, *supra* note 98, at 910; *see also* FCC v. AT&T, Inc., 131 S. Ct. 1177, 1179 (2011); United States v. Morton Salt Co., 338 U.S. 632, 650–52 (1950); Fleck & Assocs. v. City of Phoenix, 471 F.3d 1100, 1104 (9th Cir. 2006).

103 *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 575 (1977); Fong Foo v. United States, 369 U.S. 141, 143 (1962); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1517 n.211 (1996) (stating that double

avowed them as rights holders for the purposes of the Fifth Amendment protection against self-incrimination.[105] In addition, the Court has held that the Sixth Amendment's guarantees to a right to trial by jury and counsel extend to protect corporations,[106] though the federal courts have not extended the right to appointed counsel to corporations.[107] Finally, while the Fourteenth Amendment's Equal Protection and Procedural Due Process Clauses[108] and some of the incorporated Bill of Rights protections also extend to corporations,[109] the Privileges and Immunities Clause does not.[110]

As a number of leading corporate law scholars have noted, the Court's extension and expansion of constitutional rights to corporations has often occurred without any justification by the Court.[111] In fact, the case considered by many scholars as the seminal case ground-

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jeopardy protection "is only available against government suits brought with the object of punishment . . . ."); Pollman, *supra* note 21, at 1656 n.166 (explaining that many rights of corporations relate to the "Court's recognition of the corporation as subject to criminal liability.").

104 *See* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (constitutional personhood vests foreign corporation for purpose of Fifth Amendment takings clause).

105 Wilson v. United States, 221 U.S. 361, 383–84 (1911) (holding corporations are not rights holders for the purpose of the Fifth Amendment right against self-incrimination); Hale v. Henkel, 201 U.S. 43, 74–75 (1906). On the development of the Fourth and Fifth Amendment rights of corporations, see generally Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 826–40 (1996); Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 814–18 (2005).

106 Ross v. Bernhard, 396 U.S. 531, 542 (1970).

107 *See, e.g.*, United States v. Unimex, Inc., 991 F.2d 546, 550 (9th Cir. 1993) ("Being incorporeal, corporations cannot be imprisoned, so they have no constitutional right to appointed counsel."). *But see* Am. Airways Charters, Inc. v. Regan, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984) ("It appears beyond sensible debate that corporations . . . do indeed enjoy the right to retain counsel.").

108 *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–14 (1984); Santa Clara Cty. v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

109 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978) (corporations are rights holders for some First Amendment rights).

110 Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1869) ("The term citizens . . . applies only to natural persons, . . . not to artificial persons created by the legislature . . . .").

111 For excellent discussions of the Court's vacillating methodology for determining corporate constitutional personhood, see Mayer, *supra* note 72, at 629, 650; Miller, *supra* note 98, at 909 ("[C]orporations fall within a category of entities protected by the Constitution, sometimes. No unified theory governs when or to what extent the Constitution protects a corporation."); Pollman, *supra* note 81, at 50 ("[T]he Court has confronted issues concerning the applicability and scope of constitutional protections for corporations for over two hundred years. In all of this time, it has failed to articulate a test or standard approach for its rulings."); Pollman, *supra* note 21, at 1630 ("Over time, however, the Court expanded the doctrine without a coherent explanation or consistent approach."); Rivard, *supra* note 19, at 1465 (stating that the Court's approach to corporate constitutional personhood lacks doctrinal and instead reflects "[o]nly

ing the grant of constitutional rights-holder status to corporations, the 1896 case of *Santa Clara County v. Southern Pacific Railroad Co.*,[112] extended constitutional personhood to corporations absent any argument by counsel on the issue before, and without any analysis in the opinion.[113] Holding that the Fourteenth Amendment's Equal Protection Clause extended to corporations, Chief Justice Waite specified before oral argument commenced that:

> The [C]ourt does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.[114]

Similarly, the earlier case of *Noble v. Union River Logging Railroad*[115] made Fifth Amendment Due Process protections available to corporations, without analysis or reasons.[116] There, the Court held that the Fifth Amendment's Due Process Clause prohibited the Secretary of the Interior from revoking his earlier approval for a right-of-way over public land. The Court claimed simply that, "[a] revocation of the approval of the Secretary of the Interior . . . by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void."[117]

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[l]egal [c]onclusions"); Elizabeth Salisbury Warren, Note, *The Case for Applying the Eighth Amendment to Corporations*, 49 VAND. L. REV. 1313, 1317–24 (1996).

112 Santa Clara Cnty. v. So. Pac. R.R., 118 U.S. 394 (1886) (addressing the question of whether the Fourteenth Amendment's Due Process Clause prohibited California from taxing the property of a railroad company differently from the property of an individual). For commentary on the decision, see Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1123–25 (2000).

113 *See* Warren, *supra* note 111, at 1317.

114 *Santa Clara Cty.*, 118 U.S. at 396; *see also* Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574 (1949) (Jackson, J., concurring) ("It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886 . . . ."); Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States."); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."); Mayer, *supra* note 72, at 581; Robert Sherrill, *Hogging the Constitution: Big Business & Its Bill of Rights*, 7 GRAND STREET 95, 106 (1987).

115 Noble v. Union River Logging R.R., 147 U.S. 165 (1893). For an excellent overview of this decision, see Mayer, *supra* note 72, at 590–91.

116 *Noble*, 147 U.S. at 176.

117 *Id.*; *see* Pollman, *supra* note 21, at 1646 (discussing the case).

Yet, despite the Court simply declaring corporations as rights holders in a number of contexts, there are instances where the Court *has* engaged in an analysis of the corporation as a constitutional person.[118] The following paragraphs will outline a handful of core cases that are illustrative of the Court's approach to corporate constitutional personhood more generally. Although, as commentators have noted, there is no consistent, unified approach across the Court's corporate constitutional personhood cases,[119] arguably the cases can be best understood in two separate tranches of caselaw: those cases decided before 1960 and those decided after 1960.[120] The distinction is significant. Before the 1960s, the Court resorted to corporate theory—albeit in an ad hoc, ungrounded manner—to determine whether to grant or deny the protection of any given constitutional right.[121] In the post-1960s cases, however, the Court abandoned its recourse to theories of corporate personhood and, at least in those cases where it undertook any analysis when extending a constitutional right to corporations, seemingly focused on the history, structure, and purpose of the right on which the corporations were relying.[122]

1. Pre-1960s Constitutional Corporate Personhood Cases

The Court's early approach to corporate constitutional persons rested on ad hoc recourse to various, and often competing, theories of corporate personality.[123] One scholar aptly describes the Court's approach in this early period of corporate constitutional personhood as "schizophrenic."[124] Initially, the Court relied on the artificial entity theory of corporate personality and was skeptical of corporate claims of constitutional personhood. In *Trustees of Dartmouth College v. Woodward*,[125] for example, the Court held that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either ex-

118 *See infra* Part II.A.1 and accompanying notes.

119 Miller, *supra* note 98, at 909 ("No unified theory governs when or to what extent the Constitution protects a corporation."); Rivard, *supra* note 19, at 1465 ("Rather than developing a coherent theory of constitutional personhood, the Supreme Court has used only pragmatic concerns to derive a legal conclusion of constitutional personhood.").

120 Mayer, *supra* note 72, at 620–21; Warren, *supra* note 111, at 1320.

121 Mayer, *supra* note 72, at 626 ("The Court championed, and then abandoned, corporate theory."); Pollman, *supra* note 21, at 1647.

122 *See* Pollman, *supra* note 21, at 1655.

123 *See id.*; Mayer, *supra* note 72, at 580.

124 Mayer, *supra* note 72, at 621.

125 Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).

pressly, or as incidental to its very existence."[126] On this view, corporations were regularly denied constitutional protections.[127]

Yet, over time, the Court occasionally began to embrace a second theory of corporate personality—the natural entity theory.[128] Often the Court would rely on both theories in the one case to extend constitutional personhood under one right, but deny it under another.[129] In *Hale v. Henkel*,[130] for example, the corporation claimed that a subpoena for corporate documents violated the Fifth Amendment's privilege against self-incrimination.[131] Denying that the privilege against self-incrimination extended to protect corporations, the Court stipulated that the words "no person" in the Fifth Amendment extended only to natural persons.[132] According to Carl Mayer, in reaching this conclusion, the Court relied on an artificial entity theory of the corporation, specifying that because the corporation is a creation of the state, the state can limit its powers by law.[133] Moreover, Mayer also noted that the Court specified that while "an individual may refuse to answer incriminating questions, . . . a corporation may not if it is charged with an abuse of its state-conferred privileges."[134]

In a somewhat bizarre twist, the *Hale* Court unilaterally raised the question whether a corporation is entitled to the protections of the Fourth Amendment's Unreasonable Search and Seizures Clause.[135]

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126 *Id.* at 636; *see also* Rivard, *supra* note 19, at 1456.

127 *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 99 (1873) (Field, J., dissenting) ("[T]he court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed . . . ."). On *Dartmouth College*, see Pollman, *supra* note 21, at 1635–36.

128 Mayer, *supra* note 72, at 580–81.

129 *See* Warren, *supra* note 111, at 1319 (discussing *Hale v. Henkel* and the Court's intraopinion vacillation between methods of determining corporate personality).

130 Hale v. Henkel, 201 U.S. 43 (1906).

131 *Id.* at 46; *see also* Mayer, *supra* note 72, at 592–93 (discussing *Hale*).

132 *Hale*, 201 U.S. at 75; *see also* Curcio v. United States, 354 U.S. 118, 122 (1957) ("It is settled that a corporation is not protected by the constitutional privilege against self-incrimination."); Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 9 (explaining that the Supreme Court has held that corporations are entitled to Fifth Amendment protection against self-incrimination).

133 Mayer, *supra* note 72, at 621–22; *see Hale*, 201 U.S. at 75; *see also* Miller, *supra* note 98, at 925–26 (discussing the case).

134 Mayer, *supra* note 72, at 623 (analyzing the decision).

135 *Hale*, 201 at 76; *see* Mayer, *supra* note 72, at 592 ("The Court raised the question, on its own, whether a corporation is entitled to fourth amendment protections against unreasonable searches and seizures."); *see also* Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986)

Even more bizarrely, the Court relied on a different theory of corporate personality than it had for the Fifth Amendment analysis, to answer this question in the affirmative.[136] The Court specified that as a "distinct legal entity,"[137] an "association of individuals under an assumed name," the corporation had a right to independent protection of the Fourth Amendment.[138] This vacillation between different theories of corporate personality internal to *Hale* would be repeated in subsequent cases: where the Court held that a corporation was an artificial entity, the Court would deny that constitutional personhood vested in the corporation, and, conversely, where the Court considered the corporation a natural entity, it could grant constitutional personhood.[139] For example, the Court relied on the artificial entity theory in *United States v. Morton Salt Co.*[140] when it denied the corporation's claim to Fourth Amendment privacy rights.[141] The Court specified that "corporations can claim no equality with individuals in the enjoyment of a right to privacy . . . . The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation."[142]

2. Post-1960s Constitutional Corporate Personhood Cases

As some corporate law scholars have noted, after 1960, the Court abruptly ceased relying on theories of corporate personality in cases of corporate claims to constitutional rights-holding status and instead began to ask whether the constitutional right being claimed should extend to corporations.[143] The 1967 decision of *See v. City of Seattle*[144] grounds the Court's shift from corporate personality theory to an

(explaining that a corporation has an expectation of privacy for the purposes of the Fourth Amendment).

136 *Hale*, 201 U.S. at 76.

137 *Id.*

138 *Id.*

139 Mayer, *supra* note 72, at 628.

140 United States v. Morton Salt Co., 338 U.S. 632 (1950).

141 *Id.* at 652; *see* Miller, *supra* note 98, at 919 (discussing the case in the context of an extended analysis of artificial entity theory); *see also* Pollman, *supra* note 81, at 34–37 (engaging in an extended discussion of the case).

142 *Morton Salt Co.*, 338 U.S. at 652 (citations omitted).

143 Mayer, *supra* note 72, at 620–21, 629; Pollman, *supra* note 21, at 1655 ("The 1960s marked the beginning of a major expansion of corporate constitutional rights and protections."); Warren, *supra* note 111, at 1320 ("After 1960, the Court stopped pondering expressly the nature of corporate personhood and began focusing on the amendment at issue.").

