The Supreme Court’s subversion of the constitutional process .pdf

Wm. Dennis Huber
The Supreme Court’s Subversion of the Constitutional Process and the Creation of Persons ex nihilo

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I. Introduction

We hold these truths to be self-evident, that all corporations are created equal, that they are endowed by their incorporators with certain unalienable rights, that among these are perpetual life, liberty and the pursuit of profits. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the shareholders.... that these united corporations are, and of right ought to be free and independent

For over 150 years the Supreme Court has answered the question “is a corporation a ‘person’\textsuperscript{1} or a citizen recognized in the Constitution” in the affirmative. Amazingly, the Supreme Court has answered this question affirmatively many times without ever having conducted a critical linguistic analysis and exegesis of the meaning of “person” in the Constitution as a whole.\textsuperscript{2}

The Supreme Court has answered this question in the affirmative by disregarding, twisting, and distorting the basic rules of English grammar and syntax and that the Court has consistently ignored its own canons of constitutional construction and interpretation.\textsuperscript{3}

In this article I demonstrate that the Court’s ruling that corporations are persons and citizens subverted the most fundamental constitutional process—that of amending the Constitution.

\textsuperscript{1} “Person” is set in quotes throughout this article to identify it as a specific term used in the Constitution in order to differentiate it from the word person which has a broader meaning in general language.

\textsuperscript{2} Wm. Dennis Huber. Law, language, and corporatehood: corporations and the U.S. Constitution. INT'L J. LAW, LANGUAGE & DISCOURSE. (2017, Forthcoming).

\textsuperscript{3} Id.
In this article I consider only the definitions of “person” and citizen found in the Constitution. While 200 plus years have proven there are many things in the Constitution that require referencing historical and other extrinsic documents and evidence to understand the meaning or intent of a particular word or phrase, “person” is not one of them.

I have previously firmly established through a comprehensive linguistic analysis and exegesis of the Constitution as a whole that “person” in the Constitution refers exclusively to natural persons and admits to no other interpretation when the Constitution as a whole is considered. This article builds on that principle and further establishes that the Supreme Court ruling that corporations are persons and citizens is a subversion first of the constitutional process reserved exclusively to the American people, namely, that of creating persons by amending the Constitution, and second a usurpation of the power of Congress to create citizens.

The rest of this article is organized as follows. First, I examine the process of how states are created in the Constitution as a foundation for analyzing how persons are created in the Constitution. Second, I build on the foundation of creating states by analyzing the constitutional process for creating persons and

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4 *Id.* In the various rulings in which the Supreme Court held that corporations are persons and citizens it did so by considering historical documents external to the Constitution on the basis of selected articles or amendments and what it considered the purpose of the amendment, never by an analysis “person” in the Constitution as a whole. Zoe Robinson. *Constitutional personhood*, 84 GEO. WASH. L. REV. 605 (2016).
citizens. This is followed by an examination of the process of amending the Constitution.

Fourth, I review the Supreme Court’s rulings declaring corporations to be persons and citizens. Next, I show that the Supreme Court ruling that corporations are persons and citizens is unconstitutional. Conclusions follow.

In this article I do not discuss the pros and cons of extending constitutional rights to corporations. Rather, I take the unique approach in arguing that by ruling that corporations are persons and citizens the Supreme Court has subverted the most basic constitutional process—amending the Constitution itself—in violation of Art. V.⁵

By declaring a corporation a citizen, the Supreme Court usurped the power of Congress to determine who, other than a person naturally born in the United States, may be a citizen pursuant to the exclusive power given to Congress under Art. I, § 8.⁶ By declaring a corporation a “person” the Supreme Court created persons ex nihilo⁷ and arrogated to itself the power to decide who can be a

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⁵ “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.” U.S. CONST art. V.

⁶ “The Congress shall have Power To…To establish an uniform Rule of Naturalization…” U.S. CONST art. I, § 8.

⁷ Ex nihilo is Latin meaning “out of nothing.” It is often used in a theological sense to describe the creation of the universe.
“person” – a right reserved exclusively to the American people under the Tenth Amendment and exercised by the people in adopting the Fourteenth Amendment.

Two things should be noted at the outset. First, this article does not argue for or against a constitutional amendment making, or not making, a corporation a “person.” Such arguments are beyond the scope of this article. This article focuses solely on the process of amending the Constitution and the Supreme Court’s subversion of that process.

