

---

---

## TAKING THE IDEA OF CONSTITUTIONAL “MEANING” SERIOUSLY

*Richard H. Fallon, Jr.\**

David Strauss’s Foreword, entitled *Does the Constitution Mean What It Says?*,<sup>1</sup> is both provocative and wise. I agree with nearly everything that it says. In particular, I agree that constitutional law frequently develops in a common law–like way and that in many cases the language of the Constitution ceases to drive judicial decisions, even though the courts insist on linking their results to the constitutional text. I further agree that this situation poses an interesting puzzle, involving why our constitutional practice maintains the kind of connection that it does between the Constitution’s language and judicial outcomes. Finally, I believe that Strauss offers fascinating speculations in response to this puzzle. Overall, the Foreword makes a number of important contributions.

I do not believe, however, that Strauss ever clearly answers the question that his title poses: does the Constitution mean what it says? To the extent that he does answer it, he appears to do so in the negative. In my view, a negative answer is at least misleading and mostly mistaken. Nor do I believe that Strauss provides the necessary conceptual resources for furnishing a good answer to the question that he highlights. In the grand scheme, these are minor criticisms. In view of the many insights that Strauss’s Foreword develops, he may well regard the question that his title poses as more nearly a rhetorical provocation to consider other issues than as a question worth deeply pursuing in its own right. For my part, however, I think that answering it with care and in depth — or at least providing the resources to do so — would help Strauss give richer, rather than different, answers to the questions that his Foreword addresses most centrally.

In this brief Response, I shall, accordingly, first trace what Strauss says in response to his own question, notice a puzzle that his analysis raises, and then seek to lay the conceptual foundations for an answer that I think he should, and quite possibly would, accept: with at most rare exceptions, the Constitution does indeed mean what it says, as long as we understand what it says, as well as what it means, in an appropriately nuanced way.

---

\* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. I am grateful to Frank Michelman and David Shapiro for helpful comments on an earlier draft of this Comment and to Ephraim McDowell for research assistance.

<sup>1</sup> David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

## I. STRAUSS'S ANOMALIES

In order to take seriously the question whether the Constitution means what it says, we need accounts of what the Constitution says and of what it means that would allow in principle for the two to diverge. Developing the requisite distinction is terminologically tricky, but poses no conceptual difficulty. The terminological awkwardness arises because the word “meaning” will almost inevitably figure in any account of what it means for the Constitution to say something, just as it will appear in any explication of what it means for the Constitution to have a meaning. Nevertheless, we can contemplate the possibility of a disparity between what the Constitution says and what it means if we (1) equate “what the Constitution says” with what we might call the linguistic meaning of its text and (2) differentiate the Constitution’s linguistic meaning from its legal meaning or effect.<sup>2</sup> With this distinction in place, we can obviously ask whether the Constitution means (in the legal sense) what it says (in the linguistic sense).

Strauss seems to imagine a distinction along these lines when he trains his attention on situations in which he thinks that “we” — by which he invariably means insiders to legal practice — often ignore or even “contradict[]”<sup>3</sup> the “ordinary,”<sup>4</sup> “natural,”<sup>5</sup> or most “straightforward”<sup>6</sup> meaning of constitutional language and resolve cases on some other basis. Strauss’s menu of examples includes these:

- Although the First Amendment begins by prescribing that “Congress shall make no law,” we interpret it as applying to the President and the Executive Branch;<sup>7</sup>
- We construe the Fourth Amendment guarantee of “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” to encompass the interception of many electronic communications;<sup>8</sup>
- The Supreme Court has repeatedly held since 1954 that the Due Process Clause of the Fifth Amendment subjects the federal government to the same equal protection norms that the Fourteenth Amendment explicitly imposes on the states, even though the Fourteenth Amendment applies only to the states and virtually no one, at the time

---

<sup>2</sup> For a lucid exposition of this distinction, see Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013).

<sup>3</sup> Strauss, *supra* note 1, at 12.

<sup>4</sup> *Id.* at 29, 36, 51.

<sup>5</sup> *Id.* at 16, 29, 42; *see also id.* at 39 (“naturally”).

<sup>6</sup> *Id.* at 3, 10, 11, 12, 29, 31, 34, 35, 38, 39.

<sup>7</sup> *Id.* at 30 (quoting U.S. CONST. amend. I).

<sup>8</sup> *Id.* at 36 (quoting U.S. CONST. amend. IV).

of the Fifth Amendment's ratification, understood it as barring race-based discrimination;<sup>9</sup>

• The Supreme Court has similarly held, and today most people unselfconsciously accept, that the Equal Protection Clause provides significant guarantees against a wide variety of forms of discriminatory legislation, even though it would be more consistent with both ordinary language and the original understanding of the Fourteenth Amendment to restrict its application to cases in which a state affirmatively affords some people, but not others, "protection from private violence."<sup>10</sup>

As the last two of these examples suggest, Strauss sometimes relies on original understandings to buttress his conclusions concerning the "natural" or "straightforward" meaning of a number of constitutional provisions. Yet he denies that original understandings necessarily define "natural" or "straightforward" meanings.<sup>11</sup> Taken at his word on this point, he thus accepts that natural or straightforward meanings could vary over time. In any event, by distinguishing the Constitution's natural or linguistic meaning from its legal effect, he enables us to ask whether the Constitution means what it says. In response, two possible answers seem to stand out. (1) Yes, the Constitution means what it says. (2) No, the Constitution does not mean what it says.

