SUPREME COURT USAGE & THE MAKING OF AN 'IS'

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SINCE THE FOUNDING ERA, the phrase "United States" has undergone a well-known shift from plural to singular noun. The turning point in that grammatical shift is commonly thought to be the Civil War. In a memorable passage from Ken Burns's documentary film *The Civil War*, the writer Shelby Foote says:

> Before the war it was said "the United States are." Grammatically it was spoken that way and thought of as a collection of independent states. And after the war it was always "the United States is," as we say today without being self-conscious at all. And that sums up what the war accomplished. It made us an "is."[1]

James M. McPherson, in his Pulitzer Prize-winning history of the Civil War, describes the change similarly: "Before 1861 the two words 'United States' were rendered as a plural noun: 'the United States *are* a republic.' The war marked a transition of the United

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[1] THE CIVIL WAR (Florentine Films, 1990).

States to a singular noun."[2] Legal scholars have adopted this account of the change. William Michael Treanor, for example, has written: "'United States' was often matched with a plural verb in 1787 and consistently matched with a singular verb after the Civil War."[3] Whatever disputes there may be about the significance of the change,[4] there seems to be little disagreement about its timing.

This survey examines use of the phrases "United States is" and "United States are" in opinions of the United States Supreme Court from 1790 to 1919. It demonstrates that the familiar claim about the timing of the change is not accurate. In the Supreme Court, the plural usage – "United States are" – did not end with the Civil War. Although patterns of usage changed abruptly in the 1860s, justices continued to use the plural form through the end of the nineteenth century. Indeed, the plural usage was the predominant usage in the 1870s, 1880s, and 1890s. Only in the beginning of the twentieth century did the singular usage achieve preeminence and the plural usage disappear almost entirely.

The written record of Supreme Court opinions stretches back to the early 1790s. Published case reports from the nineteenth century are not always accurate accounts of the justices' words,[5] especially

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[2] JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 859 (1988).

[3] William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 489 (2007); *see also*, *e.g.*, Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 831 (2000) (citing Foote's description of the shift from plural to singular).

[4] *See* Treanor, *supra* note 3, at 489 n.3 (disagreeing with commentators who "assign[] significance to the fact that the 'United States' takes a plural verb in the Constitution").

[5] *See*, *e.g.*, MORRIS L. COHEN & SHARON HAMBY O'CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 7, 20-22, 47-48, 84-85 (1995) (noting that Alexander Dallas, for example, did not include all cases in his reports, and there were sometimes discrepancies between Dallas's reports and manuscript opinions; that sometimes court reporters did not read the justices' handwriting properly; and that prior to the practice of delivering always written opinions, reporters would inevitably err in their transcription of court

prior to 1834, when the practice of filing manuscript opinions with the court clerk began.[6] Nevertheless, the *United States Reports* are the best single body of evidence of the justices' usages over the long run, and besides, the work of the Court is easy to analyze, thanks to Westlaw. A justice writing a sentence whose subject was "United States" would have to choose whether to treat that noun as singular or plural. Assuming the justices intended to use what was regarded as contemporaneously correct grammar, their choices over time can shed light on broader trends in usage.

The methodology for this survey was as follows: For each decade in the survey period, I ran word searches for "United States is" and "United States are" through the Westlaw Supreme Court database. To eliminate false positives, I reviewed the search results to identify opinions where (1) "United States" was a subject and (2) the associated verb was "is" (or "are," depending on the search). To isolate only usage choices made by the author, anything appearing only in a quotation from a statute, a court rule, or another case was ignored, as was anything in West headnotes. Each opinion in a particular case was treated as a separate work, and thus a case could have more than one entry if more than one justice wrote or if a justice used both "is" and "are" in the same opinion. I collected data on usage in the opinions of justices, the arguments of counsel before the court, and supplementary material prepared by the reporter of decisions (*e.g.*, a syllabus). Except where noted, the focus of the presentation here is on usage in opinions of the justices; data on usage in other portions of the case reports appear in the Appendix.

Figure 1 summarizes the data collected on usage in Supreme Court opinions. The number of opinions that used the singular form and plural form appear, by decade, in the table at the bottom of Figure 1. The table also shows those same results as percentages of

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proceedings); CHARLES FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION & REUNION 1864-88, PART ONE 71-78 (1971) (recounting the sometimes troubled reportership of John Wallace during the 1860s and 1870s).

[6] COHEN & O'CONNOR, *supra* note 5, at 4.

Figure 1
Usage of "United States" with "is" and "are" in Supreme Court Opinions, 1790-1919

	1790s	1800s	1810s	1820s	1830s	1840s	1850s	1860s	1870s	1880s	1890s	1900s	1910s
Total "Is" opinions	1	0	0	1	0	0	2	9	15	16	16	29	26
Is %	20%	0%	0%	14%	0%	0%	20%	53%	29%	31%	34%	94%	100%
Total "Are" opinions	4	5	6	6	11	8	8	8	36	35	31	2	0
Are %	80%	100%	100%	86%	100%	100%	80%	47%	71%	69%	66%	6%	0%

all opinions with either usage from that decade. Those percentages are plotted at the top of Figure 1 on the next page. The darker line represents the percentages of cases with "United States is," and the lighter line the percentages with "United States are." The vertical shaded area indicates the Civil War period.

