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"Shall Not be Construed": Reversal of Supreme Court Decisions by Constitutional Amendment

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"SHALL NOT BE CONSTRUED" REVERSAL OF SUPREME COURT DECISIONS BY CONSTITUTIONAL AMENDMENT

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Abstract

This Article considers the way in which small changes of wording can signal large changes of thought in the United States Constitution (Constitution). Drawing upon examples found in the Eleventh and Sixteenth Amendments, and in the Reconstruction Amendments, the Article shows that there are two ways to reverse a U.S. Supreme Court decision by constitutional amendment. The first type of amendment may reverse the decision by instructing the Court on the proper construction of a particular provision, as in the case of the Eleventh Amendment. The second means involves reversing the decision by altering the constitutional provision in question, rather than its construction, as by the Sixteenth Amendment.

Changed wording can even reflect changes in the understanding of the federal union. In the Constitution, as it was reported out of the Constitutional Convention in Philadelphia on September 17, 1787, the name of the new nation was consistently construed as a plural noun. In Article I: "No Title of Nobility shall be granted by the United States; and no Person holding any Office of Profit or Trust under *them*, shall, without the Consent of the Congress, accept of any Present, Emolument, Office, or Title, of any Kind whatever, from any King, Prince, or foreign State."[1] In Article II: "The President shall, at stated Times, receive for his Services a Compensation, which shall neither be encreased [sic] nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of *them*."[2] And in Article III: "Treason against the United States, shall consist only in levying war against *them*, or in adhering to *their* Enemies, giving them Aid and Comfort."[3]

The "United States" was construed as a plural noun through 1865 and the ratification of the Thirteenth Amendment: "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*."[4] But three years later in the first sentence of the Fourteenth Amendment, the plural number was carefully

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1. U.S. CONST. art. I, § 9.
2. U.S. CONST. art. II, § 1.
3. U.S. CONST. art. III, § 3.
4. U.S. CONST. amend. XIII, §1.

avoided: "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."[5] And, in contrast to the wording of the Treason Clause in Article III, the plural number is also avoided in the third section of the Fourteenth Amendment: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort *to the enemies thereof*."[6] Something similar occurs in the Fifteenth Amendment. Rather than referring to actions by "the United States or any of them," as in the text of Article II, the 1870 Amendment provides: "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."[7]

In no succeeding amendment is the United States construed as a plural noun. The wording of the Eighteenth Amendment in 1919 repeats the usage of the Fourteenth, rather than that of the Thirteenth Amendment, when referring to the territories of the United States: "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory *subject to the jurisdiction thereof* for beverage purposes is hereby prohibited."[8] Today, of course, United States is "a noun plural in number but usually singular in construction."[9] The grammatical shift reflects the reality created by the Union victory in the Civil War and the consolidation of national power.

Proper construction, in a different sense, is addressed by the Eleventh Amendment to the Constitution, adopted in 1795: "The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

5. U.S. CONST. amend. XIV, § 1.

6. U.S. CONST. amend. XIV, § 3. It is also noteworthy that, in contrast to the wording of Article II, the Amendment refers to persons holding office under "the United States, or under any State," rather than under "the United States, or any of them"; and, in contrast to the wording of Article III, it refers to "insurrection or rebellion against the same," rather than insurrection or rebellion "against them."

7. U.S. CONST. amend. XV, § 1.

8. U.S. CONST. amend. XVIII, § 1.

9. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2501 ("*n pl but usu sing in constr*") (1971).

State."[10] As is well known, the Amendment was adopted to overturn the result in *Chisholm v. Georgia*.[11] In *Chisholm*, a citizen of South Carolina sued Georgia in *assumpsit* to recover on a debt.[12] Georgia denied the Court's jurisdiction and refused to appear.[13] At issue was the constitutional grant of federal jurisdiction over suits against states in Article III: "The judicial power shall extend … to Controversies … between two or more States; *between a State and Citizens of another State*; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and Foreign States, Citizens or Subjects."[14]

Of the five Justices who heard the case,[15] four upheld the jurisdiction of the Court and ruled in favor of Chisholm, each explaining in detail the reasons for his decision. All four—who had either signed the Constitution at Philadelphia (Justices John Blair and James Wilson) or had supported the original text at their state ratifying conventions (Chief Justice John Jay and Justice William Cushing), or both (Justices Blair and Wilson)—construed the constitutional grant of jurisdiction over suits "between a State and Citizens of another State" to cover Chisholm's suit against Georgia. Only one Justice dissented. While acknowledging that the wording of Article III could cover the suit, Justice James Iredell pointed out that the constitutional grant of federal jurisdiction does not specify what types of actions against states are included.[16] Since the common law did not recognize actions in *assumpsit* against the Crown,[17] and the