144 See v. City of Seattle, 387 U.S. 541 (1967).

amendment-focused approach.[145] There, the corporate claimant challenged the City of Seattle's fire inspection system, claiming that the inspection process violated the Fourth Amendment's Unreasonable Search and Seizures Clause.[146] While the Court relied on the line of authority beginning with *Hale*, Carl Mayer argues that "the Court ignored the competing theories of the corporation" it had developed in its earlier cases.[147] Instead, the Court "analogized official entries upon commercial property to administrative subpoenas and held that it is untenable for subpoenas to be subject to fourth amendment limitations that are inapplicable to actual searches and inspections of 'commercial premises.'"[148]

From this point onwards, the Court has not returned to its pre-1960 corporate theory analysis. Instead, in determining whether constitutional personhood in the claimed right should extend to corporations, the Court examines the right being claimed to ascertain whether vesting the corporation with constitutional personhood would serve the purpose of the right.[149]

In *Ross v. Bernhard*,[150] for example, the corporate claimant argued that the Seventh Amendment right to a trial by jury extended to stockholders' derivative actions.[151] After examining the history of the Seventh Amendment right, and the scope of application of the right at the time of the adoption of the Amendment, the Court agreed that the protection of the Seventh Amendment extends to corporations.[152] The Court undertook a careful analysis of the types of common law actions that the Seventh Amendment was intended to preserve, concluding that the shareholder derivative suit fit into the category of a suit whose right to a trial by jury was preserved by the Seventh Amendment.[153] In so doing, the Court expressly disavowed the rele-

145 *Id.* at 545–46. For a robust discussion of the case, see Mayer, *supra* note 72, at 629–30 (claiming that the decision "inaugurated the move away from personhood theory").

146 *See*, 387 U.S. at 541–42.

147 Mayer, *supra* note 72, at 630.

148 *Id.*

149 *See* Pollman, *supra* note 21, at 1655 ("Sometimes echoes of earlier conceptions of the corporation have reverberated in the case law or the Court has focused on the history or purpose of the amendment at issue on an ad hoc basis."); Warren, *supra* note 111, at 1320, 1323.

150 Ross v. Bernhard, 396 U.S. 531 (1970).

151 *Id.* at 532.

152 *Id.* at 531–33; *see* Warren, *supra* note 111, at 1320–21 (discussing the decision).

153 *Ross*, 396 U.S. at 533. The dissent disagreed, holding that "this Rule, like the Amendment itself, neither restricts nor enlarges the right to jury trial. Indeed nothing in the Federal Rules can rightly be construed to enlarge the right of jury trial . . . ." *Id.* at 543–44 (Stewart, J., dissenting) (footnote omitted).

vance of theories of corporate personality,[154] and instead relied exclusively on an historic analysis of the Amendment at issue.[155] The Court took a similar approach in *United States v. Martin Linen Supply Co.*[156] There, when considering whether the Fifth Amendment Double Jeopardy Clause extended to protect corporations, the Court traced the history of the Clause, focusing in on the purpose of the prohibition against double jeopardy.[157] The Court specified that the purpose of the Clause is to preclude repeated conviction attempts against any person given the potential for embarrassment, expense, and the insecurity associated with repeated conviction attempts.[158] Subsequently, the Court held that the Clause extended to the corporate claimant, without any attempt to link that stipulated purpose of the Clause to the nature of the claimant (i.e., the corporation). Instead, the Court seemed to assume that extending constitutional personhood in this instance would achieve those purposes.[159]

The Court continued with this approach in what is considered one of the Court's most critical Fourth Amendment decisions, *Marshall v. Barlow's, Inc.*[160] In *Marshall*, the Court was asked to determine whether the Fourth Amendment's Warrant Clause extended to protect a corporation from surprise inspections from Occupational Safety and Health Administration.[161] In concluding that it does, the Court analyzed the history of the Clause, reflecting on the role and protections of merchants in the colonies post-revolution, and arguing the Clause was intended to cover "commercial buildings" as well as private property.[162] In adopting a historical purpose approach to resolving the question of corporate constitutional personhood in the Fourth Amendment context, the Court expressly rejected the government's invitation to rely on theories of corporate personhood.[163] Mayer notes

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154 *Id.* at 531 (majority opinion).

155 *Id.* at 533–34.

156 United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

157 *Id.* at 568–69.

158 *Id.* at 569 (quoting Green v. United States, 355 U.S. 184, 187–88 (1957)); *see also* Downum v. United States, 372 U.S. 734, 736 (1963). This point is discussed in Warren, *supra* note 111, at 1320.

159 Mayer, *supra* note 72, at 635–36; Warren, *supra* note 111, at 1320 ("[The Court] apparently assumed that applying double jeopardy to corporations accomplishes these goals.").

160 Marshall v. Barlow's, Inc., 436 U.S. 307, 324–25 (1978) (holding that the Fourth Amendment protects corporations against warrantless inspections by workplace safety regulators). This point is discussed by Mayer, *supra* note 72, at 608–09; Warren, *supra* note 119, at 1321.

161 *Marshall*, 436 U.S. at 311.

162 *Id.* at 311–12.

163 *See* Mayer, *supra* note 72, at 631.

that "[t]he Court easily could have adopted the artificial entity analysis of *Morton Salt* to circumscribe narrowly corporate rights, but chose not to do so."[164]

As Elizabeth Pollman notes, the closest the Court has come to establishing a test for determining the rights-holder status of corporations was in in the 1978 case of *First National Bank of Boston v. Bellotti*.[165] In *Bellotti*, the Court was asked to determine whether a Massachusetts statute prohibiting campaign contributions by corporations violated the First Amendment's Speech Clause.[166] The Court explicitly rejected the Massachusetts Supreme Court's reliance on corporate theory; the lower court had held that individuals enjoy broader First Amendment protections than corporations and that the First Amendment does not extend to protect corporate speech.[167] The Court stated that the reliance on corporate personality as a guide for determining rights-holder status was "an artificial mode of analysis."[168] Instead, the Court said, the proper mode of analysis is to determine whether a right is "purely personal" or not.[169] Explaining this distinction, the Court specified that:

> Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason *depends on the nature, history, and purpose of the particular constitutional provision*.[170]

However, as Pollman notes, the Court "has not consistently used this approach"[171] for resolving claims of corporate constitutional personhood.[172]

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164 *Id. But see* Donovan v. Dewey, 452 U.S. 594, 598–99 (1981) (distinguishing between the privacy accorded to commercial property and that of an individual's home in holding that the warrantless search provisions of MSHA did not violate the company's Fourth Amendment rights).

165 First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (holding that the First Amendment protects political speech through corporate financial contributions to influence referendum and electoral campaigns); *see* Pollman, *supra* note 81, at 52; *see also* Mayer, *supra* note 72, at 615; Miller, *supra* note 98, at 911; Warren, *supra* note 119, at 1321.

166 *See Bellotti*, 435 U.S. at 776.

167 *See id.* at 777–78; Mayer, *supra* note 72, at 615.

168 *Bellotti*, 435 U.S. at 779.

169 *See id.* at 778 n.14.

170 *Id.* (citation omitted); *see also* Pollman, *supra* note 81, at 25.

171 *See* Pollman, *supra* note 81, at 53.

172 *Id.*

The most recent case where the Court determined corporate constitutional personhood is the 2010 decision in *Citizens United v. FEC*.[173] There, the Court was asked to determine whether federal restrictions on corporate campaign contributions in the Bipartisan Campaign Reform Act of 2002 (BCRA) violated the First Amendment Speech Clause.[174] In oral argument, corporate constitutional personhood was the subject of many of the Justices' questions.[175] For example, Justice Ginsburg asked "is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?" and Justice Stevens asked "does the First Amendment permit any distinction between corporate speakers and individual speakers?"[176] Justice Sotomayor went as far as to suggest that the Court had erred when it "imbued a creature of State law [the corporation] with human characteristics."[177]

In holding that corporations are rights holders for the purposes of the First Amendment Speech Clause, the Court seemed to rely on the general post-1960s approach to the question of corporate constitutional personhood, and focused on the purpose of the right, rather than the nature of the claimant.[178] The Court specified that their concern is the purpose of the right—here, protecting the rights of listeners and the "marketplace of ideas."[179] For the Court, the identity of the speaker was irrelevant; if the regulations encroached on the subject protected by the right, the right was violated, no matter the identity of the speaker.[180] Justice Scalia's concurrence took pains to point out the textual basis for the Court's conclusions. Justice Scalia noted that the text of the Speech Clause "makes no distinction between types of speakers" and that the Clause protects individuals' right to speak "in

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173 Citizens United v. FEC, 558 U.S. 310, 340–41 (2010) (holding that corporations are rights holders for the purpose of the First Amendment Speech Clause).

174 *Id.* at 331.

175 For an extended analysis of the Justices' questioning of counsel on corporate constitutional personhood, see Miller, *supra* note 98, at 839–99.

176 Transcript of Oral Argument at 4, 7, Citizens United v. FEC, 558 U.S. 310, (No. 08-205), 2009 WL 6325467.

177 *Id.* at 33.

178 Warren, *supra* note 111, at 1323 ("Thus, the Court's recent jurisprudence has disregarded the express use of corporate personhood theories when deciding which bill of rights guarantees apply to corporations.").

179 Pollman, *supra* note 21, at 1657; *see also* Mark Tushnet, *Corporations and Free Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 253 (David Kairys ed., 1982) (critiquing the "marketplace of ideas" approach); Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863–68 (2007) (arguing that corporate personhood has played a less prominent role in shaping corporate speech rights than some claim).

180 *See* Citizens United v. FEC, 558 U.S. 310, 347 (2010).

association with other individuals."[181] Justice Scalia concluded, "The [First] Amendment is written in terms of 'speech,' not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . . ."[182] For Justice Scalia, denying constitutional personhood to corporations, at least for First Amendment speech purposes, would be violative of the text of the Clause.[183]

The question of corporate constitutional personhood is not a historical one. Indeed, the question again came before the Court last Term in the *Burwell v. Hobby Lobby* litigation.[184] There, the corporate claimant argued that the protections of the First Amendment Free Exercise Clause extended to protect the religious liberty of the corporation.[185] Although the Court in *Hobby Lobby* ultimately reached a decision on statutory, not constitutional, grounds, the issue is likely to come before the Court in the not-too-distant future. With its highly political, deeply fraught undertones,[186] the question of corporate constitutional personhood in the Free Exercise Clause highlights the importance of developing a coherent and unified theory for understanding constitutional personhood.[187]

B. Aliens

Just as the constitutional rights of corporations is an open, contemporary issue, the question of the constitutional personhood of aliens—both within and outside the United States, documented and undocumented—is currently at the forefront of American law and politics.[188] As thousands of undocumented persons cross into the

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181 *Id.* at 386 (Scalia, J., concurring).

182 *Id.* 392–93.

183 *See* Miller, *supra* note 98, at 899 ("According to Justice Scalia, any attempt to craft a special category of corporate persons for core First Amendment purposes would be in clear derogation of the text.").

184 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).

185 *Id.* at 2765–66.

186 *See, e.g.*, Eastman, *supra* note 20; Flowers, *supra* note 20; Schwartzman & Tebbe, *supra* note 20.

187 *Cf.* Miller, supra note 98, at 891 (examining the potential for corporations to claim Second Amendment protections).

188 *See, e.g.*, Rachel Brody, *Should Unaccompanied Immigrant Children Be Sent Home?*, U.S. NEWS & WORLD REP. (July 7, 2014, 1:15 PM), http://www.usnews.com/opinion/articles/2014/07/07/should-undocumented-immigrant-children-be-sent-home-from-the-border; Niraj Chokshi, *More than 30,000 Undocumented Kids Have Been Released to Sponsors in Every State*, WASH. POST (July 25, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/07/25/more-than-30000-undocumented-kids-have-been-released-to-sponsors-in-every-state/.

United States from Latin America, many of them unaccompanied minors, the lower courts are increasingly being asked to determine what, if any, rights these persons have under the U.S. Constitution.[189]

Just as with corporations, the question of alien constitutional personhood is fraught and unclear.[190] However, the question of alien constitutional personhood typically comes under a different guise than that of corporate constitutional personhood.[191] While the Court has always dealt with the issue of corporate constitutional personhood expressly or implicitly as a question antecedent to the merits of the rights-claim, the constitutional personhood of aliens is often bound up in the question of the level of protection afforded to the alien-claimant.[192] That is, with some limited exceptions, the Court has conflated the front-end question of whether the alien is a rights holder for any given constitutional right, with the back-end merits question of the level of protection to be afforded to the claimant when determining that the government's conduct is permissible under a deferential standard of review.[193]

In a significant number of cases involving alien rights claims the question is one of diluted constitutional personhood—an implicit denial of constitutional personhood for aliens through dilution of the "protection" of the right afforded to the alien-claimant rather than the express denial of constitutional personhood at the front-end, antecedent question stage.[194] This is the same issue as in corporate constitutional personhood, but under a different guise.[195] Diluting the rights

189 Chokshi, *supra* note 188.

190 Linda S. Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L J. CONST. L. 9, 12 (2010).

191 *Id.*

192 Bosniak, *supra* note 27, at 1064, 1088–89.

193 On the value of disaggregating rights analysis, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 265–66 (1981) (discussing the importance of categorization in the context of the First Amendment). *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (discussing the determinants of the boundaries of constitutional categories).

