Shall We Proceed? Ebbs, Flows, and Futility in the Debate over Words of Authority

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In September 2020, the Virginia Supreme Court republished what it described as modest changes to its rules of practice, the Rules of the Supreme Court of Virginia.[1] The changes, the court explained, were the product of a four-year study. They were not significant or substantive: they sought only to correct certain "potentially ambiguous" uses of the word *shall*. They had been circulated a year earlier and had prompted little comment or controversy.[2] And yet, after much "study and discussion," the court had decided to circulate them one more time.[3]

You can understand why the court wanted to check its work twice. *Shall* is one of the most controversial words in legal drafting — maybe even the most controversial. Writers have long struggled with its slippery meanings, fumbling between its mandatory, future, and even permissive senses. So if the court was having a hard time pinning it down, it was at least in good company.

Shall has a long history in our language. First recorded in the 700s, it traces back to Germanic and Old English words meaning

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1 Memorandum from the Supreme Court of Virginia to the Bar and Bench of Virginia (Sept. 3, 2020) ["September Memorandum"], http://www.vacourts.gov/courts/scv/call_for_comment/notice_request_for_comment_shall.pdf.

2 *See* Memorandum from the Advisory Committee on the Rules of Court to the Bar and Bench of Virginia (Apr. 12, 2019) ["April Memorandum"], https://www.vsb.org/docs/call_comments_shall.pdf.

3 *See* September Memorandum.

"to owe."[4] But it lost that sense over the centuries, and today, it has largely disappeared from ordinary speech.[5] When it does show up, it appears almost exclusively in set interrogatory phrases — and even then with pantomimed formality ("Shall we dance?").[6]

The word does, however, still thrive in one place: legal prose. Lawyers sprinkle it through their documents like modern-day Johnny Appleseeds planting the next crop of legalese.[7] *Shall* technically has two meanings: one a marker of future action, the other a "modal auxiliary" sense indicating requirement or obligation. When lawyers call the word into service, they usually want the second sense. If you asked these lawyers, most would describe *shall* as something like a term of art. They'd say that it denotes a mandatory action — it creates a duty or prohibition.

The problem is, they don't always use it that way. Bryan Garner, the leading lexicographer of legal — and, perhaps, American — English, has shown that lawyers use *shall* in more than a dozen different senses.[8] They use it for everything from describing a future event to defining terms. Sometimes they even use it to create a permissive option or entitlement (e.g., "If buyer objects to the goods, he shall submit his objection within 30 days.").[9]

The main objection to these vagaries is that they violate the Golden Rule of Legal Drafting: Thou shalt restrict each word to one sense.[10] The reason for that rule is as old as it is obvious.

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4 *See Shall*, Oxford English Dictionary Online, https://www.oed.com/ (last visited Dec. 3, 2020) (subscription required).

5 *See* Joseph Kimble, *The Many Misuses of* Shall, 3 Scribes J. Legal Writing 61, 63 (1992) (noting that *shall* has largely disappeared from modern American speech).

6 See *id.*

7 *See id.* at 64 (noting that legal prose is the one place where *shall* still thrives).

8 Bryan A. Garner, *Garner's Dictionary of Legal Usage* 952–53 (3d ed. 2011) (cataloguing uses of *shall*).

9 *See id.* (listing senses).

10 *Id.* (attributing the Golden Rule to Reed Dickerson).

Courts assume consistent usage throughout a document.[11] So when drafters use a word in multiple senses, they potentially throw the interpretive process into chaos.

Shall's shape-shifting has thus led many a party into confusion — and litigation. *Words and Phrases*, a series of books cataloguing judicial interpretations of particular words, bulges with more than 120 pages of citations devoted to *shall*.[12] Disputes have arisen in nearly every jurisdiction, and in each, courts have ascribed multiple senses to the word, ranging from mandatory to permissive to simply precatory.[13] It is thus impossible to say that even in legal drafting, where specificity is the writer's lifeblood, *shall* has anything like a single firm meaning.

That problem has attracted no shortage of reformers, who generally fall into two camps.[14] The first camp subscribes to the so-called American rule, which tells drafters to use *shall* only to impose a duty on the grammatical subject of a sentence.[15] Writers in this camp include Kenneth Adams, author of *A Manual of Style for Contract Drafting*. Adams and his cohorts believe that, restricted to this one sense, *shall* plays a role in legal drafting that

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[11] *Id. See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* loc. 2614 (2012) (ebook) ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning." (citing *Atl. Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932))).