My uncertainty whether Strauss ever actually answers his own question arises from his responses to these two possibilities. Although many of Strauss's arguments seem to point to the conclusion that the Constitution does not mean what it says, he offers a few remarks that sound more equivocal. Moreover, most if not all of his discussion of the possibility that the Constitution means what it says takes the form of a refutation of what he calls fundamentalism. As I shall show, there are other possible paths to the conclusion that the Constitution means what it says.

## II. THE "FUNDAMENTALIST" VERSION OF THE VIEW THAT THE CONSTITUTION MEANS WHAT IT SAYS

Strauss devotes much of this Foreword to considering and rejecting the position of constitutional fundamentalists,<sup>12</sup> who insist firmly that the Constitution means what it says. As described by Strauss, fundamentalism comprises two parts. More specifically, it combines accounts of what the Constitution says and what it means.

---

<sup>9</sup> *Id.* at 43–44 (discussing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

<sup>10</sup> *Id.* at 42.

<sup>11</sup> See, e.g., *id.* at 31 ("[W]hy would we allow original understandings to defeat the straightforward meaning of 'Congress'?'").

<sup>12</sup> E.g., *id.* at 18–21.

The first fundamentalist premise identifies what the Constitution says with its “ordinary,” “natural,” or “straightforward” meaning.<sup>13</sup> In addition, although Strauss never defines any of these terms precisely, he almost necessarily appears to contemplate that fundamentalists sometimes rely on widely held original understandings of constitutional language as gauges of their natural meaning.<sup>14</sup> However “natural” and originally understood meanings relate to one another, the contrast that fundamentalists centrally seek to draw is plain enough. They equate what the Constitution says with its natural or straightforward or sometimes its originally understood meaning, as distinguished from the sense of meaning that modern participants in constitutional argument have in mind when they say, for example, that the First Amendment applies to the President (even though it begins “Congress shall make no law”) or that the Due Process Clause requires the federal government to abide by equal protection norms.

The second fundamentalist premise then holds that the Constitution either necessarily means or ought to mean legally what it says linguistically.<sup>15</sup> In other words, the Constitution’s original, most natural, or straightforward meaning (that is, what it says) should always trump other considerations (such as precedent or fairness) that some believe should bear on the legal meaning or effect of constitutional language.<sup>16</sup>

Strauss clearly rejects the second of these fundamentalist claims, and, in doing so, cogently explains his reasons for holding that the Constitution’s legal meaning should not always follow its originally understood or supposedly most natural or straightforward linguistic meaning. But the first premise (involving what the Constitution says or means as a linguistic, as distinguished from a legal, matter) does not necessarily fall with the second (involving the legal entailments of the Constitution’s linguistic meaning). To the contrary, Strauss himself sometimes seems implicitly to accept the first fundamentalist premise when he characterizes courts’ deviations from natural or straightforward meanings as “anomalies” that require explanation. If so, the best answer to the question whether the Constitution means legally what it says linguistically might be that it does not.

---

<sup>13</sup> See *supra* notes 3–6 and accompanying text.

<sup>14</sup> For example, he points cautiously to original understandings in developing his accounts of why various “anomalies” — including modern interpretations of the Establishment Clause, the Equal Protection Clause, and the Due Process Clause — are indeed anomalous as measured against what the Constitution says. E.g., Strauss, *supra* note 1, at 44 (“[I]t is obviously not what the Framers of the Due Process Clause of the Fifth Amendment thought.”).

<sup>15</sup> *Id.* at 18.

<sup>16</sup> See *id.* (“Fundamentalism . . . treats the foundational text as the only ultimate authority. Only a narrow range of interpretations and implementations is permitted; deviations from the text are forbidden.”).

Strauss says, for example, that “[i]n constitutional cases, . . . the text is often all but ignored and sometimes even contradicted.”<sup>17</sup> He also writes that there are “instances in which well-established principles of constitutional law are inconsistent with the text of the Constitution.”<sup>18</sup>

### III. STRAUSS’S EQUIVOCATION CONCERNING THE POSSIBILITY THAT THE CONSTITUTION DOES NOT MEAN WHAT IT SAYS

Although much of Strauss’s analysis seems to accept that the Constitution’s legal meaning frequently deviates from its linguistic meaning — and thereby generates anomalies — he seems to me to equivocate in several passages. His equivocation manifests itself when he acknowledges the availability of theories of meaning and interpretation under which “the proper interpretation of the text, or the true meaning of the text, is one that harmonizes the text with the precedents and other sources of law.”<sup>19</sup> “Using terms like ‘interpretation’ and ‘meaning’ is problematic if it suggests that the text is foundational,” he continues.<sup>20</sup> But, the next sentence concludes, “some version of that view” — that the true meaning of the text is one that harmonizes it with precedents — “seems to me correct.”<sup>21</sup>

Strauss also hints, albeit cryptically, that even as a linguistic matter, no one should “expect to treat the Constitution as if it were any ordinary text.”<sup>22</sup> Pressing this suggestion a step further, we might again begin to imagine that the Constitution’s only true meaning, even in the linguistic sense, is its legal meaning.