194 On rights-dilution as rights-denial, see, for example, Bosniak, *supra* note 190, at 14 (stating that "[p]ersonhood may not be formally withdrawn, and yet it may be diminished in its effect, evaded, effaced, diluted, displaced" and referring to this concept as "depreciation" of rights); Gulasekaram, *supra* note 96, at 626 ("The federal government can—and routinely does—make distinctions based on citizenship."); Laurence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77, 82 (1999) (discussing the theory of limited scope rights for children).

195 *See* Houlgate, *supra* note 194, at 80–85 (discussing the theory of limited scope rights in the context of children's constitutional rights).

of any person ends up giving us two (or more) sets of constitutional rights, where the difference between the rights in each set having the same name is a difference in their scope.[196] The question is thus simply reframed: "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?"[197] In other words, we end up at the same place even though the Court has framed the question differently—the question is still one of who holds any given constitutional right. Leading immigration scholar Linda Bosniak notes:

> Personhood may not be formally withdrawn, and yet it may be diminished in its effect, evaded, effaced, diluted, displaced. This is the real risk to constitutional personhood for noncitizens and for some citizens, as well; not outright removal but depreciation—at times specifically imposed by government and at others, perhaps, a function of the inherent incompleteness of the category itself.[198]

The difference in the treatment of the constitutional personhood question between aliens and corporations is understandable.[199] As Alexander Bickel noted, "It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a non-person . . . ."[200] It is important to recall, however, that what is at stake in the designation as a constitutional person is not a declaration of a person's humanity.[201] Rather, at stake is recognition of a legal status under the Constitution. To that end, it is critical to separate the emotive and loaded assumptions of humaneness in declarations of constitutional personhood and instead focus on ascertaining the status as a rights holder.[202] The following paragraphs attempt to highlight the Court's assumptions of constitutional personhood that are entrenched in the balancing analysis for this purpose.[203]

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196 *Id.*

197 *Id.* at 82.

198 Bosniak, *supra* note 190, at 14.

199 *Id.* at 11–12.

200 *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 53 (1975); *see also* Bosniak, *supra* note 190, at 9–10 (discussing citizenship and personhood); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community,* 81 IOWA L. REV. 707, 712–13 (1996) (distinguishing between membership and personhood).

201 *See* Rivard, *supra* note 19, at 1446–47 ("[A] constitutional person is one who is protected by the Constitution of the United States; in other words, a constitutional person is one who is granted constitutional rights."); Scaperlanda, *supra* note 200, at 713 n.16 (citing Supreme Court cases) ("Personhood denotes constitutional status. Persons have constitutional rights, nonpersons do not.").

202 *See* Rivard, *supra* note 19, at 1447.

203 For an excellent and exhaustive summary and analysis of the constitutional status of

With that said, perhaps the best starting point for analyzing the alien constitutional personhood jurisprudence is with the case that uses a form of analysis familiar from corporate constitutional personhood. In *Johnson v. Eisentrager*,[204] the Court was faced with the question whether German citizens, captured by the United States in China aiding and abetting the Japanese war effort against the United States, and who remained on Chinese soil (albeit in U.S. custody), were entitled to Fifth Amendment rights in their criminal proceedings.[205] The Supreme Court held that extraterritorial, nonresident aliens were not "persons" for the purposes of the Fifth Amendment.[206] The Court specifically stated that the claimants were not Fifth Amendment rights holders because they had both no territorial connection to the United States (i.e., the crime and trial occurred outside of the territory of the United States) and the claimants were "alien enemies."[207]

Importantly, the Court in *Eisentrager* highlighted that it was not necessarily a consequence of the alienage classification that resulted in the denial of personhood.[208] Instead, the Court held that it was the combination of alienage status and enemy status during a time of war that led to the denial of the capacity to claim the right in question.[209] The Court stated that the "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage."[210] In addition, the Court noted that aliens are "accorded a generous and ascending scale of rights as [they] increase[ ] [their] identity with [American] society," a scale that is based in part on the "alien's presence within [the] territorial jurisdiction [of the United States]."[211]

Similarly, the Court has used the familiar front-end mode of analysis in the criminal procedure rights context, and imposed limits on the relevant class of rights holders based on a conception of member-

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aliens, see generally Moore, *supra* note 43 (discussing the concept alienage, before comprehensively examining the constitutional rights of aliens).

204 Johnson v. Eisentrager, 339 U.S. 763 (1950). On the case, see Cole, *supra* note 21, at 369 ("While some distinctions between foreign nationals and citizens are normatively justified and consistent with constitutional and international law, most are not."); Moore, *supra* note 43, at 826–30.

205 *Eisentrager*, 339 U.S. at 765–67.

206 *See id.* at 784; Moore, *supra* note 43, at 826.

207 Moore, *supra* note 43, at 826.

208 *See Eisentrager*, 339 U.S. at 772.

209 *Id.*

210 *Id.*

211 *Id.* at 770–71.

ship in the political community.[212] In the leading 1990 case of *United States v. Verdugo-Urquidez*,[213] the Court was asked to address the applicability of the Fourth Amendment's Search and Seizure Clause to aliens.[214] Writing for a plurality, Chief Justice Rehnquist stated that the rights holder designation "the people" in the Fourth Amendment was distinct from the Fifth Amendment's designation of the rights holder as a "person," a designation that the Court had previously held attached to aliens.[215] The Chief Justice held that the Fourth Amendment's reference to "the people" "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."[216]

The Court's proclamation in *Verdugo-Urquidez* that "the people" excludes those who are not part of the American national community necessarily raises related questions in the context of other rights.[217] Core among these is the right of "the people" to bear arms under the Second Amendment.[218] As Pratheepan Gulasekaram notes, in the Court's seminal Second Amendment decision in *District of Columbia v. Heller*,[219] Justice Scalia's majority opinion interprets the nominal right-holder as a specific class of "law-abiding citizens,"[220] and specified that "the people" is limited to "members of the political commu-

212 On community membership and alienage, see Bosniak, *supra* note 190, at 1055; Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 392 (2013); Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 261 (1992); *see also* Gulasekaram, *supra* note 96, at 622; Gulasekaram, *supra* note 52, at 1546 (stating, in the context of the right to bear arms, that "Pre-Revolutionary War gun regulation did not necessarily depend on categories of legal citizenship but rather on a conception of membership in the national community contingent upon race, wealth, and gender.").

213 United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990). On the decision in *Verdugo-Urquidez*, see NEUMAN, *supra* note 36, at 105 ("Kennedy's concurring opinion diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed really to be speaking for a plurality of four."); Moore, *supra* note 43, at 835; *see also* Heeren, *supra* note 212, at 389–90 ("For the first time, the Court seemed to be saying that the Fourth Amendment, long considered a basic right of personhood, was a membership right, restricted to persons with 'sufficient connection' to the United States. . . . *Verdugo-Urquidez* and *Dred Scott* both use communitarian logic to limit the rights of putative outsiders.").

214 *Verdugo-Urquidez*, 494 U.S. at 261.

215 *See id.* at 265–66; Moore, *supra* note 43, at 825.

216 *Verdugo-Urquidez*, 494 U.S. at 265–66.

217 *See* Gulasekaram, *supra* note 52, at 1527–35.

218 *See id.* at 1527.

219 District of Columbia v. Heller, 554 U.S. 570 (2008). For detailed discussion of this claim and associated arguments, see Gulasekaram, *supra* note 52; Gulasekaram, *supra* note 96.

220 *Heller*, 554 U.S. at 625, 635.

nity."[221] In a carefully reasoned article, Gulasekaram outlines the ramifications of both *Heller* and *Verdugo-Urquidez* for the Second Amendment rights of non-citizens.[222] Gulasekaram claims that *Heller*'s reading of "the people" invites the question "whether the Constitution compels reading 'the people' of the Second Amendment to mean 'citizens.'"[223]

In the face of these denials of alien constitutional personhood follow a number of cases where the Court has accepted that the alien-claimant falls within the meaning of the term "person" or "people" for the purpose of the right whose protection was being claimed. For example, in *Yick Wo v. Hopkins*,[224] the Court was faced with a challenge to a California ordinance regulating laundry facilities.[225] The petitioner's claim was that the ordinance was applied unequally because it was only enforced against Chinese immigrants, violating the Fourteenth Amendment Equal Protection Clause.[226] Citing the Equal Protection Clause, the Court stated that "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[227] The Court struck down the Ordinance, holding that despite being "fair on its face," it was applied unequally, and therefore violated the Equal Protection Clause.[228] As a general matter, after *Yick Wo*, the Court has consistently applied the Equal Protection Clause to classifications based on alienage and held that the appropriate standard of review is strict scrutiny.[229]

The Court has also held that aliens are rights holders for the purposes of constitutional rights outside of the Fourteenth Amendment.

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221 *Id.* at 580.

222 *See* Gulasekaram, *supra* note 52.

223 *Id.* at 1532–33; *see also* U.S. CONST. pmbl. ("We the People"); *id.* art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States"); Sugarman v. Dougall, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (explaining distinction between "person" and "citizen"); Henkin, *supra* note 52, at 13; Miller, *supra* note 98; Moore, *supra* note 43, at 843–44.

224 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

225 *See id.* at 366.

226 *Id.* at 368; *see also* Moore, *supra* note 43, at 811 (discussing the case).

227 *Yick Wo*, 188 U.S. at 369.

228 *Id.* at 373–74; *see also* Moore, *supra* note 43, at 811.

229 *See* Graham v. Richardson, 403 U.S. 365, 371–72 (1971); Moore, *supra* note 43, at 811. However, the Court has established exceptions. *See* Moore, *supra* note 43, at 812–14 (outlining and discussing exceptions based on alienage to the protections afforded by the Fourteenth Amendment).

In *Wong Wing v. United States*,[230] for example, the alien-petitioner claimed that a 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"[231] violated provisions of both the Fifth and Sixth Amendments.[232] Relying on the authority of *Yick Wo*, the Court agreed, stating without further explanation that the Fifth and Sixth Amendments applied to "all persons within the territory of the United States . . . even aliens . . . ."[233] In addition, the Court has recognized that the Sixth Amendment right to effective assistance of counsel includes, in the case of alien defendants, "the right to be informed of the immigration-related consequences of entering a guilty plea."[234] Generally speaking, it is assumed that aliens are on the same constitutional footing as other persons—at least inasmuch as the rights are not limited to the citizen rights holder.[235]

Yet, in the face of this assumption the Court *does* differentiate between categories of persons: between both alien and citizen and between different classes of aliens (e.g., between non-resident aliens and illegal aliens).[236] As noted above, this differentiation occurs at the back end of the right analysis when the Court dilutes the level of protection afforded to the alien constitutional person as compared to other constitutional persons.[237] A key example of this is the "public

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230 Wong Wing v. United States, 163 U.S. 228 (1896).

231 *Id.* at 233–34; *see also* Heeren, *supra* note 212, at 388 (discussing the case); Moore, *supra* note 43, at 825 (same).

232 *Wong Wing*, 163 U.S. at 234.

233 *Id.* at 238.

234 *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1482–83 (2010) ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."); *see also* Moore, supra note 43, at 825–26 (citing Scott C. Gyllenborg, *Effective Assistance of Counsel to an Alien Criminal Defendant under the Sixth Amendment after* Padilla v. Kentucky, 79 UMKC L. REV. 925 (2011)). *But see* Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013) (holding that the rule announced in *Padilla* does not apply retroactively).

235 *See* Moore, *supra* note 43, at 825 ("Today, an alien's right to the full panoply of constitutional criminal-trial protections is essentially beyond dispute, despite the fact that the Supreme Court has not explicitly held that aliens are entitled to each of the specific underlying rights . . . ."); *see also* Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators From Non-Americans Abroad*, 91 GEO. L.J. 851, 874 (2003) ("When an alien defendant is on trial in a federal courtroom in the United States, no one would dispute the fact that he is afforded the right to an attorney, the right to call witnesses in his defense[,] and all of the other constitutional rights that are synonymous in this country with the right to a fair trial.").