[12] *See Shall*, *Words & Phrases* (Thomson West 2020). *See also* Garner, *Dictionary of Legal Usage* at 953 (making the same point); Chadwick C. Busk, *Using* Shall *or* Will *to Create Obligations in Business Contracts*, 96 Mich. B.J. 50 (Oct. 2017), https://www.michbar.org/file/barjournal/article/documents/pdf4article3230.pdf (same).

[13] Garner, *Dictionary of Legal Usage* at 952; Kimble, 3 Scribes J. Legal Writing at 64, 73 (collecting cases).

[14] *See* Busk, 96 Mich. B.J. 50 (surveying the two views and their supporting arguments); *see also* Garner, *Dictionary of Legal Usage* at 952–53 (observing the same split).

[15] Busk, 96 Mich. B.J. 50.

no other word can.[16] It clearly delineates who must do what — maybe the most important thing that a legal instrument can do.[17]

Writers in the second camp see things differently. They swear by the "ABC Rule," standing for Australia, Britain, and Canada. The ABCers believe that *shall*, far from being indispensable, is in fact irredeemable. The word has too many possible meanings, they say, and lawyers lack the syntactic sophistication to restrict it to one sense. And defeatist as this view might seem, its adherents can marshal history on their side. Lawyers have been misusing *shall* for centuries, and modern drafters show no signs of improving on that performance.[18]

Garner himself falls into this latter camp. Across more than two decades and a half-dozen books, he has urged lawyers to send *shall* into verbal exile.[19] The word's modern usage, he says, is hopelessly tangled — a "horrific muddle."[20] So rather than try to fix it to a single sense, lawyers should opt for words with less

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[16] *See* Kenneth Adams, *A Manual of Style for Contract Drafting* ¶¶ 3.67–.68 (3d ed. 2013); Kenneth Adams, *Banishing* Shall *from Business Contracts: Throwing the Baby out with the Bathwater*, 24 Australian Lawyer 12, 13 (2014), https://www.adamsdrafting.com/wp/wp-content/uploads/2014/09/Banishing-Shall-from-Business-Contracts-ACLA.pdf?x35647; Ross Guberman & Gary Karl, *Deal Struck: The World's Best Drafting Tips* 17 (2014) (recommending that drafters use *shall* as an equivalent to "is obligated to").

[17] *See* Adams, *A Manual of Style* ¶¶ 3.67–.68 (arguing that *shall* continues to play an essential role in legal drafting).

[18] *See* Garner, *Dictionary of Legal Usage* at 952–53 (cataloguing misuses); *see also id.* at 536 (attributing many problems in legislative drafting to the widespread misuse of *shall*).

[19] *See, e.g.*, Garner, *Dictionary of Legal Usage* at 952–53; Bryan A. Garner, *Garner's Guidelines for Drafting and Editing Contracts* 161–66 (2019); Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 123 (2016) ("In almost all senses, *shall* is archaic and replaceable with *will* or *must*."); Bryan A. Garner et al., *Guidelines for Drafting and Editing Legislation* 43–46 (2016); Bryan A. Garner, *The Elements of Legal Style* 140 (2d ed. 2002).

[20] Garner, *Dictionary of Legal Usage* at 952.

malleable meanings: *must*, *may*, *will*, *should*, or whatever else context requires.[21]

For their part, the Virginia Supreme Court's drafters took neither approach. At first glance, they seem to agree with Garner: they cited his work in their first circulation memo,[22] and they stripped nearly every *shall* from the Revised Rules.[23] In *shall*'s place, they inserted Garner's preferred words of authority: *must*, *may*, *will*, and *should*.[24] But for reasons left unstated, they decided to keep *shall* in a few places. For example, Rule 3:20 still says that when the evidence shows that a party is entitled to summary judgment, the court "shall" enter an order for that party. Likewise, Rule 5:11 still says that some appellees "shall have the burden" to establish prejudice. And Rule 3.5 still says that the court clerk "shall" issue certain summonses. It's not clear why the drafters thought these *shall*s worked better than others. It is clear, however, that they chose not to embrace the ABC Rule wholeheartedly.[25]

But nor did they embrace the American Rule. Again, the American Rule permits *shall* only to impose a duty on the grammatical subject of a sentence.[26] But of the examples just quoted, only Rule 3:20 arguably does that. Odder still, if Rule 3:20 does impose a duty, it imposes that duty on the court — something that the drafters studiously avoided in other places. For example, when they revised Rule 4:11, they used *will* rather than *must*:

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[21] *Id.*

[22] *See* April Memorandum (citing Bryan A. Garner, *Legal Writing in Plain English* 125–26 (2d ed. 2013)).