Second, the Supreme Court has used various theories of the corporation to justify its rulings that corporations are persons. This article is not concerned with particular theories of corporations. The particular theories of corporations relied on by the Court to justify its rulings that corporations are persons and citizens are of no consequence and have no impact on the result. Regardless of the analytical framework in which corporations are placed, the end result is the same – the Court ruled that corporations are persons. It is the end result that is the subject of this article.

Finally, some of this article is adapted and condensed from Wm. Dennis Huber Law, language, and corporatehood: corporations and the U.S. Constitution, International Journal of Law, Language & Discourse. (2017, Forthcoming), with permission.

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II. The Constitution – State, Person, and Citizen.

It would be an error to say that the Supreme Court has never conducted an analysis of “person” in the Constitution. It has. But while the Supreme Court has analyzed whether a corporation is a “person” or citizen in the Constitution, it arrived at its conclusion that a corporation is a “person” in the Constitution on a piecemeal basis. That is, rather than conducting a critical linguistic analysis and exegesis of the meaning of “person” in the Constitution as a whole the Court first determined the purpose of a specific amendment (or article) in question and concluded that the purpose of the amendment would be served by declaring a corporation to be a “person” or a citizen.

Among the few things the Constitution refers to by name, and the most important, are “state” and “person” (along with their derivatives such as “states,” “persons,” and “people”). Indeed, the title of the Constitution is “Constitution of the United States,” and the Preamble begins “We the People of the United States.”

Although this article focuses on “person” the creation of “person” in the Constitution, it is necessary first to understand the meaning of “state” and the

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9 Most, but not all, questions concerning whether a corporation is a “person” in the Constitution arose under specific amendments. A few early cases arose under Art. III, § 2 concerning jurisdiction.

10 “The Court suggests that “a corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment's purposes are furthered…” Carl J. Mayer. Personalizing the impersonal: corporations and the bill of rights, 41 HASTINGS CONST. L.Q. 577 (1990); “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.” Zoe Robinson, supra note 4.
process of creating a state since “person,” as well as “citizen,” are inextricably
bound to the meaning and process of creating a “state.” This will provide the
foundation for understanding the creation of “person” in the Constitution. The
importance of “state” and its relation to citizen will be seen in that states are
expressly prohibited from creating citizens\(^1\) since that power is delegated to the
United States, specifically to Congress, not to the judicial or executive branches.\(^2\)

The state is the fundamental unit of the United States, and person is the
fundamental unit of the state.\(^3\) Yet, the Constitution does not define either “state”
or “person” or their derivatives. With the entire emphases in the Constitution on
“state” and “person,” it must be concluded that the omission of the definitions of
the most important terms in the Constitution was not accidental.\(^4\)

It is important to understand the meaning and process of creating a “state”
because, as discussed infra, the process for creating a state is explicitly defined in

\(^1\) Since Art. X specifies that “The powers not delegated to the United States by the Constitution,
nor prohibited by it to the States, are reserved to the States respectively, or to the people,” Amend.
XIV states that “All persons born or naturalized in the United States and subject to the
jurisdiction thereof, are citizens of the United States and of the State wherein they reside”
(emphasis added). Since Art. I, § 8 delegates to Congress the exclusive power “To establish an
uniform Rule of Naturalization,” states are effectively prohibited from creating citizens. See Dred
Scott v. Sandford, 60 US 393 (1857)
\(^2\) U.S. Const. art. X.
\(^3\) While it could be said that “citizen” is the fundamental unit of the state, “person” is broader than
citizen since a natural person may or may not be a citizen depending on whether a foreign born
person has been naturalized. Citizens have greater rights, e.g., the right to vote, but non-citizen
persons have rights such as the right to be secure in their persons and against unreasonable
searches and seizures. Furthermore, it is the number of persons, not citizens, who are counted for
the number of representatives and apportioned taxes. U.S. Const. art. I, § 3.
\(^4\) “[T]he men who framed this declaration perfectly understood the meaning of the language they
used, and how it would be understood by others” Dred Scott v. Sandford, supra note 11.
the Constitution. The creation of a new state and its admission to the Union does not require a constitutional amendment. The creation of a new state must follow a process that is defined in the Constitution and is clearly understood. It has occurred 37 times since the adoption of the Constitution.