236 *See, e.g.*, Moore, *supra* note 43, at 806–10 (discussing the differences between various classes of alienage, and between citizen and alien). *See generally* Bosniak, *supra* note 190 (discussing polity membership in the context of alienage and personhood).

237 *See supra* notes 188–211 and accompanying text.

functions" exception to alienage discrimination under the Equal Protection Clause.[238] The Court has consistently held that where the state discriminates against aliens for the purpose of excluding them from participation in governmental or political activities or functions, the lowest level of scrutiny is applied: rational basis review.[239] The notion of "public functions" reaches beyond the purely political realm, extending to exclusion of alien employment as teachers in public schools,[240] as peace officers,[241] and as state police officers.[242]

The Court's justification for the modified equal protection right for aliens in the context of "public functions" centers on notions of who has the right to participate in government in the political community.[243] In essence, the Court has implicitly held that aliens are excludable from the political community, and that the state, in discriminating on the basis of alienage, is simply "defin[ing] its political community."[244] For this reason, the Court has held that it will be extremely deferential to laws that "exclude aliens from positions intimately related to the process of democratic self-government."[245] For the 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'"[246] and a

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238 This point is made by Moore, *supra* note 43, at 812–13 (examining the "public function" exception). *See also* Scaperlanda, *supra* note 200, at 736–38 (discussing the "public functions" exception).

239 Bernal v. Fainter, 467 U.S. 216, 220–22 (1984) ("[T]he 'public function' exception . . . applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."). For an excellent overview of the caselaw on the public functions exception, see, for example, Moore, supra note 43, at 812–13; Scaperlanda, *supra* note 200, at 736–37 (analyzing the public function exception in the context of membership in the democratic community); Tamra M. Boyd, Note, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 337 (2001).

240 Ambach v. Norwick, 441 U.S. 68, 75–76 (1979) ("Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'").

241 Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982) ("[F]rom the perspective of the larger community, the probation officer may symbolize the political community's control over, and thus responsibility for, those who have been found to have violated the norms of social order.").

242 Foley v. Connelie, 435 U.S. 291, 297 (1978) (upholding a New York statute limiting police force to citizens because "the police function is essentially a description of one of the basic functions of government").

243 *See* Boyd, *supra* note 239, at 337; Heeren, *supra* note 212, at 387.

244 *See* Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973); Scaperlanda, *supra* note 200, at 736–37.

245 Bernal v. Fainter, 467 U.S. 216, 220 (1984); *see* Scaperlanda, *supra* note 200, at 737.

246 *Foley*, 435 U.S. at 295–96 (citation omitted); Gerald L. Neuman, "*We are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 311–12 (1992); *see also* Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1093, 1135–36 (1977).

"necessary consequence of the community's process of political self-definition."[247]

C. *Felons*

The final class of claimants that this Article will examine is felons.[248] As a class, felons present interesting questions of interpretation. Whereas the questions in the corporations and alienage categories were when and under what conditions these persons would be granted constitutional personhood, generally, in the case of felons, the claimants had previously held the right in question but by virtue of being, or having been, incarcerated they have been stripped of constitutional protections.[249] Felons, then, present the questions of when and under what conditions an existing constitutional person will be stripped of constitutional personhood.[250]

Of all of the rights that felons forfeit, the most significant legal right that felons forfeit is the loss of the right to vote.[251] The right to vote is not expressly guaranteed in the Constitution; the original Constitution left it to each state to determine voter qualifications.[252] However, in the wake of the Civil War, a series of constitutional amendments were passed limiting the states from excluding persons from voting based on a variety of statuses, including citizenship, race, sex, age, and poll tax.[253] Contemporary understandings of the right to vote, then, is that it at least extends to all "citizens"; that is, the designated rights holder of the right to vote is a "citizen" of the United States.[254] Yet, in the face of this general assumption that all citizens have the constitutional right to vote, persons convicted of a felony are

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247 Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

248 The term "felon" includes prisoners, parolees, and probationers. *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1054 n.23 (discussing the variety of state laws on the disenfranchisement of prisoners, parolees, and probationers). *See generally* Emily Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977).

249 Ewald, *supra* note 248, at 1046.

250 Calhoun, *supra* note 248, at 219–20.

251 *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 3 (2006); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 50, 51–52 (Marc Mauer & Meda Chesney-Lind eds., 2002).

252 MANZA & UGGEN, *supra* note 251, at 7.

253 U.S. CONST. amend. XIV (guarantee of voting rights); *id.* amend. XV (race no bar to vote); *id.* amend. XIX (women's suffrage); *id.* amend. XXIV (no poll tax); *id.* amend. XXVI (extending voting rights to citizens over eighteen).

254 *See* MANZA & UGGEN, *supra* note 251, at 163.

regularly disenfranchised (i.e., denied the right to vote),[255] with some states currently disenfranchising close to ten percent of their voting populations on the basis of prior felony convictions.[256]

Felon disenfranchisement has a long history.[257] It finds its roots in the English concept of "civil death," which the colonists imported to North America.[258] As a concept, civil death is broader than disenfranchisement, encompassing prohibitions on a broad array of civil rights, including the right to sue, as well as the right to vote.[259] There was a resurgence in felon disenfranchisement laws following the Civil War and, by 1869, some twenty-nine states had enacted laws disenfranchising persons convicted of felonies, with many of the laws mandating a permanent disenfranchisement (i.e., not limited to while serving time).[260] Many scholars have carefully noted the link between the post-Civil War rise in felon disenfranchisement laws and the rise of black involvement in politics during the Reconstruction period.[261] Alec Ewald notes that "[a]fter Reconstruction, several Southern states carefully re-wrote their criminal disenfranchisement provisions with the express intent of excluding blacks from the suffrage."[262] The Sentencing Project's study of felon disenfranchisement claims that these states expressly tailored their disenfranchisement laws to capture those crimes that they believed were most frequently committed by blacks.[263] Alabama's disenfranchisement provision, for example, ex-

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255 *Id.*

256 *See* JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER, (2014) 1–2, 4, http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf (discussing the various state restrictions on voting rights).

257 *See* Ewald, *supra* note 248, at 1059–72.

258 *Id.* at 1060–61 (describing the English concept of civil death).

259 *See id.* at 1059–61; Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 724 (1973).

260 *See* CHUNG, *supra* note 256, at 3, 5 (outlining in brief the history of felon disenfranchisement laws); Ewald, *supra* note 248 at 1065–66.

261 *See* Ewald, *supra* note 248, at 1047–48 (noting that scholars have discussed the racial dimension of felon disenfranchisement); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900–01 (1999); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 733–43 (1998).

262 Ewald, *supra* note 248 at 1065; *see also* CHUNG, *supra* note 256, at 3 ("In the post-Reconstruction period, several Southern states tailored their disenfranchisement laws in order to bar black male voters . . . .").

263 *See* CHUNG, *supra* note 256, at 3; *see also* PAUL LEWINSON, RACE, CLASS, & PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 85–86 (1963); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540–42 (1993) (providing examples of crimes considered more likely to be committed by blacks than whites).

cluded men charged with spousal abuse, the author of the law estimating that "the crime of wife-beating alone would disqualify sixty percent of the Negroes."[264] Indeed, in Alabama, spousal abuse would have resulted in disenfranchisement, but murder would not.[265]

Across the United States, there is diversity in the scope of felon disenfranchisement. In twelve states, even after a felon has completed her prison sentence, any parole, and her probation period, she remains completely disenfranchised.[266] In another nineteen states, a felon remains disenfranchised during the term of prison, parole, and probation.[267] In fact, only two states do not restrict the voting rights of felon-citizens at all (i.e., both while in prison or after release): Maine and Vermont.[268] In the face of these restrictions, a number of challenges to felon disenfranchisement laws have ensued. One scholar notes, "[t]here are so many constitutional arguments against the disenfranchisement of felons that one can only wonder at the survival of the practice."[269]

However, in its 1974 decision of *Richardson v. Ramirez*,[270] the Court held that there was no constitutional impediment to states limiting the voting rights of felon-citizens.[271] In *Richardson*, three men

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264 Underwood v. Hunter, 730 F.2d 614, 616 (11th Cir. 1984) (citation omitted).

265 *See* CHUNG, *supra* note 256, at 3.

266 *See* THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES. (2014) [hereinafter LOSING THE VOTE], http://www.sentencingproject.org/doc/file/fvr/fd_losingthevote.pdf; *see also* CHUNG, *supra* note 256, at 2.

267 *See* CHUNG, *supra* note 256, at 2; LOSING THE VOTE, *supra* note 266, at 5.

268 The states that maintain restrictions on voting for post-release convicted felons not on probation are Florida, Iowa, Kentucky, and Virginia. *See, e.g.*, VA. CONST. art. II, § 1 (2002); FLA. STAT. § 97.041(2)(b) (2001); *see also Fact Sheet: Felony Disenfranchisement Laws in the United States*, THESENTENCINGPROJECT.ORG Apr. 2014, at 4, http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf (outlining each states' approach to felon voting rights).

269 Fletcher, *supra* note 261, at 1903; *accord* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150 (2004); *see also* MANZA & UGGEN, *supra* note 251, at 21 (claiming a "national guarantee of the right to vote has essentially developed" through Constitutional Amendments and Supreme Court decisions). *Contra* Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1584 (2012) (claiming felon disenfranchisement is constitutionally protected); Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1727 (2014) (purporting to develop a version of felon disenfranchisement that is symbiotic with a modern liberal democracy).

270 Richardson v. Ramirez, 418 U.S. 24 (1974).

271 *See id.* at 54; Ewald, *supra* note 248, at 1066–72; Re & Re, *supra* note 269, at 1642–48; *see also* U.S. CONST. amend. XIV § 2 (stating that state representation may be reduced if the state denies voting rights to adult male citizens "except for participation in rebellion, or other crime"); Trop v. Dulles, 356 U.S. 86, 97 (1958) (explaining that felon disenfranchisement is a

sued the state of California, arguing that the state statute on felon voting rights violated the Constitution's Fourteenth Amendment Equal Protection Clause.[272] The Constitution, the claimants argued, guarantees a right to citizens to vote, and the California law denying that right was an equal protection violation—the state was treating two groups of citizens differently.[273]

The Court disagreed, overturning the lower court's decision striking down California's permanent felon-disenfranchisement law.[274] In reaching its decision, Chief Justice Rehnquist's majority opinion of drew on Section 2 of the Fourteenth Amendment, a clause, according to Alec Ewald, that most scholars had, until that point, referred to as "obsolete."[275] Section 2 outlines that any state that engages in the disenfranchisement of citizens will face a proportionate reduction in representatives in Congress, and with an exception for "participation in rebellion, or other crime."[276] The Court claimed that the express terms of Section 2 permitted states to ban felons from voting, therefore the Fourteenth Amendment Equal Protection Clause "could not have been meant to bar outright a form of disenfranchisement that was expressly" permitted in the subsequent provision.[277] In reaching this conclusion, the Court relied on the text of the Constitution, legislative history, and the broader historic context.[278] The Court argued that the text of Section 2 clearly permits states to limit the voting rights of those citizens who have committed a crime, and that the legislative history "indicates that this language was intended by Congress to mean what it says."[279] The Court also considered the historic prac-

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"nonpenal exercise of the power to regulate the franchise" and a way to "designate a reasonable ground of eligibility for voting").

272 *Richardson*, 418 U.S. at 26–27.

273 *Id.*

274 *Id.* at 56.

275 *See* Ewald, *supra* note 248, at 1068 n.90; *see also Richardson*, 418 U.S. at 41–42.

276 U.S. CONST. amend. XIV, § 2; *see also Richardson*, 418 U.S. at 42.

277 *Richardson*, 418 U.S. at 55; *see also* CHUNG, *supra* note 256, at 3; Ewald, *supra* note 248, at 1068.

278 *See Richardson*, 418 U.S. at 43.