[23] *See* Proposed Revisions to the Rules of the Supreme Court of Virginia ["Revised Rules"], https://www.vsb.org/docs/shall_replacement.pdf (last visited Dec. 3, 2020)).

[24] See *id.* passim.

[25] *See also id.* at R. 1A:4(6) ("[T]he tribunal having jurisdiction over such transferred or appealed case *shall* have the discretion to revoke the authority of the out-of-state lawyer to appear *pro hac vice*." (emphasis added)).

[26] *See* Adams, 24 Australian Lawyer at 12–13.

"Unless the court determines that an objection is justified, it ~~shall~~ will order that an answer be served." The only reason to use *will* in Rule 4:11 was to avoid burdening the court with a duty. But if that's what the drafters were trying to avoid, why use *will* there and not in Rule 3:20? Why leave Rule 3:20's *shall* untouched?

We might write off these vestigial *shall*s as mere drafting errors — a simple neglect to use control + F. But we would still be left with the changes the drafters did make, and those changes only add to the confusion.

Must comes in for the worst of it. In some places, the drafters used *must* to impose a duty on the subject of the sentence, just as the ABCers recommend.[27] For example, Rule 1:5(c) now says that an unrepresented party "must" sign every pleading and "must" provide a mailing address. But in other places, the drafters used *must* in a different sense. Rule 1:3, for example, now states that court reporters "must" be "duly sworn." Surely it's not the reporter's duty to make sure that she's sworn in. Someone else may be responsible, but that someone appears nowhere in the sentence. More likely, the *must* here creates a condition or qualification, not a duty. A similar variation appears in new Rule 1:12, which now says that pleadings, motions, or other papers "must be served" by certain methods. But it leaves unstated who must do the serving.

Will shows similar flexibility. In some cases, the drafters used it to describe future events. But in others, they used it to set out prohibitions, such as in Rule 1:9: "[T]he time fixed for the filing of a motion challenging the venue ~~shall~~ will in no case be extended except to the extent permitted by § 8.01-264." And in still others, they used it to describe general procedures: "All civil case motions in circuit court ~~shall~~ will be scheduled and heard using the

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[27] *See, e.g.*, Garner, *Dictionary of Legal Usage* at 953 (recommending *must* or *will*); Kimble, 3 Scribes J. Legal Writing at 75–76 (recommending *must* as the best of several imperfect options).

following procedures . . . .” That’s at least three senses, and we haven’t even mentioned the few places the drafters used it, potentially, to impose a duty. See again Rule 4:11: “Unless the court determines that an objection is justified, it ~~shall~~ will order that an answer be served.”

Not even *should* escapes these sematic shifts. Most often, the drafters used *should* to avoid creating a duty, usually when that duty would fall on the court or its personnel. But in a few places, they oddly substituted it when a duty would fall on no one in particular. Rule 3B:2, for example, now reads: “Likewise, nothing in this Rule ~~shall~~ should be construed to alter the operation of or penalties prescribed pursuant to §§ 46.2-1220 through 46.2-1230.” Why reach for *should* in that place when the simple present tense could have done the job (e.g., “nothing in this Rule *alters* . . . .”)?

At this point, the reader could reasonably ask, So what? Sure, the drafters gave their words of authority multiple meanings. They failed to nail each word down to a single sense. But we still know what they meant. We can work out the senses, even if we’re not always following the Golden Rule.

And in most cases, the reader would be right. None of the examples cited is actually unclear. Though we could quibble about possible interpretations, we generally know what the Revised Rules mean. For example, while Rule 1:12 fails to say who has a duty to serve pleadings properly, we know that this duty generally falls on the parties. No one would, or could, credibly argue otherwise. And the same goes for the other examples. We can figure out who’s responsible for what, even if the drafters gave some words slightly different shades in different places. The revisions

will likely cause no difficulty for readers and little controversy in practice.[28]

But that conclusion, though mundane, reveals a larger truth: we could have said the same thing even before the revisions. That is, we could have read *shall* in context just as we can now read *must* or *may*. And that point isn't particular to these revisions: it's true of drafting in general.[29] Swapping one word for another doesn't prevent us — or relieve us — from considering context. Nor does it prevent others from doing so. Whatever words we choose, multiple interpretations will be possible (though perhaps not always plausible).

Shall's persecutors have to concede that much. And indeed, many of them do. Joseph Kimble, for one, has written that for all of *shall*'s faults, swapping it for another word won't suddenly make a document immune to interpretive twisting.[30] That's not how the English language works. Yet many will still argue that we can take a step toward clarity by dropping *shall* from our lexicons. After all, the word's manifold meanings have generated mountains of litigation; it practically invites a lawsuit. Why take the risk?