Likewise, the creation of a citizen does not require a constitutional amendment but is provided for in the Constitution. The Constitution delegates the exclusive power to create a citizen to Congress. By explicitly delegating to Congress the exclusive power to create citizens, the Constitution prohibits both the executive and judicial branches from creating citizens. An attempt by either branch to create citizens is a violation of the separation of powers.

The creation of a “person” does not, however, have a constitutional process and is not delegated to any of the three branches specified in the Constitution. Therefore, the creation of a person is so extraordinary that, as discussed infra, the only time a “person” was created required an amendment to the Constitution by the American people. In fact, although the Constitution delegates to Congress the exclusive power to create citizens of foreign-born persons through a uniform Rule of Naturalization, creating citizens of persons who were born in the United States, but who were not eligible to be naturalized

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15 U.S. Const. art. IV, § 3.  
17 Id. Naturalization is not defined but is understood as the process of becoming a citizen of the United States.
pursuant to a uniform rule of naturalization established by Congress\(^\text{18}\) (i.e., slaves and descendants of slaves) also required the extraordinary step of amending the Constitution to make them citizens.

It is clear from the language of the Constitution that the creation of new states was expected as was the creation of citizens, while the creation of persons was not expected. The fact that no process was incorporated into the Constitution for the creation of a “person” as there was for “state” and “citizen” indicates that the creation of a “person” not only was not expected but that the meaning of “person” was already so well established in the Constitution that an amendment was required to create a “person.”

A. State

“State” or its plural is referred to over 200 times in the Constitution and Amendments. Yet, not only was the term “state” not defined explicitly for the states existing at the time the Constitution was adopted, it was not even defined for new states to be admitted in the future pursuant to Art. V\(^\text{19}\).

Although the meaning of “state” is not defined explicitly in the Constitution, it is defined implicitly. But with no explicit definition of “state” in the Constitution the meaning of “state” is neither questionable nor debatable. The framers of the Constitution and Bill of Rights, and the drafters of all subsequent

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\(^{18}\) Dred Scott, supra note 11.

\(^{19}\) “New States may be admitted by the Congress into this Union…” U.S. CONST. art. IV, § 3.
Amendments, knew and understood what “state” meant and expected that everyone who read the Constitution and its amendments would know what “state” meant, at least insofar as it is used in the Constitution as evidenced by the process specified in Art. V. “State” simply did not need to be explicitly defined in order to be understood. 20

The meaning of “state” and the creation of a new state are of the utmost importance because, unless expressly forbidden by the Constitution, only states are given the constitutional authority to determine who has the right to vote. For example, states may not deny the right to vote to women or to persons eighteen years old. 21 Since determining who has a right to vote is a power not delegated to the United States, that power is reserved to the states. 22

The power to determine who is a citizen of the United States is delegated to the United States. Specifically, the Constitution determines that one is a citizen through birth 23 and delegates to Congress the exclusive power to determine who is a citizen through the naturalization process. 24 Therefore the power to determine

20 Dred Scott, supra note 11.
21 “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 sex.” U.S. Constitution, Amendments XIX. “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. Const. amend. XXV.
22 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const., amend. X.
23 “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States” U.S. Const., amend. XIV.
24 U.S. Const. art. V, § 8, cl. 4.
who is a citizen of the United States is a power not reserved to the states. Therefore, no act by a state can create a citizen of the United States.\textsuperscript{25}

The closest definition of the term “state” in the Constitution is that states were originally colonies, at least the original 13 states. This is confirmed by the Declaration of Independence that states, “these united colonies are…free and independent states.”\textsuperscript{26} That is, following the dissolution of the political bonds which connected the people with one another (i.e., the people of the colonies with the people of England), the united colonies should be free and independent states, i.e., the United States.\textsuperscript{27}

Following the War of Independence the colonies did, of course, become free and independent states. The transformation from colony to state fills multiple volumes of American history and is beyond the scope of this paper. However, for the purpose of understanding the meaning of “state,” and ultimately “person,” in the Constitution, a very brief historical note is necessary.