279 *Id.* Note that although the *Richardson* Court failed to engage in any theoretical analysis of why it is constitutionally acceptable to disenfranchise felons, other courts have considered the underlying justification. *See, e.g.*, Green v. Bd. of Elections of New York, 380 F.2d 445, 451 (2d Cir. 1967) (invoking social contract theory and stating that "[a] man who breaks the laws . . . could fairly have been thought to have abandoned the right to participate in further administering the compact"); Washington v. State, 75 Ala. 582, 585 (1884) (upholding felon disenfranchisement on the ground that "one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage"). *See generally* Ewald, *supra* note 248.

tice in the states, noting that twenty-nine states had provisions that limited the voting rights of felon-citizens at the time of the adoption of the Fourteenth Amendment.[280]

While the Court's denial of voting rights to a previously recognized constitutional person in *Richardson* is the most prominent example of denial of constitutional personhood for felons, it is not the only one.[281] Similar to the dilution of alien constitutional rights in the balancing analysis discussed above, in a variety of contexts felons are denied constitutional personhood through the dilution of the protection afforded to the claimed constitutional right.[282] In a recent empirical study on the rights of parolees, Tonja Jacobi, Song Richardson, and Gregory Barr comprehensively demonstrate how there exists a "significant yet unappreciated attrition of constitutional rights."[283]

A core example highlighted by Jacobi, Richardson, and Barr of diluted constitutional personhood for parolees is in the context of the Fourth Amendment right granted to "the people" to be free from unreasonable searches and seizures without probable cause and other warrant requirements.[284] While safeguards exist to prevent against suspicionless searches of the ordinary citizen, in the context of felon-parolees the Court has held that persons on parole have lowered expectations of privacy, and searches and seizures without the usual requirements are permissible.[285] That is, both warrantless searches, and searches without the usual probable cause safeguards are permitted in the case of a parolee.[286] The Court has specified that, "by virtue of their status alone" persons falling into one of these classes "do not enjoy the absolute liberty to which every citizen is entitled."[287] Instead, these persons "have diminished expectations of privacy by virtue of their status alone."[288] The practical import of this diminished

280 *Richardson*, 418 U.S. at 48.

281 *See, e.g.*, Lewis v. United States, 445 U.S. 55, 66 (1980) (recognizing that legislatures may constitutionally prohibit a convicted felon from engaging in a range of fundamental activities, including possession of a firearm).

282 *See, e.g.*, De Veau v. Braisted, 363 U.S. 144 (1960) (upholding prohibition against felons holding office in a waterfront labor organization); Hawker v. New York, 170 U.S. 189 (upholding prohibition against felons engaging in the practice of medicine).

283 Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 890 (2014).

284 *Id.* at 905–11.

285 *Id.* at 906 ("[I]n *Samson v. California*, the Supreme Court deemed parolees to have such a diminished expectation of privacy that even suspicionless searches can be authorized."); *see* Samson v. California, 547 U.S. 843, 847 (2006).

286 *Samson*, 547 U.S. at 847.

287 *Id.* at 848–49 (citations omitted); *see* Jacobi et al., *supra* note 283, at 906.

288 *Samson*, 547 U.S. at 852; *see* Jacobi et al., *supra* note 283, at 906.

privacy right is that persons like felon-parolees are subject to a suspicionless search at any time, should the state choose to do so.[289]

Interestingly, in the series of cases establishing that felons have diluted privacy rights, the Court does not refer to the textually designated rights holder, namely "the people."[290] Instead, the Court uses "citizens" as its comparator category that enjoys the full protections of the Fourth Amendment privacy right.[291] Further, in its analysis of *why* the Fourth Amendment privacy right of prisoners, parolees, and probationers is diluted, the Court relies on the fact that the state's interest in punishment, and relatedly parole and to some extent, probation, is at least to "reduc[e] recidivism, [and] thereby promot[e] reintegration and positive citizenship . . . ."[292]

In *Samson v. California*,[293] for example, the Court spent some significant time reciting the empirical evidence supporting the state's claim that suspicionless searches were essential to aid the state interest of reduction in recidivism.[294] The Court quoted a variety of statistics on the recidivism rate of parolees and stated, "California's ability to conduct suspicionless searches of parolees serves its interest in reducing recidivism, in a manner that aids, rather than hinders, the reintegration of parolees into productive society."[295] It seems, then, that for determining the constitutional personhood of felons, the Court strongly considers the state's interest in violating the otherwise textually available constitutional right.[296] Implicitly underlying the Court's permissiveness of state restrictions on rights of prisoners seems to be an assumption that, by committing a crime, these citizens have proved themselves to be unworthy of equal citizenship and rights.[297]

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289 *Samson*, 547 U.S. at 852; *see* Jacobi et al., *supra* note 283, at 906.

290 U.S. CONST. amend. IV ("The right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added)).

291 *Samson*, 547 U.S. at 849.

292 *Id.* at 853; *see* Jacobi et al., *supra* note 283, at 907–08 (discussing the underlying rationale of the Court's decision in *Samson*).

293 Samson v. California, 547 U.S. 843, 852 (2006) ("The extent and reach of [parole] conditions demonstrate that parolees . . . have severely diminished expectations of privacy by virtue of their status alone.").

294 *Id.* at 854.

295 *Id.*

296 *Id.* at 843.

297 *See* AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 30 (2014); Jacobi et al., *supra* note 283, at 892.

The aim of this Part has been to analyze the Court's methodology and doctrinal justifications for granting or denying constitutional personhood across a range of claimants and panoply of rights. The three case studies show that the Court has vacillated in its approach when determining the personhood of litigants.[298] More broadly, taken together, the case studies demonstrate that the Court has failed to consider constitutional personhood in the aggregate, as a question for which a unified theory and approach should be developed. This Article repudiates this individualistic, disaggregated precedential tradition. Part III explains why, before Part IV turns to begin to develop an aggregate theory and approach to questions of constitutional personhood.

III. Constitutional Personhood and Constitutional Legitimacy

This Part is concerned with identifying the fundamental trouble with the Court's opaque and disaggregated approach to constitutional personhood. At its core, the Court's constitutional personhood jurisprudence presents a worrying narrative of majoritarianism, whereby the decision to grant or deny personhood privileges dominant classes and harms subordinate and vulnerable groups. That is, the constitutional personhood jurisprudence roughly mirrors contemporary public opinion, the views of the political branches, and the positions held by powerful social institutions (e.g., corporations).[299] While a rich body of scholarship across a range of traditions—from scholars including constitutional theorists, political scientists, and critical legal theorists—has described the majoritarian tendencies of the Court,[300] this

298 *See supra* Part II.A–C and accompanying notes.

299 *See, e.g.*, Thomas R. Marshall, Public Opinion and the Supreme Court 192 (1989) ("Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution."); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 424 (2002) ("Supreme Court decisions by and large correspond with public opinion."); Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 Law & Inequality 1, 1–4 (2005) (claiming that the Supreme Court is a majoritarian, rather than a countermajoritarian, institution); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 Am. Pol. Sci. Rev. 87, 97 (1993) ("Our analyses indicate that for most of the period since 1956, the Court has been highly responsive to majority opinion."); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 Am. Pol. Sci. Rev. 711, 711 (1994) ("[N]umerous scholars have found that the Court is not generally out of line with public opinion.").

300 *See* Hutchinson, *supra* note 299, at 2, 20 (quoting David Kairys, *Law and Politics*, 52 Geo. Wash. L. Rev. 243, 247–49 (1984)) ("arguing that the 'results' in legal contests 'come from those same political, social, moral, and religious value judgments from which the law purports to

Part demonstrates that these majoritarian concerns are heightened in the context of constitutional personhood.

At the outset, it is important to recall what the constitutional personhood inquiry entails. As an inquiry analytically antecedent to any consideration of the merits of the rights-claim, constitutional personhood acts as the metaphoric gate through which a litigant must pass before her claim of governmental transgression will be considered by the courts.[301] As described in Part I, constitutional personhood asks whether the litigant is in fact *entitled* to challenge the alleged governmental violation of an individual constitutional entitlement.[302] The question of a litigant's entitlement to claim the protection of any given constitutional right is a necessary predicate to any judicial consideration of the merits of that claim.[303] Without vested personhood, the claimant has no entitlement to the substantive protections of the right.[304]

Stepping back from the technicalities of the personhood inquiry, at the theoretical level constitutional personhood represents membership in the constitutional polity.[305] In this way, constitutional personhood decisions reflect judgments as to the boundaries of the constitutional community.[306] On this view, a claim to be a constitutional person is a claim that the litigant is *entitled* to call on the constitutional compact.[307] When undertaking constitutional personhood determinations, then, the Court is determining *who is eligible to call on the contract*.[308] While in a limited sense, designation as a constitu-

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be independent'")); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) ("Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral."); *see also Samson*, 547 U.S. at 853–55.

301 *See supra* notes 49–76 and accompanying text.

302 *Id.*

303 *Id.*

304 *Id.*

305 *See* NEUMAN, *supra* note 36, at 3 ("Eligibility to participate in constitutional discourse confers an opportunity to influence the shaping of the framework for government action."); Cleveland, *supra* note 36, at 20–22 (discussing the scope of the Constitution's application).

306 *See* Bosniak, *supra* note 27, at 1086–89 (pointing out controversies in boundaries of the membership sphere); Pildes, *supra* note 25, at 734 ("'[R]ights' are best understood as the way constitutional law marks the boundaries between different spheres of political authority.").

307 *See* Rivard, *supra* note 19, at 1446–47 ("[A] threshold question for determining whether one is entitled to constitutional rights is whether one is a constitutional person.").

308 On social contract theory, and the Constitution as contract, see, for example, THOMAS HOBBES, HOBBES'S LEVIATHAN 128–32 (Oxford Univ. Press 1967) (1651); JOHN LOCKE, LOCKE'S SECOND TREATISE OF CIVIL GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT 47–55 (Lester DeKoster ed., William B.

tional person is simply reflective of a legal status under the Constitution—that is, indicative of the legal rights that the rights holder is entitled to—in a broader sense, recognition or non-recognition as a constitutional person is reflective of the Court's normative assumptions about *who belongs in the constitutional community*.[309] That is, the inclusion or exclusion of certain persons from the protection of certain constitutional rights is intimately linked to that person's membership status in the broader polity.[310]

On a conventional academic account, no concern would be raised by this description of constitutional personhood or the Court's role in these determinations.[311] As Darren Hutchinson notes, "[c]onventional academic literature portrays the Supreme Court as a countermajoritarian body."[312] The Court is traditionally viewed as the institutional enforcer of rights and the bulwark against governmental transgressions on individual rights.[313] The various justifications for the

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Eerdmans Publ'g Co. 1978) (1689); JOHN RAWLS, A THEORY OF JUSTICE 17–22 (1971); JEAN-JACQUES ROUSSEAU, *On the Social Contract*, *in* BASIC POLITICAL WRITINGS 141, 141–53 (Donald A. Cress ed. & trans., Hackett Publ'g 1987) (1762).

309 *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 54–56 (1992) (explaining that choosing a strict intentionalist approach to constitutional theory will better affirm originalist values of stability, clarity and certainty, while a moderate intentionalist approach will authorize judges to use their own political judgment, but will also accommodate political decisions like *Brown v. Board of Education*); Roger P. Alford, *In Search for a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 708–11 (2005) (explaining that a judge's use of comparative constitutional methodology will depend on the constitutional theory grounding the judge's decisionmaking, and that the constitutional theory a judge uses will aspire to promote political democracy and to advance substantive justice by respecting individual rights); Bosniak, *supra* note 27, at 1053 (discussing community membership in the context of alienage and noting that "the exclusion of aliens from access to various rights and benefits in this society properly preserves the benefits of membership for those deemed to belong within the moral boundaries of the national community"); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 549–52 (1999) (a constitutional theory should advance the goals of maintaining the rule of law, preserving a fair opportunity for majority rule in political democracy, and promoting substantive justice by protecting individual rights); Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1845–46 (1997) (explaining that a constitutional theory must address how undebatable ideas change into debatable ones, and debatable ideas change into undebatable ones).

310 *Id.*

311 *See* Pildes, *supra* note 25, at 2.

312 Hutchinson, *supra* note 299, at 1.

313 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–59 (1980) (justifying judicial review on the grounds that it ensures the protection of vulnerable minorities from majoritarian abuse); Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 380 (2008); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996) (arguing that the perception of Supreme Court as protector of "minority

Court as the institutional locus for rights-protection revolve around the need for a static, independent, and countermajoritarian overseer to preserve the rights of individuals against abridgement by transient popular majorities.[314] This institutional role is necessary, supporters claim, in order to curtail the political and legal power of the democratic institutions.[315]

However, a robust body of scholarship has emerged to challenge this traditional characterization of the Court as the defender of unpopular minorities.[316] With its roots in political science and legal realism, this counter-narrative claims that neither the historic nor the contemporary Supreme Court functions as a countermajoritarian institution.[317] Instead, the claim is that the Court is in fact a majoritarian institution. Conducting an empirical study of Supreme Court decisions in 1957, political scientist Robert Dahl argued, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[318] Building on Dahl's work, political scientists have continued to explore the extent to which larger political forces keep the Court tethered to the mainstream viewpoint.[319] In addition, constitutional and critical legal theorists have explored swathes of constitutional doctrine, claiming that "far from being a countermajoritarian institution, the Supreme Court functions to enforce and enshrine

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rights from majoritarian overreaching" is one that "exercises a powerful hold over our constitutional discourse"); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 105; Andrei Marmor, *Randomized Judicial Review* 2 (USC Gould Ctr. L. & Soc. Sci. Legal Stud. Res. Papers Series 15-8, 2015) (noting "constitutional judicial review is needed as a countermeasure to ordinary democratic procedures *as a limit on majority rule*).

