

A Fragment on *Shall* and *May*

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NEPOMMUCK: Can you shew me any English woman who speaks English as it should be spoken? Only foreigners who have been taught to speak it speak it well.

— Bernard Shaw, *Pygmalion*¹

Recently Professors Randy E. Barnett and Sotirios Barber, two commentators with very different views with regard to how the United States Constitution should be interpreted, have expressed the view that “words have not, for the most part, changed meaning [since 1787]. Most of the meanings [of the words of the Constitution] have not been changed.”² We suggest that the American English of the founding generation was a more capacious language than its modern successor and that which came into being after Noah Webster’s publication of his grade school primer, *A Grammatical Institute of the English Language*, in 1783, and his *Dictionary*

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1. GEORGE BERNARD SHAW, *PYGMALION: A ROMANCE IN FIVE ACTS*, act 3, at 74 (2009) (using an archaic spelling for “shew”).

2. Lawrence B. Solum, Legal Theory Blog, Blogging from APSA: The New Originalism, <http://tinyurl.com/2gxvdpdt> (Sept. 3, 2007, 4:57 AM); see also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 178-79* (2004) (taking the position that the use of *shall* in the Sweeping Clause (and elsewhere in the Constitution) creates a mandatory obligation which is “presumptively enforceable by the other branches of government, including the courts”); cf. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 236 (2005) (“In the Article III vesting clause and roster, ‘shall’ and ‘all’ meant what they said.”); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1181 (1995) (“Article III demands that the trial for ‘all crimes shall be by jury’ and ‘shall’ and ‘all’ meant just that to the Framers.”). *But cf.* Jack Tsen-Ta Lee, *The Text Through Time*, 31 STATUTE L. REV. (forthcoming Sept. 2010) (manuscript at 2) (“[A]s time passes, ‘drift’ or ‘slippage’ in meaning may occur. A word that had a certain meaning in the past may come to be used in new situations.” (footnote omitted)), available at <http://tinyurl.com/3643nsl>.

in 1806.³ As we explain more fully below, where a word once had multiple meanings, but only one variant is now remembered and understood, we may be seriously mistaken when we ascribe near certainty to our understanding of how a constitutional term was used.

For example, legal discussions frequently focus on the alleged distinction between the use of (the mandatory) *shall* and (the permissive) *may* in the Constitution of 1787. But this distinction may very well be a victim of presentism.⁴ Considering how much current scholarship and judicial authority rides on this distinction, it would be helpful if any of its many proponents would cite some authority in its support⁵ or would otherwise give some indication that they had considered counter-authority.⁶

3. Compare NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 351 (Philip B. Gove ed., Bounty Books 1970) (1806) (defining *will* as “to desire, command, direct, purpose”), with 2 NOAH WEBSTER, A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE 16-17, 115-16 (New York, L. Nichols 1804) (noting *shall* is distinguished from *will* by person). The first, second, and third parts of Webster’s *Grammatical Institute* were originally published in 1783, by Hudson and Goodwin of Hartford, Connecticut, and in 1784, and 1785, respectively. A generation later Hudson and Goodwin were embroiled in litigation. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (Johnson, J.) (holding that the federal circuit courts could not exercise a common law criminal jurisdiction pursuant to an indictment for a libel on the President and Congress of the United States).

4. See JOHN ALGEO, BRITISH OR AMERICAN ENGLISH? A HANDBOOK OF WORD AND GRAMMAR PATTERNS (2006); PAM PETERS, THE CAMBRIDGE GUIDE TO ENGLISH USAGE (2004); cf. Howard Darmstadter, *Shall? Will? Who Makes the Rules?*, BUS. L. TODAY, May-June 1998, at 8; Reed Dickerson, Note & Query, *Choosing Between Shall and Must in Legal Drafting*, 1 SCRIBES J. LEGAL WRITING 144 (1990); Robert Eagleson & Michele Asprey, Current Topics, *Must We Continue with “Shall”?*, 63 AUSTL. L.J. 75 (1989); Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEGAL WRITING 61 (1992); Anthony Watson-Brown, *Do We Still Need ‘Shall’?*, 28 HONG KONG L.J. 29 (1998); Anthony Watson-Brown, *Shall Revisited*, 1995 QUEENSL. L. SOC’Y J. 263. But see J.M. Bennett, *In Defence of Shall*, 63 AUSTL. L.J. 522 (1989). But compare Robert D. Eagleson, Reply, *We Must Abandon Shall*, 63 AUSTL. L.J. 726 (1989), with J.M. Bennett, Reply, *Final Observations on the Use of Shall*, 64 AUSTL. L.J. 168 (1990).