That's a reasonable position, one that many drafters will doubtless take. But before we make our language one word poorer, it's worth asking: did *shall* generate all that litigation because it's especially malleable, or because it's especially

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[28] *Cf.* Michele Asprey, Shall *Must Go*, 3 Scribes J. Legal Writing 79, 81 (1992) (explaining that when words of authority are left unclear, we have to interpret them through context — a task that poses no special difficulty for the legal system: "That's what judges do. They've been doing it for years.").

[29] *See, e.g.*, Samuel Bray, *A Challenge to Hendiadys in the Law*, Volokh Conspiracy (Dec. 1, 2020), https://reason.com/volokh/2020/12/01/a-challenge-to-hendiadys-in-the-law/ (observing that "slipperiness" in language necessarily leads to ambiguity in the law); Kimble, 3 Scribes J. Legal Writing at 75 ("Absolute precision, after all, is a dream; flexible language is not only useful but necessary.").

[30] *See* Kimble, 3 Scribes J. Legal Writing at 75.

important? The latter is surely possible. After all, lawyers often use *shall* to create obligations. And words imposing obligations naturally invite the most disputes. So it may be that *shall* isn't particularly unclear, but that it involves particularly high stakes. A party who wants to squirm out from under an obligation will fix on the word creating that obligation. Substituting one word for another won't change that incentive. Parties will still test the word's limits.[31]

You might think that some words would withstand that test better than others. But experience suggests otherwise. Even *must*, that supposedly more stable substitute, has in some cases been twisted through the adversarial system's machinery to carry little more force than a suggestion.

For example, in *People v. Schonfeld*,[32] a regulation stated that a defendant forfeited his bail if he failed to appear for a scheduled hearing. It then said that the district attorney "must" proceed against the defendant's bail bond within 60 days. The defendant, Schonfeld, was released on bond and failed to show up for his hearing. The court then issued a forfeiture order more than 60 days afterward. Schonfeld's bond surety, trying to save its investment, argued that the order had come too late: the 60-day time limit was mandatory, as shown by the word *must*. But the court disagreed. It reasoned that reading the rule as mandatory in those circumstances would have been "unreasonable." So it interpreted the rule as allowing, not requiring, the forfeiture order within 60 days. In other words, it read *must* to mean *may*.[33]

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[31] *Cf.* Adams, 24 Australian Lawyer at 12 ("Banishing *shall* would only address a symptom of that chaos, but not the cause — drafters being oblivious to nuances of verb structures.").

[32] 145 A.D.2d 741, 742 (N.Y. App. Div. 1988).

[33] *Id.* ("The word 'must' is not always considered to have a mandatory meaning." (citing *People ex rel. Lawton v. Snell*, 216 N.Y. 527, 533 (1916))).

"Reasonable" or not, that result shows that at least some courts are willing to read even "firm" words of authority in multiple ways. The drafter cannot avoid the problem simply by choosing a different word.[34]

There are, of course, ways to tie words down more firmly. Drafters can be more rigorous in their writing. They can check every word of authority to make sure they've used it in only one sense. They can even include a glossary spelling out precisely what those words mean in a given instrument.[35]

But any drafter who takes that route will have to make doubly sure that she's using the words in only the defined way. Her watchword must be consistency: using each word in the chosen sense, and only in that sense. When the drafter uses a word in only a single sense, and uses it repeatedly, playing linguistic games with her work becomes harder. But when she nods, even once, creative interpretation creeps in. A single permissive *must* casts doubt on all other *must*s, glossary or no.

Of course, consistency in theory is easier than consistency in practice. No one method is foolproof. Human language is always changing, like a chameleon shifting to match its surroundings. Drafters must therefore pay attention to context and remain alive to ambiguities. There are no facile solutions; there is only linguistic sensitivity and careful drafting.

So what should we take away from the Virginia Supreme Court's revisions? It's not that the drafters failed to pay enough attention to their word choices. Nor is it that lawyers in general are incapable of linguistic rigor. Instead, it's that words are

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[34] *See* Adams, 24 Australian Lawyer at 13 (arguing that the movement to replace *shall* with *must* or *will* is "flawed" because those words "themselves give rise to multiple meanings, and the problem remains unaddressed").

[35] *See* Kimble, 3 Scribes J. Legal Writing at 77 (recommending just that approach); Bryan A. Garner, *Garner's Coursebook on Drafting and Editing Contracts* 195–200 (2020) (same).

endlessly, hopelessly, and sometimes wonderfully malleable. All words, not just *shall*.