314 *See* ELY, *supra* note 313, at 135–37.

315 *Id.*

316 *See infra* notes 318–20.

317 *See supra* note 313; *see also* Hutchinson, *supra* note 299, at 20.

318 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285, 291, 293 (1957) (for Dahl, the Court is "inevitably a part of the dominant national alliance" because "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court [J]ustices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite").

319 *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 157 (1998); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 9 (Benjamin I. Page ed., 2d ed. 2008); SEGAL & SPAETH, *supra* note 299.

majoritarian views."[320] Decisions of the Court, these scholars claim, reflect the preferences and views of America's popular majority.[321]

This counter narrative represents deep and intractable concerns for constitutional personhood.[322] Because if the Court's constitutional personhood jurisprudence is tied to contemporary political norms and identity status within the polity, this adds a significant wrinkle to the conception of rights as individual protections against majoritarian excess and to the Court's traditional position as a bulwark against majoritarian interests.[323] If the Court is calibrating those litigants entitled to claim rights protections based on a conception of the common good—i.e., tying constitutional personhood to majoritarian status—the Court is necessarily building into its analysis the opposite result.[324] That is, the presentation of the Court as the protector of rights as against a transient majority becomes complicated when the Court's grant or denial of personhood itself reflects majoritarian interests.[325] Other scholars have noted this trend in claimant-specific contexts; one scholar suggests that the Court "does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced."[326] Another scholar posits that, "redefining and constricting 'the people,' . . . has long been one of the tools employed by empow-

320 Pildes, *supra* note 313, at 105; *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 609 (1993); Hutchinson, *supra* note 299, at 19–22 (discussing the contributions of critical race theorists to the literature rebutting the "countermajoritarian difficulty").

321 *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 374–75 (1993); Pildes, *supra* note 320, at 105; *see also* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 674–75 (2005); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081–82, 1148–49 (2013); *cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1978); ELY, *supra* note 313 at 136. *See generally* Hutchinson, *supra* note 299.

322 *See* Pildes, *supra* note 320, at 116–17.

323 *See* Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting) ("[O]f the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent[ ] invoked it in protection of the negro race, and more than fifty per cent[ ] asked that its benefits be extended to corporations."); JOSEPH RAZ, *Rights and Individual Well-Being*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 29 (1994).

324 *See* Pildes, *supra* note 25, at 734.

325 *See id.* at 735.

326 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582–83 (1990).

ered elites to ostracize nonwhite, nonmales from the Constitution's largesse."[327]

While a detailed empirical analysis of the Court's personhood jurisprudence is beyond the scope of this Article, a cursory glance at the case studies in Part II suggests that constitutional personhood is reflective of community norms.[328] For example, as outlined above, felon disenfranchisement has historically reflected the racial attitudes of the majority of the community. As Alec Ewald notes, while the combination of the Fifteenth Amendment and military Reconstruction "forced Southern states to permit blacks to vote," white southerners employed various schemes to strip blacks of the newly acquired voting rights.[329] Prominent amongst these schemes were racially motivated changes to laws disenfranchising criminals.[330] Including so-called "black crimes" as worthy of disenfranchisement, the president of the 1901 Alabama constitutional convention stated, "[t]his plan of popular suffrage will eliminate the darkey as a political factor in this State in less than five years."[331] While subsequent years saw a slow shift in racial attitudes, making these kinds of overt statements both unpalatable and unconstitutional,[332] social scientists and legal scholars continue to claim that the legislative perpetuation of felon disenfranchisement is a consequence of race, and consequently status, within the polity.[333] Pam Karlan argues that "because electoral districts are . . . based on population, people in prison serve as essentially inert ballast . . . [and] enable the underpopulation of rural, overwhelmingly white districts . . . ."[334] At the same time, Karlan notes, the extension of

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327 Gulasekaram, *supra* note 52, at 1537.

328 *See What We Talk About*, *supra* note 19, at 1762.

329 *See* Ewald, *supra* note 248, at 1065, 1090–95 (outlining the racialized history of felon disenfranchisement); *see also* U.S. CONST. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, 39 (1974); JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 189 (Rev. ed. 1998).

330 *See generally* KOUSSER, *supra* note 329; MORONE, *supra* note 329; Ewald, *supra* note 248.

331 JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, May 21, 1901, at 8 (1940); *see also* Hunter v. Underwood, 471 U.S. 222, 229 (1985); Karlan, *supra* note 269, at 1154–55.

332 *See Hunter*, 471 U.S. at 233.

333 *See, e.g.*, Karlan, *supra* note 187, at 1161–63.

334 *Id.* at 1160 (footnote omitted).

felon disenfranchisement beyond the prison walls can "distort the composition of electoral districts" in favor of the white majority.[335]

Majoritarian trends can also be seen in the Court's disparate treatment across and between claimants in interest balancing. Here, the Court appears to tradeoff the personhood of the litigant against the state's interest in continuing the conduct the claimant alleges is constitutionally prohibited.[336] That is, the Court is balancing the common good against the individual claim to constitutional personhood.[337] While the Court frequently engages in interest balancing in rights, in the context of claimants at the fringe of the polity, for example, felons and aliens, the Court's balancing represents a dilution of protection vis-à-vis other constitutional claimants. The best example is the diluted criminal procedure protections of parolee-felons.[338] Recall *Samson v. California*, where the Court held that felons have a diminished expectation of privacy.[339] The Court rationalized the dilution of felon rights by reference to the interests of the community as a whole, namely reducing recidivism in order to reintegrate felons as fully functioning and law-abiding members of society.[340]

All this is to say that regardless of the conception of the Court—either as an institution providing a countermajoritarian balance, or, instead, majoritarian-reinforcement—we should want decisions about membership in the polity—constitutional personhood decisions—to be transparent. As Frederick Schauer notes, transparency is a metaphor that connotes the capacity to be "seen without distortion."[341] For information, facts, or (as in this case) doctrine to be transparent is for it to be "open and available for examination and scrutiny."[342] In the context of constitutional personhood decisions, valuing transparency ultimately serves democratic and constitutional legitimacy in three

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335 *See id.* at 1160 n.69.

336 *See, e.g.*, Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511, 1516–18 (2012) (balancing individual liberty interests and national security); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1437–39 (1962) (balancing right to freedom of speech and preservation of law and order); Houlgate, *supra* note 194, at 84–85 (balancing constitutional rights of children and the "[s]tate's interest in protecting them from harm").

337 *See* Crocker, *supra* note 336, at 1516–18; Frantz, *supra* note 336, at 1437–39; Houlgate, *supra* note 194, at 84–85.

338 *See generally* Jacobi et al., *supra* note 283 (discussing the "attrition" of rights of parolees).

339 *See* Samson v. California, 547 U.S. 843, 855, 857 (2006); *supra* notes 276–92 and accompanying text.

340 *Samson*, 547 U.S. at 853–54. *See generally* Jacobi et al., *supra* note 283.

341 Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1343 (discussing transparency in governmental decisionmaking).

342 *Id.*

ways.[343] First, transparency can act as a constraint on judicial decision-making by forcing open and reasoned decisions about constitutional membership.[344] Justice Brandeis has famously made this claim, stating that "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[345] Second, transparency acts as a facilitator of information to the entire constitutional polity, forcing debate and consideration of community membership questions to the fore.[346] From this perspective, then, transparency forces democratic engagement and responsibility for inclusion or exclusion of persons from the polity.[347] Finally, and more pragmatically, transparency in personhood adjudication, as with judicial determinations more generally, enables lower federal courts and litigants to better understand the conditions under which constitutional rights will be granted or denied.[348]

If we take the value of transparency in constitutional personhood determinations seriously, then what remains is to consider the mechanisms to force transparent decisions. One means by which to force transparency in doctrinal determinations is to impose a comprehensive and consistent decisional framework whereby all similar analytical questions are treated alike, methodologically speaking. To that end, the following Part picks up where this one leaves off, and begins to develop a unified framework for identifying constitutional persons going forward.

IV. The Path Ahead: Toward a Unified Framework for Constitutional Personhood

This Part turns from a perspective of claimant-specific, disaggregated constitutional personhood to an aggregate perspective. This Article takes the view that the pragmatic and definable way to build an aggregate framework is to examine the Court's justifications for the

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343 Schauer outlines "four values that transparency is thought to serve[;]" however, in the context of constitutional personhood doctrine, only three of these values seem apt. *Id.* at 1346.

344 Schauer would term this "Transparency as Democracy." *See id.* at 1348–50. *See generally* Gillian E. Metzger, *Remarks of Gillian E. Metzger*, 64 N.Y.U. Ann. Surv. Am. L. 459 (2009) (analyzing major United States and international transparency politics).

345 Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914); Schauer, *supra* note 341, at 1349 n.52; *see also* Archon Fung et. al., Full Disclosure: The Perils and Promise of Transparency 183 (2007).

346 *See* Schauer, *supra* note 341, at 1350 (discussing "Transparency as Efficiency" and "Transparency as Epistemology").

347 *Id.*

348 Metzger, *supra* note 344, at 459.

grant or denial of constitutional personhood across the three classes of litigants outlined in Part II. This Part, then, switches from examining the Court's approach and methodologies in each claimant-class to identifying the commonalities across the Court's jurisprudence in all three classes. The resulting analysis suggests that a number of factors appear across all classes of claimants. Drawing on these factors, the Part proposes a functional approach to questions of constitutional personhood that pragmatically draws its baseline from the Court's prior decisions.[349] The Part concludes by previewing the importance of a unified approach to constitutional personhood for a variety of constitutional personhood claims that could potentially come before the courts.

A. Identifying Trends Across Constitutional Rights and Rights Holders

Drawing on the case studies outlined in Part II, the purpose of this section is to compile a set of factors that courts can use to guide future determinations of constitutional personhood.[350] Importantly, this Article does not attempt to identify whether any specific claimant is vested with constitutional personhood in a specific right. Instead, the list of factors that originates from the case studies should be seen as the first attempt in an ongoing discussion to identify constitutional persons.

At the outset, it is valuable to note that across all classes of claimants, the Court has consistently treated each constitutional personhood claim anew.[351] That is, constitutional personhood is not a universal binary switch; a person is not a constitutional person across all constitutional rights by virtue of a successful claim for one specific right.[352] Instead, constitutional personhood is switched on—or not—

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349 The approach of examining the underlying values or factors of a body of case law and extrapolating a broader analytical framework or approach is familiar in constitutional rights scholarship. *See, e.g.*, Pollman, *supra* note 81, at 32 (examining corporate rights jurisprudence and "[b]uilding on the underlying framework of the jurisprudence" to formulate a general approach to corporate rights claims); Robinson, *supra* note 21, at 191 (analyzing the values underlying First Amendment protections for religious institutions and employing the values to promote a broader analytical approach); West, *supra* note 48, at 1030–31 (analyzing the purpose for special protections for "the Press" in the First Amendment and extrapolating to a broader framework).

350 This is similar to the approach I took in the limited context of First Amendment religious institutions. *See* Robinson, *supra* note 21, at 225 (formulating the four most significant factors in identifying a first-order religious institution).

351 *See supra* notes 57–76 and accompanying text.

352 *See supra* note 67 and accompanying text.

for each individual right claimed by the claimant.[353] For example, when the Court determined that corporations hold constitutional rights for the purposes of the Fourth Amendment Search and Seizure Clause in *See v. City of Seattle*,[354] it did not hold that corporations are constitutional rights holders for *all*, or even all applicable, constitutional rights.[355] Rather, the Court made a more narrow decision that the corporation was vested with constitutional personhood in the specific right at issue.

This is consistent with the Court's general approach across all classes of claimant of focusing on the constitutional clause in question as a first order preference, with the nature of the claimant falling as a second order consideration. That is, the Court's predominant focus has been on the right at issue, rather than the claimant.[356] For example, in the felon class the Court in *Richardson v. Ramirez* first examined the Fourteenth Amendment to determine the scope and meaning of that provision, before determining whether felons could be excluded from the Amendment's protective auspices.[357] In the alienage context, the Court in both *Wong Wing v. United States* and *Yick Wo v. Hopkins* focused on the meaning and purpose of the Clause before holding that the alien status of the claimant was not a relevant consideration in determining rights-holder status for purposes of the Fourteenth Amendment.[358] In the context of corporations, moreover, the Court has expressly stated that it was concerned with the right, and not the nature of the claimant.[359] For example, in *Citizens United*, the Court specified that the purpose of the right was to protect speech, and the identity of the speaker was irrelevant.[360]

Yet, cutting against these examples of the Court's focus on the nature of the clause at issue are a number of examples where the

353 *See supra* notes 57–76 and accompanying text.