The data show that the plural usage was overwhelming from the late eighteenth century through the middle of the nineteenth. The notion of the United States as a plural noun was so powerful in the mind of Chief Justice Roger B. Taney, for example, that in an 1851 opinion he used the construction "the government of the United States are."[7]

The Civil War does not appear to have altered the Supreme Court's usage in a fashion as dramatic as Foote and McPherson have suggested. In the 1860s, the usage pattern shifts away from "are" and toward "is," and it is during that decade that usage of "is" first predominates. But the change is not wholesale – "are" and "is" were used roughly equally in the 1860s. In the following decade, Court usage reverted back to antebellum patterns. For the remainder of the nineteenth century, plural usage predominated in Supreme Court opinions, though by slowly declining margins.

Usage was quite clearly unsettled in the latter part of the nineteenth century. One of the most striking demonstrations of this is Justice Samuel F. Miller's majority opinion in *United States v. Lee*.[8] Justice Miller managed to compose a sentence with both usages: "[T]he doctrine [of sovereign immunity], if not absolutely limited to cases in which the *United States are* made defendants by name, is not permitted to interfere with the judicial enforcement of the estab-

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[7] United States v. McCullagh, 54 U.S. 216, 217 (1851) ("The jurisdiction conferred in either case is that of a court of equity only; and the titles which the court is authorized to confirm, are inchoate and imperfect ones, which upon principles of equity, *the government of the United States are* bound to confirm and make perfect.") (emphasis added). Because "United States" is not the subject but instead modifies the subject ("the government"), this usage was not counted as an "are" use. The same phrase also appears in counsel arguments in *Mitchel v. United States*, 40 U.S. 52, 58 (1841).

[8] 106 U.S. 196 (1882).

lished rights of plaintiffs when the *United States is* not a defendant or a necessary party to the suit."[9]

By the beginning of the twentieth century, the plural verb form had fallen out of use almost entirely. The last "are" use in the study period is from an opinion by Justice David J. Brewer handed down on May 13, 1901.[10] Since that time only one justice – James C. McReynolds – has used the "are" construction. He did it twice: once in 1920 and again in 1935.[11]

The data from the 1790s through the 1910s thus demonstrate the familiar move away from the plural and toward the singular form of "United States," but the timing of the move is not consistent with the familiar account.

The pattern of usage in non-opinion material in the case reports – chiefly the arguments of counsel before the court and material prepared by the court reporter, such as syllabi – gives some hint that the Supreme Court's postbellum usage might have been out of step with usage elsewhere. Non-opinion usage, which roughly followed the pattern of usage in opinions through the 1850s, did not match the court's pattern in the 1860s and 1870s. In the 1860s, while the court used "are" and "is" roughly equally, the lawyers before the court stuck with "are," using it 71% of the time, and the court reporter mostly used "is," using it 80% of the time. An even bigger difference appears in the 1870s. The justices went back to

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[9] Id. at 207-08 (emphasis added). Perhaps the grammatical confusion in the case arose from the facts: George Washington Custis Lee, son of the Confederate General Robert E. Lee, was attempting to eject the federal government from what, prior to the Civil War, had been his family's home in Arlington, Virginia and is now Arlington National Cemetery.

[10] Barker v. Harvey, 181 U.S. 481, 492 (1901) ("therefore the United States are bound to protect their interests").

[11] Wilber Nat. Bank v. United States, 294 U.S. 120, 123 (1935) (McReynolds, J.) ("[T]he *United States are* engaged in the life and disability insurance business"); St. Louis I.M. & S. Ry. Co. v. United States, 251 U.S. 198, 208-09 (1920) (McReynolds, J., dissenting) ("[T]he United States are engaged in handling the mails for pay.").

"are," using it 71% of the time. But by then lawyers were using it only 46% of the time, and the reporter only 24% of the time. Reporting practice changed in the 1870s, and thereafter few arguments were included in the reports and the other reporter-prepared material was drastically reduced, so there is no way to tell from the *United States Reports* whether the patterns of usage by the reporter and lawyers appearing before the Supreme Court shifted back toward "are" later in the nineteenth century.[12]

The use of "are" on the Supreme Court itself, however, was widespread; it was not just the function of a few grammatical Rebels. Fifteen justices served on the Supreme Court for at least part of the 1890s.[13] Ten of them appear in my data,[14] and each of those ten used "United States are" at least once during the decade. Only one justice, the first Justice John Marshall Harlan, used "is" more frequently than "are" in the 1890s, although four additional justices used "is" at least once. The other five justices used "are" exclusively. Geography does not help explain this pattern. Looking at the geographic latitudes of the justices' residences prior to appointment, there is no meaningful difference between the mean latitude for the exclusive "are" users and the mean for those who dabbled in "is."[15]

To see whether the Civil War might have influenced usage in a different way, I isolated the usage by justices who were appointed

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[12] John William Wallace, who prepared the reports from 1863 to 1874 and was the last of the nominative court reporters, was accused by the American Law Review of "unexecusable prolixity in his statements of facts and his reports of arguments." *Wallace's Reports*, 1 AM. L. REV. 229, 231 (1867) (*quoted in* COHEN & O'CONNOR, *supra* note 5, at 110).