Colonies were created by charters from the European powers which granted to them certain rights and imposed certain duties. Some colonies that were originally chartered by certain European powers subsequently became colonies of other European powers, with England eventually obtaining sole

\textsuperscript{25} When a new state is admitted to the Union its citizens automatically become citizens of the United States.
\textsuperscript{26} \textit{The Declaration of Independence} para.3 (U.S. 1776).
\textsuperscript{27} \textit{Id.}
control over the thirteen colonies as reflected in the Declaration of Independence.28 In becoming “Free and Independent States,” and upon the ratification of the Constitution, the citizens of the colonies became citizens of the United States.

Art. IV, § 3 of the Constitution begins, “New States may be admitted by the Congress into this Union...”29 As the Constitution fails to define states other than as the then existing colonies, it also fails to define what makes a new state a new state. For example, after the purchase of the Louisiana territory in 1803 Louisiana became the first new state in 1812 following an act of Congress in 1811 that empowered the people of the territory of Orleans to form a Constitution and state government, which was in turn followed by an act of Congress formally admitting Louisiana to the United States.30 The creation of the state of Louisiana was thus accomplished by complying with the constitutionally mandated process for creating new states specified in Art. V and therefore creating citizens of the United States.

The purpose of the foregoing discussion is to show that the creation of new states must follow a constitutionally determined process. In like manner, the

28 “[T]hese United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown...” THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).
29 U.S. Const. art. IV, § 3.
creation of citizens must follow the constitutionally determined process specified in Art. I, § 8.

B. Person and Citizen

As with “state,” “person” is never explicitly defined in the Constitution. But we can conclude that the framers of the Constitution considered that neither “person” nor “people” needed to be defined in the Constitution any more than they believed that “state” needed to be defined.31 Otherwise they obviously would have done so.

In discussing the creation of persons in this section only the articles and amendments pertaining to the creation of persons and citizens are examined.32

Art. I, § 2 states that the number of representatives and the amount of direct taxes to be apportioned is a function of the respective numbers of the population of the several States which may be included within the Union, anticipating the admission of additional states to the Union, but only counting “three fifths of all other Persons,”33 i.e., slaves. The importance of this clause will be seen in Art. V and the Fourteenth Amendment, infra.

“Person” and its plural, “persons” are mentioned three times in Art. I, § 9.

“The Migration or Importation of such Persons as any of the States now existing

31 Dred Scot. supra note 11.
32 For a more in-depth analysis of “person” and citizen in the Constitution as a whole, see Huber, supra note 2.
33 U.S. Const. art. I, § 2., cl. 3.
shall think proper to admit, shall not be prohibited by the Congress... Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person” 34 The importance of the Section will be seen in the Thirteenth and Fourteenth Amendments.

Art. IV deals with persons charged with crimes who flee to another state 35 and the return of escaped slaves to their owners. 36 The particular language used—“escaping into another [state]”—obviously is limited to slaves. Only non-slaves can flee from one state to another upon being charged with treason, felony, or other crime. An escaped slave must be delivered up without having been accused of treason, felony, or other crime thus indicating that slaves were not citizens of the United States subject to constitutional protection, which becomes important in the adoption of the Fourteenth Amendment.

Amendments IX and X both expand and limit the powers of the states. Amendment IX states “The enumeration in the Constitution, of

34 “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. Const. art. I, § 9, cl. 1. This clause was instrumental in the infamous Dred Scott decision, discussed infra.
35 “A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.” U.S. Const. art. IV, § 1.
36 “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. Const. art. IV, § 2, cl. 2.
certain rights, shall not be construed to deny or disparage others [i.e., other rights] retained by the people,”37 while Amendment X states “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”38

Amendments IX and X expand the powers of the states by granting to them all powers not delegated to the United States. At the same time, they limit the powers of the states by prohibiting the states from exercising any power delegated to the United States.

One of the powers delegated to the United States, specifically Congress, is the power to create citizens.39 The power to create persons, however, is not delegated to the United States and is therefore reserved to the American people, a power the people exercised in adopting the Fourteenth Amendment.