354 *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

355 *Id.* at 545–46 (holding only that the basic component of a reasonable search under the Fourth Amendment is applicable to businesses as well as to residential premises and stating that constitutional challenges in related programs "can only be resolved . . . on a case-by-case basis under the general Fourth Amendment standard of reasonableness").

356 *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

357 *Id.*

358 Wong Wing v. United States, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.").

359 *See* Citizens United v. FEC, 558 U.S. 310, 364 (2010).

360 *Id.* ("The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.").

Court has held that the nature of the claimant *is* determinative of their constitutional personhood.[361] The Court has frequently stated, without explanation, that the status of the claimant renders them unable to claim constitutional personhood.[362] The early corporate constitutional personhood cases provide a good example of this approach.[363] In these cases, the Court was focused on the nature of the claimant via various theories of corporate personality.[364] In *Hale v. Henkel*, for example, without any analysis of the Fourth Amendment, the Court specified that as a distinct legal entity, the corporation was entitled to constitutional protection against unlawful searches and seizures.[365] While the Court's approach to corporate constitutional personhood has shifted to analysis of the right as a first order priority, the trend of examining the claimant without reference to the nature of the right is not limited to corporate rights-holder claims. Indeed, in both the alienage and felon categories, the Court has denied constitutional personhood based on the claimant's status, without any reference to the nature or scope of the right. In *Eisentrager*, for example, the Court proclaimed that the claimant's enemy status was sufficient reason for denying him the protections of the Fifth Amendment, without discussion of the purpose, scope, or limits of the provision.[366] And felons have been routinely denied criminal procedure rights "by virtue of their status alone," without any consideration of the right being claimed.[367]

With that said and as noted above, the Court's disregard for the constitutional right is not universal.[368] Across all classes of claimants, the Court has generally prioritized an analysis of the right at issue in determinations of constitutional personhood.[369] In doing so the Court has relied on one or more interpretive factors to determine the viabil-

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361 *See supra* notes 113–35 (discussing the Court's early corporate constitutional personhood decisions).

362 *Id.*

363 *Id.*

364 *Id. See generally* Pollman, *supra* note 21; Pollman, *supra* note 81, at 50–51.

365 Hale v. Henkel, 201 U.S. 43, 76 (1906).

366 *See* Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950).

367 Samson v. California, 547 U.S. 843, 852 (2006).

368 *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 364 (2010).

369 *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (placing priority on scope of Fourteenth Amendment over felony status); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (citing the nature of the rights protected by the Fifth and Sixth Amendments as the reason they should not be restricted to citizens).

ity of the constitutional personhood claims.[370] The factors that frequently, albeit sporadically, appear in the Court's constitutional personhood decisions are text, history, and purpose, including what this Article will term general boundaries. These factors will be outlined independently.

First, across all categories of claimants, the Court sometimes (but not always) considers the *text* of the constitutional provision at issue.[371] In *Richardson v. Ramirez*, for example, the Court focused extensively on the text of Section 2 of the Fourteenth Amendment to justify denying voting rights to felons.[372] The Court stated that it was determinative that the express terms of the right permitted states to disenfranchise felons.[373] In *Wong Wing*, the Court stated that the textual designation of a "person" as the rights holders in the Fifth Amendment respectively meant that aliens were necessarily rights holders for the purposes of this constitutional right.[374] And in *Citizens United*, the Court expressly noted that the text of the First Amendment designated no rights holder, instead it is open-textured, leading the Court to conclude that, for the purposes of the Speech Clause, the identity of the speaker is irrelevant. Rather, it is the speech itself that is of constitutional importance.[375]

With that said, in at least one of the classes of claimants, even where the textually designated rights holder clearly includes the claimant, the Court has limited the application to a subset of constitutional persons. Frequently, the Court has limited the plain meaning of a term without explanation. For example, in *Eisentrager*, the Court held that the extraterritorial aliens were not "persons" for the purposes of the Fifth Amendment, even though the claimants were clearly natural persons.[376] Likewise, in *Verdugo-Urquidez* the Court held, without explanation, that "the people" in the Fourth Amendment did not include aliens.[377] Instead, the Court proclaimed, "the people" refers to a certain subset of that term; specifically those persons who fall within the national community or have a "sufficient connection to the United

370 *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 722 (2011).

371 *See* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1264–65 (2015); Colby, *supra* note 370, at 721; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468–69 (2013).

372 *Richardson*, 418 U.S. at 54.

373 *Id.*

374 *Wong Wing*, 163 U.S. at 238.

375 Citizens United v. FEC, 558 U.S. 310, 342–43 (2010).

376 Johnson v. Eisentrager, 339 U.S. 764 (1950).

377 United States v. Verdugo-Urquidez, 494 U.S. 259, 259–60 (1990).

States."[378] In other instances, however, the Court has limited the textual meaning with reference to other interpretive factors, such as the history of the right, the purpose of the right, or some conception of a need for a connection to the United States. To the extent that the Court relies on these factors to limit the textual category of constitutional rights holders, these factors are considered independently.

Second, the Court has considered *history of the right*. In a subset of cases, across all classes of claimants, the Court has occasionally relied on the history of the right at issue to ascertain the appropriate scope of the class of rights holder.[379] In *Marshall v. Barlow's, Inc.*,[380] for example, the Court focused almost exclusively on the history of the Fourth Amendment's Warrant Clause to determine whether the intent of the Clause would indicate that corporations are persons entitled to claim its protection.[381] Similarly, in *First National Bank v. Bellotti*,[382] the Court held that in determining whether a right should extend to corporate claimants, the Court must examine the "historic function" of the right at issue to determine whether personhood in the right could extend to the claimant.[383] Beyond the corporate claimant, the Court has likewise relied on the history of a right to determine the extent of its reach. Recall from the prior section that, in the felon class, in *Richardson v. Ramirez*, the Court examined both the broader history and the legislative history of felon disenfranchisement to determine whether the text should be read to permit state disenfranchisement of felons.[384]

Finally, the Court has also discussed the *purpose of the right* when determining whether a person is a rights holder. Sometimes the Court will state that they are considering the purpose of the right in tandem with the history of the Clause; for example in *Bellotti*, the Court specified that it would consider the history and purpose of the Clause to determine the persons in whom constitutional personhood would vest.[385] However, more frequently, the concept of purpose manifests in what is best described as *general boundaries*. These general bound-

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378 *Id.* at 286; Heeren, *supra* note 212, at 389.

379 *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978); Pollman, *supra* note 81, at 50 (noting that the Court has sometimes looked at the "history of the right at issue to determine whether to accord it to a corporation . . . .").

380 *Marshall*, 436 U.S. at 307.

381 *Id.* at 311–12.

382 *Bellotti*, 435 U.S. at 765.

383 *Id.* at 799 n.14.

384 Richardson v. Ramirez, 418 U.S. 24, 43–56 (1974).

385 *Bellotti*, 435 U.S. at 778–84; *see also* Pollman, *supra* note 81, at 53–54 (relying on *Bellotti* and proposing a purposive approach to determining corporate constitutional rights holders).

aries, or general principles, do not organically derive from the text of the right, nor is it clear from the Court's analysis that the history of the right supports these extra-textual impositions. Rather, the Court has inferred some kind of purpose-driven limitation on certain rights.

This is best illustrated by an example. Take the case of *Johnson v. Eisentrager*, where alien enemy combatants claimed to be protected by the Fifth Amendment.[386] Recall the Court's analysis that the Fifth Amendment was inapplicable because of the lack of territorial connection to the United States and the enemy status of the claimant.[387] While it may seem intuitively correct that a person needs some kind of connection with the United States in order to claim its constitutional protections, the Court fails to articulate any reasons for its superimposition of a territorial connection.[388]

This idea of a territorial connection to the United States permeates the alienage jurisprudence.[389] Yet, the concept of a "connection" to the United States is not limited to territorial connection. In both the alienage and the prisoner classes, the Court has stated, generally without explanation, that the Constitution generally, and the right at issue specifically, requires some kind of community membership; this is a threshold left unexplained except for the fact that the claimant did not form part of that community.[390] The "public functions" exception that denies an alien constitutional personhood in a subset of Equal Protection Clause claims is justified by the Court on the basis that the state has the right to define the boundaries of its political community, and determining who falls within and who falls outside of those boundaries is part of the process of democratic self-government.[391] Similarly, in *Verdugo-Urquidez*, the Court specified, without elaboration, that the "people" referenced in the Fourth Amendment is limited to those who form part of the national community, with a sufficient connection to the United States.[392]

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386 Johnson v. Eisentrager, 339 U.S. 764, 773 (1950).

387 *Id.* at 778 ("[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial[,] and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

388 *Id.* at 768.

389 *See supra* notes 167–226 and accompanying text (discussing the Court's alienage constitutional personhood jurisprudence).

390 *Id.*

391 *See* Moore, *supra* note 43, at 812 (discussing the concept of community membership in the context of alien constitutional rights).

392 United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990).

The phenomenon of superimposition of general limitations is not limited to aliens.[393] In the context of felons, the Court routinely denies rights-holder status to felons who would otherwise clearly fall within the textual, and perhaps even historic, scope of protection of the right.[394] In the line of cases preceding and including *Samson v. California*, for example, while felons clearly fall within the designated textual rights holder—"the people"—even when considering the Court's limitation in *Verdugo-Urquidez* that this only includes persons with sufficient connection to the United States,[395] the Court still refused to extend the protection of the Fourth Amendment to felons.[396] Instead, the Court superimposed a notion of citizenship, implying that "the people" included only those persons who proved themselves worthy of recognition by the state as members in the political and national community.[397] For the Court, it seems that driving the limited rights protections for felons is some conception that, by virtue of their status, these persons are necessarily excludable and excluded from full constitutional membership.[398]

In summary, the Supreme Court has vacillated between various factors when determining constitutional personhood, both as within the same class of claimants and as between the different classes of claimants.[399] This erratic approach indicates the absence of a theoretically unified approach to questions of constitutional personhood. What we see is a doctrine in disarray, unbound and unhinged from any clear theoretical or interpretive baseline. As noted in Part III, this has the effect of producing and reifying inequalities between different persons under the Constitution, as well as leaving the Court open to criticism of result-driven decisionmaking, whereby the legal conclusion is a consequences of some ex post, value-based decision on the validity of including a certain claimant in the constitutional community.[400] This thus raises the question whether there is a plausible

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393 *See, e.g.*, Samson v. California, 547 U.S. 843 (2006).

394 *See, e.g.*, *id.*

395 *Verdugo-Urquidez*, 494 U.S. at 265–66.

396 *Samson*, 547 U.S. at 855–57.

397 *Id.* at 850–52; *see also* Jacobi et al., *supra* note 283, at 905–08.

398 *See Samson*, 547 U.S. at 850.

399 *See id.* at 855–57; *Verdugo-Urquidez*, 494 U.S. at 265–66; Johnson v. Eisentrager, 339 U.S. 764, 773 (1950).

400 Rivard, *supra* note 19, at 1466 ("In short, the threshold question of constitutional personhood is relegated to the status of a conclusion. Rather than developing a coherent, unified theory of personhood, the Supreme Court follows a result-oriented approach."); *What We Talk About*, *supra* note 19, at 1747.

aggregate approach to constitutional personhood going forward—a question taken up in the following Section.

B. Recalibrating the Personhood Analysis

As it stands, taken in the aggregate the Court's jurisprudence fails to provide a consistent methodology for determining constitutional personhood.[401] As we saw in Part I, even within a class of claimant, sometimes the Court looks to the textually designated rights holder to determine constitutional personhood, yet other times it ignored the textual mandate.[402] At times, the Court looks to the history of the right; sometimes not. Sometimes the Court considers the purpose of the right and superimposes community membership criteria and sometimes it does not.[403] Frequently, the Court does all of these things without explanation, justification, or analysis.