10. Confusion exists about the correct date of the adoption of the Eleventh Amendment. The difficulty stems from the fact that President John Adams proclaimed the ratification of the Amendment on January 8, 1798, and for most of the Amendment's long history that has been the date given for its effectiveness, but the Amendment had actually attained the necessary number of state ratifications by February 7, 1795, during the presidency of George Washington. Two annotated editions of the Constitution, both published in 2009, illustrate the point. SETH LIPSKY, THE CITIZEN'S CONSTITUTION: AN ANNOTATED GUIDE 245 (2009) (Eleventh Amendment ratified 1798); JACK N. RAKOVE, THE ANNOTATED U.S. CONSTITUTION & DECLARATION OF INDEPENDENCE 245 (2009) (Eleventh Amendment ratified 1795).

11. 2 U.S. (2 Dall.) 419, 419 (1793). *See* JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 12–20 (1987).

12. *Chisholm*, 2 U.S. (2 Dall.) at 420.

13. *Id.* at 469.

14. U.S. CONST. art. III, § 2.

15. Although the Judiciary Act of 1789 provided for six Justices of the Supreme Court, the sixth seat was vacant at the time of the *Chisholm* case. On the development of the modern expectation that multi-member appellate courts require an odd number of Justices, see John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?* 19 CONST. COMMENT. 681, 681 (2002).

16. *Chisholm*, 2 U.S. (2 Dall.) at 427.

17. Actions to recover property from the Crown were instituted not by the common law action of *assumpsit* but by petition of right, a proceeding in equity which adjudicated "as a matter of grace, though not upon compulsion." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS

Judiciary Act of 1789 did not specifically provide for such actions against a state, he would have dismissed the suit. In the last paragraph of his twenty-one-page opinion he ventured what he called an "extra-judicial" doubt about whether even Congress could permit a "compulsive suit against a State for the recovery of money."[18]

Over the years since the adoption of the Eleventh Amendment, much has been made of the phrase "shall not be construed." The Supreme Court has interpreted the phrase to mean that the Amendment was intended to restore the original understanding of the grant of federal jurisdiction rather than to alter or amend the text.[19] In consequence, a state can sue a citizen of another state in federal court but, but the state cannot be sued in federal court—at least, not without its consent.[20] More significantly, the phrase has been used as evidence to support the conclusion that the states did not surrender their sovereign immunity by ratifying the Constitution. [21]

Not generally noticed is that correction of a mistaken construction, whether of a constitution or a statute, is characteristic of a decision by an appellate court overturning a decision of a lower court. Had the Constitution provided for appeal from a decision of the Supreme Court to the Congress, a decision overturning *Chisholm* would have included instructions concerning the correct construction of the constitutional grant of jurisdiction. Appeal from a court to the legislature would not have surprised eighteenth-century Americans, who had been familiar with the English practice of appeal to the House of Lords.[22] Considered in this light, the Eleventh Amendment resembles the reversal of a judicial decision, rather than the amendment of a text. Furthermore, like a reversal, the Amendment has retrospective effect, applying to suits like *Chisholm* that had been "commenced" before its adoption and that could not be "prosecuted" thereafter.[23]

OF ENGLAND *236 (David Lemmings ed., Oxford Univ. Press 2016) (1765)*; see also* 3 *id.* *256–57 (1768).

18. *Chisholm*, 2 U.S. (2 Dall.) at 449–50 (Iredell, J., dissenting). For more on Iredell's dissent, see John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793)*, 73 N.C. L. REV. 255 (1994).

19. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 18 (1890); Orth, *supra* note 11 at 22.

20. How a defendant state can consent to suit in federal court when the Eleventh Amendment expressly states that federal judicial power "shall not be construed to extend" to such a suit has never been adequately explained. *See* Orth, *supra* note 11 at 123–24.

21. Orth, *supra* note 11 at 151.

22. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 454–55 (1768). New York until 1846 allowed appeal from the state Supreme Court to the Court for the Correction of Errors, composed of the entire New York Senate, augmented by the state's Chancellor and the Justices of the state Supreme Court. N.Y. CONST. of 1777, § 32; N.Y. CONST. of 1821, art. V, § 1.