Of the utmost importance is the fact that a power delegated to Congress is the exclusive power to create citizens through a uniform Rule of Naturalization. Therefore, states are constitutionally prohibited from creating citizens.40

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37 “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.
38 U.S. CONST. amend. X.
39 “The Congress shall have Power…To establish an uniform Rule of Naturalization…” U.S. CONST. art. I, § 8, cl. 4
40 Dred Scott supra note 11.
At this juncture it is necessary to make a detour to consider one of the most infamous cases decided by the Supreme Court, known simply as the *Dred Scott* case.\textsuperscript{41}

The plaintiff, Dred Scott, a slave, brought an action in a Circuit Court of the United States to assert a title of freedom to himself and his family. The Supreme Court ruled that it had no jurisdiction to hear the case because Scott was not a citizen of the United States because he was a slave and could not therefore avail himself of the right to sue in federal court.\textsuperscript{42}

As distasteful, as repugnant, as abhorrent as the *Dred Scott* decision was, especially compared to modern standards, the Court’s reasoning was impeccable and its logic irrefutable, at least insofar as “citizen” and the Constitution is concerned, as the following demonstrates.

The question before the Court was this: “can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?”\textsuperscript{43}

\textsuperscript{41} *Id.*

\textsuperscript{42} Art. III, § 2, limits the jurisdiction of the judicial Power of the United States to citizens.

\textsuperscript{43} *Dred Scott*, supra note 11.
The Court acknowledged that Indians, who were not citizens, could be naturalized as foreign-born persons in accordance with a uniform Rule of Naturalization should Congress enact such a rule. Slaves, like Indians, were also not citizens but unlike Indians, they could not be naturalized. Congress could not enact a uniform Rule of Naturalization to naturalize slaves because the Constitution prohibited slaves from being naturalized because they were not foreign-born persons.\textsuperscript{44} They were property.

Regarding “citizen” and the Constitution, the Court said:

we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States…Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States…The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and \textit{this right is evidently exclusive}, and has always been held by this court to be so…this power granted to Congress to establish an uniform rule of naturalization is, by the well understood meaning of the word, confined to persons born in a foreign country, under a foreign Government…no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.\textsuperscript{45}

\textsuperscript{44} The importation of such slaves could be prohibited after 1808. The descendants of slaves born after 1808 were therefore not foreign-born. U.S. CONST. art. I, § 9, cl. 1.

\textsuperscript{45} Dred Scott, \textit{supra} note 11, (emphasis added).
That the Court’s reasoning was impeccable and its logic irrefutable is proven by the history during the following ten years. That is, it took a war and a constitutional amendment to undo the *Dred Scott* decision and make slaves citizens. Congress could not make slaves citizens through a uniform Rule of Naturalization. The Court could not make slaves citizens by a ruling since that power was delegated exclusively to Congress and not the judiciary. Only the American people could make slaves citizens by a constitutional amendment which they did in 1868.

The Thirteenth Amendment abolished slavery and involuntary servitude, neither of which is defined but both of which were clearly understood without the need for a definition. Slavery and involuntary servitude relate back to Art. I, §§ 2 and 9.

The Fourteenth Amendment necessarily refers back to the Thirteenth Amendment which ended slavery and involuntary servitude. Were slaves and

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46 It is historically noteworthy that the Dred Scott case is the only time the Supreme Court engaged in a critical linguistic analysis and exegesis of “citizen” in the Constitution as a whole (but not of person).

47 “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII.

48 “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.” U.S. CONST. art. I, § 2. “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. CONST. art. I, § 9.
their descendants citizens following the Thirteenth Amendment? No. They were still not even persons. They were still only three-fifths of a person. Enter the Fourteenth Amendment.

Another proof that the *Dred Scott* court had rightly interpreted the Constitutional prohibition that states are prohibited from creating citizens, and that a uniform Rule of Naturalization applied only to foreign born persons is that following the Civil War there would have been no need to adopt the Fourteenth Amendment. The Confederate states would merely have been occupied by the Union states. Indeed, had a constitutional amendment not been required to create citizens and persons, citizens and persons could have simply been created by the Emancipation Proclamation. 49 As it was, a constitutional amendment was required to create persons and citizens.

