

A Fragment on *Shall* and *May*

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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."¹ 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 post-Noah Webster's first dictionary and grade school primer, *A Grammatical Institute of the English Language*, first published in 1783.² 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. Considering how much current scholarship and judicial authority rides on this distinction, it would be helpful if any of its many proponents cited some authority in its support.³

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¹ Legal Theory Blog, Blogging from APSA: The New Originalism, <http://lsolum.typepad.com/legaltheory/2007/09/blogging-from-a.html> (Sept. 3, 2007).

² I NOAH WEBSTER, A GRAMMATICAL INSTITUTE OF THE ENGLISH LANGUAGE: COMPRISING AN EASY, CONCISE, AND SYSTEMATIC METHOD OF EDUCATION, DESIGNED FOR THE USE OF ENGLISH SCHOOLS IN AMERICA. (Hartford, Conn., Hudson & Goodwin 1783). Parts II and III were published in 1790 and 1792. A generation later Hudson & Goodwin were embroiled in litigation. See *U.S. v. Hudson and Goodwin*, 11 U.S. 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).

³ Compare *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, available in READEX ("MR. MADISON" noted that the Constitution "said that Congress *may* appoint the time; but [the Constitution] does not positively declare that they *shall*."), with XIV DEBATES IN THE HOUSE OF REPRESENTATIVES/THIRD SESSION: DECEMBER 1790-MARCH 1791, at 327 (William Charles diGiacomantonio et al. eds., 1995) (same), with *infra* 11 (postulating Scottish influence as significant on Madison's formative education and later views). But cf. BERNARD SHAW, PYGMALION: A ROMANCE IN FIVE ACTS, Act III at 75 (Penguin Books 1973) ("NEPOMMUCK: Can you shew [sic] me any English woman who speaks English as it should be spoken? Only foreigners who have been taught to speak it speak it well.").

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 southern⁴ English standards) was *will* (I *will*, you *shall*, he *shall*) and *shall* (I *shall*, you *will*, he *will*). In other words, the Constitution's use of *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.'⁵

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 onlookers and left to his fate because he cried, 'I *will* drown and nobody *shall* save me'."⁶ Gowers was not alone in this view.⁷

We are not suggesting that the reader adopt (or should adopt) any form of prescriptivism with regard to usage.⁸ Rather, we suggest that such standards, as may

⁴ See generally *infra* note 8 (describing southern English standards).

⁵ See, e.g., U.S. CONST. art. II, § 1, cl. 8 (emphasis added); see also, e.g., An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. 23-24, § 1 (June 1, 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.* at § 5 (using *shall* and *will* in the same fashion in regard to the separate oath taken by the Secretary of the Senate and Clerk of the House); cf. JOHN WALLIS, GRAMMATICA LINGUAE ANGLICANAE (1653) (first popularizing, if not originating, the *shall-will* standard explained above); 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) (ellipses in the original)).

⁶ ERNEST GOWERS, THE COMPLETE PLAIN WORDS 160-61 (1954) (emphasis added).

⁷ DEAN HENRY ALFORD, THE QUEEN'S ENGLISH (London, George Bell & Co. 1889) ("I never knew an Englishman who misplaced *shall* and *will*; I hardly ever have known an Irishman or Scotsman who did not misplace them sometimes.").

⁸ Of course, we are not suggesting that traditional prescriptivist standards are within easy reach either. As the Fowlers explained 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

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 useful tools 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.⁹

Our position is that the dominant, but by no means universal, usage at the Federal Convention was Anglo-English.¹⁰ One of the two of us is of the opinion that Madison adopted Scots-English usage, and suspects he was under the influence of Scottish professors during his formative years at Princeton.¹¹

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.

HENRY WATSON FOWLER & FRANCIS GEORGE FOWLER, *THE KING'S ENGLISH* (Oxford, Clarendon Press 2d ed. 1908), *appearing at* <http://www.bartleby.com/116/213.html> (last visited Dec. 1, 2007). It should be unnecessary to point out that the Fowlers' use of "manner born" is a pun, not an error.

⁹ *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 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 . . .").

¹⁰ *See supra* note 5 and accompanying text (quoting U.S. CONST. art. II, § 1, cl. 8 and roughly contemporaneous act of the First Federal Congress).

¹¹ *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"); *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").