5. Compare 14 DEBATES IN THE HOUSE OF REPRESENTATIVES/THIRD SESSION: DECEMBER 1790-MARCH 1791, at 327 (William Charles diGiacomantonio et al. eds., 1995) (“Mr. MADISON” noted that the Constitution “said that Congress *may* appoint the time; but [the Constitution] does not positively declare that they *shall*.” (reproducing the *General Advertiser*)), and *Philadelphia*, Jan. 25. *House of Representatives of the United States. Friday, January 14*, GENERAL ADVERTISER AND POLITICAL, COMMERCIAL AND LITERARY JOURNAL, Jan. 25, 1791, at 3 (same), with *infra* note 15 (postulating Scottish influence as significant on Madison’s formative education and later views). See also Lopez v. Davis, 531 U.S. 230, 241 (2001) (Ginsburg, J.) (“Congress’ use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section.”); *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-60 (1895) (White, J.) (same); cf. YULE KIM, CONG. RESEARCH SERV., ORDER CODE NO. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 9 (2008) (“Use of ‘shall’ and ‘may’ in statutes also mirrors common usage; ordinarily ‘shall’ is mandatory and ‘may’ is permissive. . . . Occasionally, however, context will trump ordinary meaning.” (collecting post-eighteenth century judicial authority in omitted footnotes)), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf>; 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 57:2, at 6-9 (7th ed. 2008) (“The question of whether a statutory provision has a mandatory or directory character is one of statutory construction. . . . ‘Shall’ is considered presumptively mandatory unless there is something in the context or the character of the legislation which requires it to be looked at differently.”).

As we understand it, prevailing eighteenth century American usage, distinguished *shall* (indicating futurity) from *will* (indicating the emphatic tense), as it is still spoken in Anglo-English. Whereas today, we Americans conjugate *will* as “I will, you will, he will,” and *shall* as “I shall, you shall, he shall,” in the eighteenth century, the dominant American usage (following southern⁷ English standards) was *will* (I will, you shall, he shall) and *shall* (I shall, you will, he will).⁸ In other words, the Constitution’s use of

6. Such authority is legion. See BLACK’S LAW DICTIONARY 1499 (9th ed. 2009) (defining *shall* as “4. Will (as a future tense verb) <the corporation shall then have a period of 30 days to object>”); *infra* note 8 (collecting authorities); cf. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939-41 (2d ed. 1995) (discussing generally “words of authority” and noting that “shall” is inherently ambiguous); Kenneth A. Adams, *The New Rules of Drafting (Part Two)*, MICH. BAR J., Aug. 2002, at 40, 40 (“*Shall* has a tortured history that gave rise to exception-ridden rules about when *shall* conveys simple futurity and when it conveys compulsion.”); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 759-60 (1999) (“Are the words ‘shall be vested’ to be understood as a kind of prediction, or as a mandate? Is ‘shall’ here a future-tense verb or an imperative verb?”); Michele M. Asprey, *Shall Must Go*, 3 SCRIBES J. LEGAL WRITING 79, 82 (1992) (“The reason why it is difficult to replace *shall* with a word that has all these subtle meanings is that *shall* never did it in the first place.”); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1179 n.125 (1992) (“Another possible construction is that the word ‘shall’ in the Vesting Clauses of Articles II and III is a present tense ‘performative’ that acquires force from its self-proclaimed status in a constituting document.”); Peter M. Goodloe, *Simplification—A Federal Legislative Perspective*, 105 DICK. L. REV. 247, 254 (2001) (“The reason given is that ‘shall’ has dual functions. In addition to expressing the mandatory, it has the alternative construction of expressing the future tense.”); John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 118-19 (1995) (“The Emoluments Clause [also known as the Ineligibility Clause] refers to the act of appointment in the future tense, ‘shall . . . be appointed,’ while referring to increased emoluments in the future perfect tense, ‘shall have been increased.’”); Dru Stevenson, *Special Solicitude for State Standing*, Massachusetts v. EPA, 112 PENN. ST. L. REV. 1, 53 n.273 (2007) (“As if this were not confusing enough, ‘shall’ is also used in a future temporal sense, somewhat interchangeably with ‘will’”); Nick Horn, *A Dainty Dish to Set before the King: Plain Language and Legislation*, in Plain Language Ass’n Int’l Fourth Biennial Conference Proceedings (Sept. 27, 2002) (unpublished manuscript) (distinguishing *shall* from *must*), available at <http://tinyurl.com/2chbytk>.