Adopted in 1868, the Fourteenth Amendment is the most important amendment for the creation of “person” in the Constitution. The Fourteenth Amendment has one purpose—to create citizens out of non-citizens by creating a person out of three-fifths of a person: “All persons born or naturalized in the United States are citizens of the United States and of the State wherein they reside.”50 Not only did the Thirteenth Amendment prohibit the involuntary

49 The Emancipation Proclamation, issued by President Lincoln on January 1, 1863 declared simply that “all persons held as slaves are, and henceforward shall be free.” [https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation](https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation).

importation of slaves, under the Fourteenth Amendment those who had previously been involuntarily imported and descendants of the involuntarily imported were no longer three-fifths of a person and no longer non-citizens. It took a four-year long war and the deaths of hundreds of thousands of citizens and soldiers to create persons and citizens by constitutional amendment.

The Fourteenth Amendment is the most important amendment for an understanding of the constitutional process of creating persons and citizen for three reasons. The first reason is that it is a clear and explicit definition of citizen: “All persons born or naturalized in the United States…are citizens.”

As a result of the definition, the second and equally important reason for understanding “person” and citizen in the Constitution as a whole is that not only is this the creation of “person” but it is also the definition of “person” as explained below.

First, it is a mathematical identity: A is B and therefore B is A. If “all persons born in the United States or naturalized in the United States are citizens,” then the converse must necessarily also be true. As a constitutional declaration, since only a person who is either born in the United States or foreign-born and naturalized in the United States, is a

51 As a mathematical expression it can be written as A ≡ B, therefore B ≡ A. An example is Theodor Geisel is Dr. Seuss, therefore Dr. Seuss is Theodor Geisel.
citizen, a citizen is only one who is either born in the United States or foreign-born and naturalized in the United States.

A citizen, as a person who is either born in the United States or foreign-born and naturalized in the United States, is therefore limited to those who are actually born, i.e., natural persons. Neither the Congress, nor the President, nor the Supreme Court can create a natural born person and neither the President, nor the Supreme Court can create a citizen. Only Congress can create a citizen through a uniform Rule of Naturalization pursuant to and required by Art. I, § 8. Those who are eligible to avail themselves of the uniform Rule of Naturalization must be, and may only be, foreign-born persons.

Second, the Fourteenth Amendment is exclusive. Since “All persons born or naturalized in the United States…are citizens,” excluded from citizenship by the Fourteenth Amendment are persons who are neither born in the United States nor foreign born and naturalized in the United States. Only natural persons can be either born in the United States or foreign-born and naturalized in the United States.

The third reason the Fourteenth Amendment is the most important amendment for understanding the creation of “person” in the Constitution

52 “The Congress shall have Power To…To establish an uniform Rule of Naturalization…” U.S. CONST. art. I, § 8.
is that it defines “person” and citizen for the entire Constitution. To the extent that the meaning of citizen or “person” might have been considered by the Supreme Court to be ambiguous in prior articles or amendments, the Fourteenth Amendment clarifies their meaning beyond doubt, a principle of interpretation that was corroborated by the Supreme Court as far back as 1845.

In United States v. Freeman, the Supreme Court stated with respect to statutory interpretation that

The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing anyone of them, and it is an established rule of law that all acts in pari materia are to be taken together, as if they were one law…If a thing contained in a subsequent statute be within the reason of a former statute, It shall be taken to be within the meaning of that statute…and if it can be gathered from a subsequent statute in pari materia, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute…

It is untenable to think that the principle of in pari materia applies only to statutes and not to the Constitution. If it can be understood from a subsequent amendment what meaning is attached to the words of a preceding amendment or article, that is equivalent to a declaration in pari materia of its meaning in the preceding amendment or article. Applying the “correct rule of interpretation” to

53 United States v. Freeman 44 U.S. 556 (1845).
54 Id., at 564-565, citations omitted.
constitutional amendments and its use of “person” and citizen, therefore, all former references to “person” and citizen must be interpreted in conformity with the Fourteenth Amendment. If “person” is limited to natural persons in one amendment, the Fourteenth, then it must be limited to natural persons in all preceding amendments and articles and by extension all subsequent amendments.

The conclusion of the above discussion is that “person” and “citizen” refer exclusively to natural persons\(^{55}\) and that the creation of persons and citizens may be accomplished only by an act of Congress in accordance with a uniform Rule of Naturalization, or by a constitutional amendment adopted by the American people.

We can now turn our attention to the rulings of the Supreme Court concerning corporations as persons and citizens in the Constitution.