If we value transparency and consistency in constitutional personhood determinations, how should constitutional law adapt? This Section proposes a functional purpose and fit analysis when determining whether constitutional personhood vests in the claimant.[404] The proposed functional analysis for constitutional personhood determinations aims to vest constitutional personhood in claimants when it promotes the objectives of the right being claimed. This functional approach requires the courts to ask two discrete questions: (1) what is the objective of the right and (2) will extending the right to the claimant fulfill that objective. A functional approach leaves room for the reality that constitutional personhood means different things in different contexts; that is, whether a person is a constitutional rights holder or not is dependent on *both* the nature of the right being claimed and the class to which the claimant belongs.

Importantly, this Section does not propose to introduce new tests or methodologies. Instead, the proposed functional analysis draws on the various interpretive approaches of the Court across all classes of

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401 *See supra* Part II and accompanying notes (analyzing the Court's constitutional personhood jurisprudence).

402 *See supra* notes 27–79 and accompanying text.

403 *See supra* Part II and accompanying notes.

404 For a similar approach in the context of other constitutional rights, see, for example, Pollman, *supra* note 81, at 54 (proposing a purposive approach to determining corporate constitutional rights holders); Robinson, *supra* note 21, at 208–24, 230–33 (identifying the values underlying the First Amendment protections for religious institutions and proposing a functional approach that identifies as constitutional religious institutions only those institutions that fit with the purpose of special constitutional protections for religious institutions); West, *supra* note 81, at 1068–70 (taking a functional approach to identifying "the press" that best fits with the purpose of the Speech Clause).

claimants discussed in Part II.[405] For the most part, then, this doctrinal reform requires only modest shifts on the part of the Court.

In determining purpose and fit, as a threshold matter, courts should seek to ascertain the objective of the right. In other words, courts should determine the nature of the activity that the right is seeking to protect. In answering this question, courts will necessarily draw on interpretive devices that should be familiar from the case studies in Part II: the textually-designated rights holder, the history of the right, the development of the right, and the purpose of the right. The value in requiring courts to expressly consider each of these factors is a higher likelihood that we will capture the true function of the right at issue.

Elizabeth Pollman raises the example of the Fifth Amendment privilege against self-incrimination.[406] When faced with the question of corporate constitutional personhood for the purposes of the privilege against self-incrimination, the Court engaged in a historic analysis of the Clause.[407] In *Murphy v. Waterfront Commissioner*,[408] the Court stated that the function of the right, as historically understood, was to protect against the "cruel trilemma of self-accusation, perjury or contempt," and to ensure an "accusatorial rather than an inquisitorial system of criminal justice[,]" and "respect for the . . . human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ."[409] Subsequently the Court held that the privilege was inapplicable to the corporate claimant because there was no need to protect corporations against the "cruel trilemma."[410] Yet, this kind of conclusory reasoning is what the functional approach seeks to avoid.[411] The Court did not give the text a glance, where the text of the right specifies that no "person[s]" shall be forced to incriminate themselves.[412] Given the long tradition of juridical persons as legal and constitutional persons, this failure is significant.

Further, it is unclear from the Court's perfunctory analysis why extending the privilege against self-incrimination to a corporation is not warranted. That is, why corporations do not need protection against the "cruel trilemma." Even more concerning than the Court's

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405 *See supra* Part II and accompanying notes.

406 Pollman, *supra* note 21, at 1671.

407 *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 53–57 (1964).

408 Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

409 *Id.* at 55; *see also* Pollman, *supra* note 21, at 1671.

410 *Murphy*, 378 U.S. at 55; *see also* Pollman, *supra* note 21, at 1671.

411 *See supra* Part II and accompanying notes.

412 *See* Pollman, *supra* note 21, at 1671–72.

failure to consistently consider all plausible factors when examining the purpose of the right is the Court's failure to consider the second prong of the functional framework suggested here: whether extending the right to the claimant fulfills that objective. In the context of corporations, this question is more complicated than for natural persons and, perhaps, even other purely juridical persons. Answering the question of whether a corporation fulfills the identified function of a right requires a clear conception of corporate personhood.[413] That is, in order to answer whether the function of the right is met by extending the right to the corporation, how the Court perceives the corporation will drive the answer.[414]

While any analysis of corporate personhood is beyond the scope of this Article, it is important to acknowledge that judicial engagement in the question is critical if courts are to meet the goal of promoting the objective of the right being claimed.[415] In addition, while the question of claimant-fit is less fraught where the claimant is a natural person, it is no less important. In the felon context, for example, identifying the fit between the function of the right and the felon-claimant forces courts to articulate a conception of the felon in our polity. Indeed, if a person's status as a felon renders them a lesser member of the constitutional polity, and that is driving the Court's decisionmaking on felon rights, then it is essential that this understanding be explicitly articulated.

This framework is not novel. It simply draws on the logic, trends, and assumptions underlying the Court's constitutional personhood jurisprudence, across all classes of claimants.[416] When the Court says that by virtue of their status aliens are only entitled to lesser privacy rights, the Court is making assumptions about the function and purpose of the right and the place of aliens in the constitutional community. Likewise, when the Court holds that citizen-felons' constitutional rights differ from those of non-felon citizens, the Court is making assumptions about the purpose of, for example, the right to vote, and the appropriateness of permitting felons to pursue recourse for that right. And in holding that corporations hold the right to free

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413 *Id.*

414 *Id.*

415 *But see generally* Pollman, *supra* note 81; Pollman, *supra* note 21 (analyzing corporate constitutional personhood).

416 For similarly pragmatic approaches to reframing constitutional doctrine, see, for example, Robinson, *supra* note 21, at 185 (arguing for a pragmatic approach to defining "religious institutions"); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2438 (2014) (promoting a functional approach to defining "the press").

speech under the First Amendment, the Court is making assumptions about the purpose of that provision. In many respects what this proposed framework does is to shift the implicit assumptions that drive judicial decisionmaking to explicit statements.

Although an analysis of the various consequences of a functional approach to questions of constitutional personhood is beyond the scope of this Article, taking steps to identify the importance of disaggregating the rights-holder question, as well as moving toward a unified jurisprudential approach, are of pressing concern in light of a variety of contemporary constitutional personhood issues.

C. Looking Forward: Constitutional Personhood and Future Jurisprudence

The first area where constitutional personhood remains a live issue is in claims for further rights protections by the rights holders examined in Part I. Following the Supreme Court's decision in *Citizens United*, commentators began to focus in on a variety of potential rights claims that corporations could potentially realize, based on the underlying rationale of the Court's decision.[417] One interesting and potentially groundbreaking claim is the possibility of a corporate claim to a constitutional right of privacy.[418] Elizabeth Pollman frames the potential for this claim:

> Could a corporation claim a constitutional right to the nondisclosure of its information, as AT&T might have argued in its recent Freedom of Information Act case? Might a corporation have a privacy claim if the Securities and Exchange Commission required it to disclose health information about its CEO, as Apple resisted disclosing information about Steve Jobs's declining health? Does the ACLU have a right to privacy that is violated by the government's mass collection and surveillance of its phone call metadata?[419]

Pollman's questions are not of mere academic interest. As she notes, in 2011, AT&T claimed a "personal privacy" exemption under the Freedom of Information Act to prevent public exposure of its doc-

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417 *See* Pollman, *supra* note 81, at 28–29.

418 *Id.*; *see also* William C. Lindsay, Comment, *When Uncle Sam Calls Does Ma Bell Have to Answer?: Recognizing a Constitutional Right to Corporate Informational Privacy*, 18 J. MARSHALL L. REV. 915, 926, 935 (1985) (claiming that corporations should have a constitutional right to informational privacy). *But see* RUSSELL B. STEVENSON, JR., CORPORATIONS AND INFORMATION: SECRECY, ACCESS, AND DISCLOSURE 6, 69 (1980) (arguing that a corporate right to privacy is "on its face an absurdity").

419 Pollman, *supra* note 81, at 27.

uments.[420] While the matter was decided on statutory grounds, the Court specifically noted the potentiality of a constitutional claim, observing that the corporation had not raised a constitutional claim.[421]

Corporations also feature in the recent debates over religious liberty and the scope of application of the Affordable Care Act, specifically the so-called "Contraception Mandate."[422] Although the litigation culminated in a Supreme Court decision that focused solely on the statutory claims made by the corporate litigants, the constitutional issue was argued before the Court, and the potential for a corporate religious liberty claim remains.[423] The courts, then, will be forced to consider whether a corporation is a rights holder for the purposes of the First Amendment Religion Clauses. In light of the fraught and socially divisive nature of this determination, it is essential that the courts adopt an approach to determining corporate constitutional personhood for the purposes of the Religion Clauses.

The difficult, contemporary constitutional personhood issues extend beyond corporate personhood claims to the other categories of claimants examined in Part II. One core example is the question of whether aliens and felons have a protected Second Amendment right to bear arms, a question raised by a number of leading immigration law scholars.[424] In *Heller*,[425] the Court commented that the "the people" of the Second Amendment refers specifically to "law abiding . . . citizens,"[426] and "members of the political community."[427] Thus, with one comment, the Court has called into question the status of aliens and felons as rights holders under a constitutional provision that, on its face, extends to both classes. It is unclear the reasons why the Court suggested limitations on the textually designated rights

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420 *See id.* at 28 (citing FCC v. AT&T, 131 S. Ct. 1177, 1184 (2011)).

421 *See AT&T*, 131 S. Ct. at 1181–85.

422 The Affordable Care Act requires that large employers provide health care insurance that offers basic preventative care—including FDA-approved contraception—at no cost to employers. *See* 26 C.F.R. § 54.9815-2713 (2015). *See generally* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

423 *See* Conestoga Wood Specialties Corp. v. U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) ("[A] for-profit, secular corporation cannot assert a claim under the Free Exercise Clause."). *See generally* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman et al. eds., 2016).

424 On this question, see generally Gulasekaram, *supra* note 52; Miller, *supra* note 98.

425 District of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the Second Amendment extends to protect an individual's right to keep firearms).

426 *Id.* at 635 ("[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.").

427 *Id.* at 580.

holder.[428] It could be that these limitations are normatively desirable; however, a clear and functional analysis is arguably necessary before any definitive determination of the rights-holder status of, for example, aliens and felons, is determined. The functional, unified framework proposed by this Article aims to get ahead of these complicated litigation possibilities and guide the courts in the inevitable determinations.

Second, and more briefly, constitutional personhood remains an issue for other claimants, including children (who have been treated differently from adults for the purpose of various constitutional rights), as well as animals, artificial agents, and the environment.[429] A unified, functional framework for assessing the constitutional rights-based claims of these persons would ensure transparent and consistent judicial determinations for all potential constitutional persons.

CONCLUSION

The popular and scholarly focus on corporate constitutional rights has left the broader question of constitutional personhood largely unexplored. This Article addresses this broader issue, identifying and examining the Court's constitutional personhood jurisprudence across three controversial classes of claimants: corporations, aliens, and felons. This Article demonstrates that the Court's approach to the questions of whether, and when, a class of claimant is vested with constitutional personhood is not readily identifiable. Instead, both within and between claimant classes, the Court has vacillated in its approach to the personhood question, relying variously on the right's text, history, purpose, or some unstated conception of constitutional membership to grant or deny the personhood claim.

This Article has sought to highlight the previously unaddressed question of the desirability and possibility of a unified approach to constitutional personhood.[430] By illuminating and analyzing the question of constitutional personhood, this Article reveals that a unified approach to the personhood question is not only plausible but ulti-

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428 *See* Akhil Reed Amar, Heller*,* HLR*, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 165–68, (2008) (examining the Court's interpretations of the Second Amendment's terms "people" and "militia"); Gulasekaram, *supra* note 52, at 1521 (analyzing the Court's limited interpretation of the rights-holding class in *Heller* and concluding that there is no sustainable basis to limit the Second Amendment as the Court did).

429 *See, e.g.*, Stone, supra note 67; STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000) (discussing the legal rights of animals); Houlgate, *supra* note 194, at 92–94; Rivard*, supra* note 19, at 1429.

430 *See supra* Part IV.

mately essential for constitutional legitimacy.[431] Consequently, this Article proposes a unified, functional framework to determine who or what is a constitutional person.[432] This functional framework draws on the various interpretive factors the Court has relied on across the case studies outlined in Part II and considers both the purpose of the right at issue, as well as whether vesting constitutional personhood in the claimant fits with that purpose.[433] In outlining this preliminary framework, this Article seeks to highlight the need for flexibility in answering difficult questions of constitutional personhood, while at the same time encouraging consistency and transparency across different classes of claimants.[434] Ultimately, these insights add a new and important dimension to the ongoing discussions about constitutional personhood and the growing body of jurisprudence concerning constitutional rights.

431 *See supra* Part IV.

432 *See supra* Part IV.B.

433 *See supra* Part IV.B.

434 *See supra* Part IV.C.