7. See *infra* note 12 (describing southern English standards).

8. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 502 (1987) (describing “I shall, you will, he will” as “simple futurity” and “I will, you shall, he shall” as “determination, promise, or command,” and denominating this distinction as the “former[] . . . paradigm, which remains helpful in formal prose” (emphasis added)); cf. OXFORD ADVANCED LEARNER’S DICTIONARY (A.S. Hornby & Sally Wehmeier eds., 7th ed. 2008) (“In modern English the traditional difference between *shall* and *will* has almost disappeared, and *shall* is not used very much at all, especially in *North American English*.”), available at <http://tinyurl.com/2dmnmp>. Compare NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 747 (New York, S. Converse 3d ed. 1830) (noting that the meaning of *shall* or *shal* changes with person, “[b]ut [if it follows] after another verb, *shall*, in the *third person*, simply foretells”), available at <http://tinyurl.com/289whn7>, with U.S. CONST. art. II, § 1, cl. 6 (“[T]he Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer *shall* then act as President, and such Officer *shall* act accordingly, until the Disability be removed, or a President *shall* [mandatory or directory? imperative or mere futurity?] be elected.” (emphasis added)); compare 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 318 (London, J. Knapton et al. 1756) (defining “shall” as “ha[ving] no tenses but *shall* future”), with *id.* at 535 (defining “[t]o will” as “3. [t]o command; to direct”), available at <http://tinyurl.com/36uptd2>.

shall in the third person sometimes expresses the use of the verb *will*, as opposed to the modern American *shall*. Indeed, in the one clause of the Constitution using the first person, “will” is used, not “shall,” and certainly not “may”!

Before he enter on the Execution of his Office, he *shall* take the following Oath or Affirmation:—‘I do solemnly swear (or affirm) that I *will* faithfully execute the Office of President of the United States, and *will* to the best of my Ability, preserve, protect and defend the Constitution of the United States.’⁹

Scots-English and other Celtic forms of English generally invert the Anglo-English standard. As Sir Ernest Gowers explained, “[t]he story is a *very old one* of the drowning Scot who was misunderstood by English on-lookers and left to his fate because he cried, ‘I *will* drown and nobody *shall* save me’.”¹⁰ Gowers was not alone in this view.¹¹

We are not suggesting that the reader adopt or should adopt any form of prescriptivism with regard to usage.¹² Rather, we suggest that such

9. U.S. CONST. art. II, § 1, cl. 8 (emphasis added); *see also* An Act to Regulate the Time and Manner of Administering Certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789) (“That the oath or affirmation required by the sixth article of the Constitution of the United States, *shall* be administered in the form following, to wit: ‘I, A. B. do solemnly swear or affirm (as the case may be) that I *will* support the Constitution of the United States.’” (emphasis added)); *id.* § 5, 1 Stat. 23, 24 (using *shall* and *will* as used in Section 1 for the Article VI officers’ oaths, but here in regard to the separate oath taken by the Secretary of the Senate and Clerk of the House); JOHN WALLIS, GRAMMATICA LINGUAE ANGLICANAE (1653) (first popularizing, if not originating, the *shall-will* standard explained above); *cf.* THOMAS PYLES & JOHN ALGEO, THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE 205 (4th ed. 1993) (distinguishing *shall* from *will*); 4 J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 645 (2000) (“‘It is back,’ he said softly, ‘they *will* all have noticed it . . . and now, we *shall* see . . . now we *shall* know . . .’” (emphasis added) (reproducing ellipses in the original)); Gertrude Block, *Writing Tips: Differentiating ‘Shall’ and ‘Will’*, PENN. LAW., April 2001, at 68, 68 (“It is hard to believe that anyone would give lip service to the Wallis rule, let alone observe it. . . . But even prescriptive grammarians of th[e] [eighteenth century] could not recall the complicated distinctions of the Wallis rule, so they only *halfway* observed it.” (emphasis added)).

10. ERNEST GOWERS, THE COMPLETE PLAIN WORDS 160-61 (1954) (emphasis added).

11. *See, e.g.*, HENRY ALFORD, THE QUEEN’S ENGLISH: A MANUAL OF IDIOM AND USAGE 122 (London, George Bell & Sons 7th ed. 1888) (“I never knew an Englishman who misplaced ‘*shall*’ and ‘*will*’: I hardly ever have known an Irishman or a Scotchman who did not misplace them sometimes.”). Albeit, some comments along these lines seem to go too far. *Compare, e.g.*, SHAW, *supra* note 1, at 5 (stating in his *Preface to Pygmalion* that “[t]he English have no respect for their language, and will not teach their children to speak it”), with 1 JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 381 (London, Charles Dilly 1791) (“‘Much (said he,) may be made of a Scotchman, if he be *caught* young.’” (emphasis in the original) (quoting Dr. Johnson)).