III. The Supreme Court’s Creation of Persons \textit{ex nihilo}.

In the beginning the Supreme Court said, “Let there be persons,” and there were persons. And the Supreme Court saw the persons that it was good. And the Supreme Court called the persons corporations. And it was the first day.

And the Supreme Court said, “Let there be citizens,” and it was so. And the Supreme Court called the citizens corporations. And it was the second day.

In this section, Supreme Court opinions that have created persons are reviewed. A sample is sufficient to demonstrate that by creating persons the Supreme Court has subverted the constitutional process for amending the

\(^{55}\) For further, see Wm. Dennis Huber, supra note 2.
Constitution for creating persons and usurped the power of Congress to create citizens.

Ultimately, that “a corporation is a person is well entrenched in American law.”56 Gregory A. Mark remarks that from the Second World War on the legal nature of corporations ceased to be controversial or even of interest.57 Lawyers today know only that a corporation is considered a person.58 John Dewey, in Humpty Dumpty like fashion, dismissed the debate of corporate personhood as pointless because “person signifies what law makes it signify.”59

John Searle60 maintains that corporations are created ex nihilo; i.e., they are created out of thin air since no pre-existing object is operated on to transform the object into a corporation. In like manner, the Supreme Court created persons (and citizens) ex nihilo by declaring that corporations are persons and citizens.

57 “The personification of the corporation was once of central concern to American jurisprudence. Diverse political and economic views, phrased in the language of legal discourse, were essential to discussions of the corporation's design, form, function, and operation. After the Second World War, however, the place of the corporation in law had ceased to be controversial, and both theoreticians and practitioners concerned themselves instead with organizational theory and economic analysis of corporate behavior. The corporation as a legal institution ceased to be of interest. The historical and jurisprudential debates which had consumed the energies of some of the leading legal scholars were relegated to the introductory pages of corporation law textbooks, if they were discussed at all. As a result, a modern lawyer knows only that a corporation is considered a legal person but finds that terminology devoid of content.” Gregory A. Mark. The personification of the business corporation in American law. 54 U. Chi. L. Rev. 1441. (1987).
58 Id.
59 John Dewey. The historic background of corporate legal personality. 35 Yale L. J. 6 (1926), 655-673. Humpty Dumpty is a character in the book Through the Looking Glass, a sequel to Alice in Wonderland. In a conversation with Alice, Mr. Dumpty tells Alice, “When I use a word, it means just what I choose it to mean—neither more nor less.”
County of Santa Clara v. Southern Pac. R. Co. People of The State of California,\textsuperscript{61} is generally considered to be “the watershed…for the personification of the corporation in its own right and can be considered the beginning of corporate personhood as we understand it today.”\textsuperscript{62}

Arising in 1886, the circumstances surrounding the ruling would be amusing if the ramifications were not so serious. It could be said that the Court’s analysis was sloppy, ill-conceived, and illogical. Except there was no analysis.

Chief Justice Waite is reported to have said prior to argument that, “The court 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 opinion that it does.”\textsuperscript{63} Sadly, the official ruling in \textit{Santa Clara} that corporations are persons under the Fourteenth Amendment did not actually appear in the case, but only in the headnotes prepared by the court reporter.\textsuperscript{64}

But \textit{Santa Clara} is not the first as is commonly believed. Two decades prior to \textit{Santa Clara} the Supreme Court had created citizens by the same method.

\textsuperscript{61} County of Santa Clara v. Southern Pac. R. Co. People of The State of California, 118 U.S. 394 (1886).
\textsuperscript{63} \textit{Id}. County of Santa Clara has been treated as precedent for 150 years.
In *Louisville, Cincinnati & Charleston R. Co. v. Letson* 65 the Court held that “*a corporation created by a state…seems to us to be a person*, though an artificial one…” 66

One may argue which is worse, that “it seems to us” that a corporation is a person, or a mere, “we are of the opinion it [a corporation] is [a person].” Such terse and unenlightened comments are both unworthy of the Supreme Court on so weighty a subject as corporations as persons. But both help the Court avoid a critical linguistic analysis and exegesis of “person” in the Constitution and ignore the results that such an analysis would reveal—the Court had no constitutional authority to amend the Constitution by creating persons.