23. U.S. CONST. AMEND. XI.

A century after the decision in *Chisholm,* the Supreme Court decided another case that was subsequently overturned by constitutional amendment.[24] In 1895, in *Pollock v. Farmers' Loan & Tr. Co.*,[25] the Court held the recently adopted federal income tax unconstitutional.[26] Finding a tax on incomes to be a direct tax, the Court held that it had to be apportioned among the states as required by the Direct Tax Clause of the Constitution: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."[27] In response, the Sixteenth Amendment, adopted in 1913, provided express constitutional authorization for a tax on incomes: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[28]

Originally argued before eight Justices, *Pollock* resulted in an equal division on one aspect of the case and required a rehearing before all nine Justices for a final decision.[29] The Justice who had been unable to attend the first hearing attended the second and voted in favor of the constitutionality of the disputed aspect of the tax, but an unidentified Justice changed his vote at the second hearing, causing the entire tax to fail.[30] Ever since, scholarly discussion concerning *Pollock* has focused on the unfortunate procedural history of the case[31] and on the Court's questionable construction of the constitutional phrase "direct tax."[32] Progressive circles denounced the Court for its adoption of laissez-faire

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24. During the hundred years after *Chisholm*, the Fourteenth Amendment, which granted citizenship to all persons born or naturalized in the United States, overturned one aspect of the Court's decision in the Dred Scott case. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party) *superseded by constitutional amendment*. U.S. CONST. amend. XIV.

25. 157 U.S. 429, 158 U.S. 601 (1895). Because the invalidation of the federal income tax required two Supreme Court decisions, *Pollock* is sometimes referred to as the Income Tax Cases (in the plural) although it was in fact only one case.

26. 158 U.S. at 637.

27. U.S. CONST. art. I, § 9, cl. 4. *See also id*. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

28. U.S. CONST. AMEND. XVI.

29. The Court divided the law into three parts: a tax on income from state and municipal bonds, a tax on income from real property, and a tax on income from personal property. 157 U.S. at 586. At the first hearing, the Court held the tax on income from state and municipal bonds and the tax on income from real property unconstitutional but was unable to decide on the constitutionality of the tax on income from personal property. *Id*.

30. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 54 (1936).

31. Charles Evans Hughes later described *Pollock*—along with the Dred Scott Case, 60 U.S. 393 (1857), and the Legal Tender Cases, 75 U.S. 603 (1870), 79 U.S. 457 (1871), both of which also had awkward procedural histories—as one of the Court's three "self-inflicted wounds." HUGHES, supra note 27 at 50–54.

32. ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 at 165–66 (1960).

constitutionalism, a view shared by one of the dissenting Justices, who declared from the bench that "[t]he practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage . . . ."[33]

Otherwise unnoticed is that the Sixteenth Amendment did not attempt to correct the Court's construction of the Direct Tax Clause.[34] Rather than provide that the Direct Tax Clause "*shall not be construed* to extend to taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," the Amendment in effect conceded the correctness of the Court's construction of the text as originally adopted.[35] By changing the text rather than the construction of the text, the Sixteenth Amendment defers construction to the Court, relying on it to construe the new text in accordance with its plain meaning.

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As demonstrated by the Eleventh and Sixteenth Amendments, there are two ways to reverse a Supreme Court decision by constitutional amendment. The amendment may reverse the decision by instructing the Court on the proper construction of the particular provision, as by the Eleventh Amendment. Or the amendment may reverse the decision by altering the constitutional provision in question, rather than its construction, as by the Sixteenth Amendment.[36] Although the Eleventh Amendment corrected the Court's construction of the Constitution, it "[p]erhaps . . . inadvertently foreshadowed the means by which the law of the Constitution was largely to be developed over the ensuing centuries—judicial . . . construction, subject only to occasional correction by formal amendment."[37]

Over the hundred years that separated the Eleventh and the Sixteenth Amendments, it came to be accepted that instructing the Court concerning the proper construction of the Constitution was out of keeping with the American concept of separation of powers.[38] Constructions of

33. 158 U.S. at 685 (Harlan, J., dissenting). *See generally* Paul, supra note 23.

34. U.S. CONST. AMEND. XVI.

35. Id.

36. U.S. CONST. AMEND. XVI (emphasis added).

37. *See* John V. Orth et al., *No Amendment? No Problem: Judges, "Informal Amendment," and the Evolution of Constitutional Meaning in the Federal Democracies of Australia, Canada, India, and the United States*, 48 PEPPERDINE L. REV. 341, 365 (2021).

38. Instructions as to proper construction did not cease altogether. The Seventeenth Amendment (1913), providing for the direct election of Senators, included an instruction on the effect of the Amendment on Senators chosen before its adoption: "This amendment *shall not be so construed* as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution." U.S. CONST. AMEND. XVII (emphasis added). By contrast, the Twenty-Second Amendment (1951), limiting presidential terms, provides simply that "this article shall

the text are for the Court. Mistaken constructions are corrected by alterations of the text. Just as the change from construing the United States as a plural noun to construing it as a singular noun signaled a new understanding of the nature of the Union, so the change in the language of amendment signaled a new understanding of the proper roles of the Court and constitutional amendments.

not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this article becomes operative from holding the office of President, or acting as President, during the . . . remainder of such term," rather than providing that the amendment shall not be construed to apply to such persons. U.S. CONST. AMEND. XXII, § 1.