12. We are not suggesting that traditional prescriptivist standards are within easy reach either. As the Fowlers explained more than a century ago:

SHALL AND WILL. It is unfortunate that the idiomatic use, while it comes by nature to *southern* Englishmen (who will find most of this section superfluous), is so complicated that those who are not to the manner born can hardly acquire it; and for them the section is in danger of being useless. In apology for the length of these remarks it must be said that the short and simple directions often given are worse than useless. The observant reader soon loses faith in them from their constant failure to take him right; and the unobservant is the victim of false security.

standards, as may have existed circa 1787 within the social circles that proposed and ratified the Constitution, may have been of import to them, and, for that reason, knowledge of those (long moribund) standards may be a useful tool with regard to determining original public meaning, at least to the extent that such standards and determinations remain possible. Regrettably, the writings of several prominent commentators suggest that such determinations no longer remain possible.¹³

Our position is that the dominant, but by no means universal, usage at the Federal Convention was Anglo-English.¹⁴ One of the two of us is of the opinion that Madison adopted Scots-English usage, and suspects he

HENRY WATSON FOWLER & FRANCIS GEORGE FOWLER, *THE KING'S ENGLISH* 133 (Oxford, Clarendon Press 2d ed. 1908) (emphasis added). It should be unnecessary to point out that the Fowlers' use of "manner born" is a pun, not an error.

13. See, e.g., Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 114-15 (1995) ("As a textual matter, each of these five formulations [in the Constitution] seemingly describes the same stations . . . the modifying terms 'of,' 'under,' and 'under the Authority of' [used in regard to the terms 'offices' and 'officers'] are essentially synonymous."); Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 160 (1995) ("The Constitution does not contemplate a weird [!] distinction between 'Officers of the United States' [as used in the Appointments Clause] and 'Officers of the Government of the United States' [as used in the Necessary and Proper Clause]."); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 754 n.73 (1993) ("The term 'votes' [in the Orders, Resolutions, and Votes Clause] apparently did not even have a specific historical meaning . . ."); cf., e.g., Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1720 n.72 (1988) ("Probably not much weight should be put on the term 'appointment' . . ."). Compare AMAR, *supra* note 2, at 172 ("Madison buttressed this argument [against legislative officer succession] by stressing Article II's slightly stilted syntax, which authorized Congress to declare 'what officer,' as opposed to 'which officer' . . ." (quoting Letter from James Madison to Edmund Pendleton (Feb. 21, 1792), in 14 THE PAPERS OF JAMES MADISON 235, 236 (Robert A. Rutland et al. eds., 1983))), with *Bowman v. Reeve*, (1721) 24 Eng. Rep. 259, 261 (Ch.) ("[T]hey must take what part they think fit in satisfaction of their debts . . ." (emphasis added)), 1 ROBERT BURNS, THE WORKS OF ROBERT BURNS 112 (Liverpool, M'Creery 1800) ("[A]nd who can chuse what book he shall read . . ." (emphasis added)), JOHN DICKINSON, AN ESSAY ON THE CONSTITUTIONAL POWER OF GREAT-BRITAIN OVER THE COLONIES IN AMERICA 391 n. (Philadelphia 1774) ("Every man's children being by nature as free as himself . . . may . . . choose what society they will join themselves to . . . [and] what commonwealth they will put themselves under . . ." (emphasis added) (quoting John Locke)), available at <http://tinyurl.com/23vkwph>, and 6 J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 271 (2005) ("'Magic?' [Tom Riddle] repeated in a whisper. 'That's right,' said [Albus] Dumbledore. 'It's . . . it's magic, what I can do?' [said Riddle] 'What is it that you can do?' [said Dumbledore]" (emphasis added)). Whether the Constitution's language was "stilted," as suggested by Professor Amar, depends on whether its original audience was more like Rowling's (and Dickinson's and the eighteenth century English Court of Chancery's) or more like Amar's *Stanford Law Review* audience. Cf. Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389 (2010) (taking a more linguistically exacting approach as suggested here).

14. See *supra* note 9 and accompanying text (quoting Article II, Section 1, Clause 8 and an act of the First Congress).

was under the influence of Scottish professors during his formative years at Princeton.¹⁵

15. See, e.g., 2 IRVING BRANT, *JAMES MADISON: THE NATIONALIST 1780-1787*, at 66 (1948) (noting that Dr. Witherspoon “started [Madison] on his studies of government and international law and pointed the way to his lifelong fidelity to freedom of conscience”); JAMES MADISON, *A BIOGRAPHY IN HIS OWN WORDS* 117 (Merrill D. Peterson ed., 1974) (describing Dr. John Witherspoon as “an impressive Scottish Presbyterian minister” and quoting Witherspoon as using a distinctly Scottish inflection); *id.* at 22 (explaining that Madison was under Witherspoon’s “guiding hand”); see also *id.* at 20 (noting that “Princeton,” actually the College of New Jersey, was, at the time of Madison’s studies, under “the ascendant intellectual spirit . . . of the Scottish Enlightenment”); *cf. id.* at 16 (explaining that “in 1762, the lad [James Madison] was sent to a celebrated school kept by Donald Robertson [who] had been educated in Scotland”).