*Letson* was decided prior to the adoption of the Fourteenth Amendment and thus the Court did not have available the Fourteenth Amendment’s definitions of “person” and citizen to guide its analysis. It reasoning, what little there was, that “a corporation created by a state…seems to us to be a person,” may therefore be forgiven.

But the Court did have at its disposal the Fourteenth Amendment’s definitions of “person” and citizen in *County of Santa Clara v. Southern Pac. R. Co. People of The State of California*. 67 Nevertheless, the Court refused, or at

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65 Louisville, Cincinnati & Charleston R. Co. v. Letson. 43 U.S. 497, 558, (1844), emphasis added
66 Id.
least neglected, to follow those definitions. It held, again without analysis, that the Fourteenth Amendment applies to corporations as persons.

Twenty years after *Santa Clara* the Court stated, still with no analysis of “person,” in the Constitution that “It is settled that -- A railroad corporation is a person within the meaning of the Fourteenth Amendment.”

IV. The Supreme Court’s Subversion of the Constitutional Process.

Scott Gerber notes well that “The Constitution provides a formal mechanism for change, and that mechanism is not judicial fiat.” As recognized in *Marbury v. Madison*, the principles of the Constitution are fundamental, permanent, and unchangeable absent a formal amendment.

The requirements to amend the Constitution are specified with great particularity in Art. V. First, Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to the Constitution. Second, the proposed amendment must be ratified by the Legislatures of three fourths of the several States. There simply is no method to amend the Constitution other than that specified in Art. V.

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70 Marbury v. Madison, 5 U.S. 137 (1803); Scott Gerber, *supra* note 69.
71 U.S. CONST. art. V
72 U.S. CONST. art. V. Art. V admits to other methods, such as a constitutional convention, but the first is presented here for ease of argument.
As proven by the adoption of the Fourteenth Amendment, creating a “person” requires a constitutional amendment. To create a citizen outside of a uniform Rule of Naturalization also requires a constitutional amendment. The Constitutional amendment process is explicit and its terms are final.

Since the Constitution is explicit and unambiguous in the process required to amend the Constitution, the Supreme Court has subverted the constitutional amendment process by creating persons and citizens. Since the Constitution is unambiguous in determining the process required to create a “person” and a citizen, the Supreme Court is without constitutional authority to decide who is a “person” and citizen and such rulings are themselves unconstitutional.

The last time a “person” was created was through the amendment process. It took 79 years from the adoption of the Constitution in 1789 to the adoption of the Fourteenth Amendment in 1868 to create a person. Yet, by a wave of the magical judicial wand the Supreme Court subverted the strict requirements of the constitutional amendment process for creating persons and citizens, first in *Louisville*, and later with more force in 1886 in *Santa Clara* and its progeny by creating *ex nihilo*, a “person” and a citizen.

Furthermore, as corporations are creatures of state law, to declare a corporation a citizen grants to states a power delegated exclusively to Congress,

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73 U.S. Const. amend. XIV.
74 Louisville, Cincinnati & Charleston R. Co. v. Letson. 43 U.S. 497, 558, (1844), supra note 65.
viz, to decide who is or is not a citizen by a uniform Rule of Naturalization. Yet by Supreme Court rulings, when a corporation is created under state law, whether by special charter or by merely filing a form, the corporation automatically becomes a citizen.76

V. Conclusion

The Supreme Court has subverted the constitutional process for creating “persons” and citizens by declaring corporations to be both. It has usurped the authority of Congress to create citizens by creating citizens by judicial decree. The Supreme Court has violated the constitutional amendment process for creating persons.

This is not just an esoteric, academic exercise. Creating persons and citizens has real consequences since “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”77 The ability to control what these “artificial beings”78 now made

76 Naturalization of foreign-born persons must be according to a uniform rule established by Congress. Since the incorporation laws of the states vary from state to state there is no uniform rule that applies to the creation of corporations as citizens.
77 U.S. CONST. amend. XIV.
78 “A corporation is an artificial being” Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, (1819).
into persons and citizens are permitted or required to do or not do is therefore severely limited.

While it is not likely to happen anytime soon, since the Supreme Court has ruled that corporations are person, it could easily ignore precedent and the principle of *state decisis* and rule they are not persons.

The ultimate question thus becomes, and one that must be and can only be answered not by the Supreme Court, but by the American people, is whether artificial persons should be made a part of the Constitution through the formal amendment process.