[13] *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 409 (4th ed. 2007).

[14] This percentage (67%) is slightly lower than my overall rate of inclusion for justices. There were 70 justices on the Supreme Court between 1790 and 1919, EPSTEIN, *supra* note 13, at 267-69, and 52 of them (74%) wrote an opinion using either "United States is" or "United States are."

[15] The latitudes were taken from Benjamin C. Zuraw & Robert A. James, *The Westerly Supreme Court*, 11 GREEN BAG 2D 341 (2008). The mean latitude for the exclusive "are" users is in fact further north, but the difference was very small and not statistically significant.

by President Abraham Lincoln. In fact, during the period when at least one justice appointed by Lincoln was on the Court, the five Lincoln-appointed justices used "are" slightly more frequently than did the other justices.[16]

Casual observation suggests that the Supreme Court's plural usage in the late nineteenth century was consistent with usage in legal scholarship and intellectual commentary at the time. For example, around the turn of the century, Yale law professor Simeon E. Baldwin frequently used "United States are" in his academic writing.[17] Likewise, the grammatical issue was still timely enough in 1901 for former Secretary of State John W. Foster to address the question in detail in the *New York Times*. After surveying the usage by various public figures, Foster concluded that, "since the civil war the tendency has been toward [singular] use; and that to-day among public and professional men it has become the prevailing practice."[18] As lexicographer Benjamin Zimmer has recently noted, Foster's article suggests that "four decades after the Civil War, the plural vs. singular question was still open to debate."[19] The data presented here on

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[16] Lincoln justices used "are" 62% of the time, and others used it 57% of the time, but the difference is not statistically significant. A justice appointed by Lincoln was on the court from 1862 (the year Justice Noah Swayne joined the Court) to 1890, when Justice Samuel Freeman left. Like the differences by region discussed above, the differences between Lincoln appointees and others are meaninglessly slight.

[17] *E.g.*, Simeon E. Baldwin, *The Mission of Gov. Taft to the Vatican*, 12 YALE L. J. 1, 7 (1902) ("so far as the United States are concerned"); Simeon E. Baldwin, *Absolute Power: An American Institution*, 7 YALE L. J. 1, 2 (1897) ("The United States are the offspring of a long past age."); Simeon E. Baldwin, *The Responsibility of the United States, Internationally, the Acts of the States*, 5 YALE L. J. 161, 162 (1896) ("the United States are under no other obligation"). Present-day plural use is uncommon. *But see, e.g.,* David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1, 11 (2000) ("It was not long, however, before the United States were in trouble in Florida again.").

[18] John W. Foster, *Are or Is?; Whether a Plural or a Singular Verb Goes With the Words United States*, N.Y. TIMES, May 4, 1901, at BR 7.

[19] Benjamin Zimmer, *Life in These, Uh, This United States*, Language Log Blog, November 24, 2005 (available at http://itre.cis.upenn.edu/~myl/languagelog/archives/002663.html).

Supreme Court usage confirm that conclusion. Only in the 1900s did the plural usage fade entirely from Supreme Court opinions. This comports with a contemporaneous account from a commentator in the *Yale Law Journal*, who observed in 1900 that "the plural use of 'United States' is gradually passing, under stress of the ever-increasing sense of unity in the national life."[20]

This survey demonstrates that the plural usage of "United States" did not fall into disuse on the Supreme Court until more than a generation after the Battle of Appomattox Courthouse. Whatever innumerable and profound changes the Civil War worked on the United States, it did not, grammatically speaking, make us an "is."

APPENDIX

Table of Uses of "United States is" and "United States are" in different portions of U.S. Supreme Court Cases, by decade, 1780-1919

Decade		*1790-99*	*1800-09*	*1810-19*	*1820-29*	*1830-39*	*1840-49*	*1850-59*
opinions	"Is"	1	0	0	1	0	0	2
	"Are"	4	5	6	6	11	8	8
arguments	"Is"	0	1	0	2	2	3	3
	"Are"	2	9	15	11	10	13	8
syllabi	"Is"	0	0	0	0	0	0	0
	"Are"	0	2	4	0	3	5	1
Total	"Is"	1	1	0	3	2	3	5
	"Are"	6	16	25	17	24	26	17
Decade		*1860-69*	*1870-78*	*1880-89*	*1890-99*	*1900-09*	*1910-19*	
opinions	"Is"	9	15	16	16	29	26	
	"Are"	8	36	35	31	2	0	
arguments	"Is"	2	8	0	0	0	1	
	"Are"	5	7	0	0	0	0	
syllabi	"Is"	4	13	0	0	1	0	
	"Are"	1	4	0	3	0	0	
Total	"Is"	15	36	16	16	30	27	
	"Are"	14	47	35	34	2	0	

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[20] Paul R. Shipman, *Webster on the Territories*, 9 YALE L. J. 185, 189 (1900).