Ultimately, however, this answer to the question whether the Constitution means what it says seems unsatisfying, regardless of whether Strauss intends to offer it. The distinction between linguistic meaning and legal effect seems wholly conceptually coherent. As a result, it seems wrong to equate the Constitution’s linguistic meaning with its legal meaning on the basis of general, categorical reasoning and thus to deny that the question whether the Constitution means what it says might yield a substantively informative answer. If we want a substantively informative answer, however, we will need to bear down harder on some of the concepts on which an informative answer would need to rely. We should ask, in particular, whether Strauss’s somewhat causal references to ordinary, natural, and straightforward meaning provide adequate resources for rigorously comparing and contrasting linguistic meaning with legal meaning.

---

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 29; *see id.* at 29 n.158.

<sup>20</sup> *Id.* at 29.

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> *Id.*

#### IV. SOME COMPLEXITIES OF “MEANING” AND “SAYING”

Strauss’s Foreword mostly seems content to leave the notions of ordinary, natural, and straightforward meaning unexamined. But an essential step in appraising the relationship between linguistic meaning and legal meaning is to recognize that the concept of meaning is a protean one, as much in ordinary language use as in law.<sup>23</sup> If we think carefully about the myriad modes and contexts in which we use language, we will find nearly as much indeterminacy, contestability, or plasticity in the notion of “what the Constitution says” (as a linguistic matter) as in that of what it means (as a legal matter). Invocations of ordinary, natural, and straightforward meaning must take their place in a less determinate and more contestable linguistic landscape than Strauss appears to imagine.

In a recent article, I provided a list of some of the diverse senses in which we use the term “meaning,” both in law and in ordinary conversation.<sup>24</sup> Here I shall be more suggestive. In thinking about possible senses of “meaning” to which judges or lawyers might point in making claims about what the Constitution says (or means linguistically), we can start with what Strauss seems to have in mind when he speaks of natural, ordinary, or straightforward meaning, but we cannot cogently end there. Solely for the sake of simplicity, I shall treat these terms as synonymous. In a further, possibly more problematic, simplifying assumption, I shall also equate constitutional provisions’ natural or straightforward meanings with their widely historically understood or at least their original public meanings. Although Strauss insists that fundamentalism is not necessarily originalism, he says almost nothing about the relationship of straightforward meanings to original historical meanings and, in particular, about when if ever the two could come apart. My simplifying assumption in aligning natural, straightforward, and original meanings not only avoids resulting complications that Strauss does not address, but also results in a relatively familiar conception of linguistic meaning — one that equates the meaning of an utterance with what reasonable people, in the context of its promulgation, would have understood it as directing or stipulating and thus as saying. The resulting conception of linguistic meaning is one that I have called “contextual meaning as framed by the shared presuppositions of speakers and listeners.”<sup>25</sup> This conception would explain why Strauss thinks that treating the Equal Protection Clause as pertinent to issues of racial and gender discrimination in public employment or ed-

<sup>23</sup> The argument of this section builds on Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).

<sup>24</sup> See *id.* at 1244–63.

<sup>25</sup> See *id.* at 1246, 1256.

ucation — rather than limiting its application to issues involving protection from private violence — represents an “anomaly”: most people did not initially understand the Equal Protection Clause as erecting a legal barrier to discrimination not involving the even-handed enforcement of the law,<sup>26</sup> and that original understanding should inform our reflections on what the clause’s language naturally or straightforwardly means.

But “contextual meaning” as defined in this way is not, even as a linguistic matter, the only possible sense of meaning or the only possible basis for claims about what the Constitution says. “Semantic” or “literal” meaning — which depends more nearly exclusively on dictionary definitions of words and the rules of grammar than does contextual meaning — furnishes a plausible alternative in some cases.<sup>27</sup> In the case of the Equal Protection Clause, the Oxford Dictionaries’ list of synonyms for “protection” includes “care,” “guidance,” “patronage,” and “support.”<sup>28</sup> These references license the conclusion that, as a strictly semantic matter, the meaning of the Equal Protection Clause can extend far beyond guarantees against private violence and can encompass requirements of equal care and support.

This, to be clear, is not to say that well-informed, linguistically competent speakers and listeners would understand guarantees of “protection” to encompass “care,” “guidance,” “patronage,” and “support” in every possible context. To the contrary, my point here is to illustrate a possible distinction between contextual meaning and literal or semantic meaning. And with that distinction in mind, we can say that a law denying women the right to practice a profession or attend a state school solely on the basis of gender deprives them of the equal protection of the laws in the semantic or literal sense.<sup>29</sup> If so, and if we take literal meaning as a possible reference point for determining what the Constitution says, we can conclude that linguistic meaning and legal meaning do not necessarily diverge in the case of this purported anomaly. The linguistic meaning of “protection” or “equal protection” may be as debatable as its legal meaning.

Indeed, in some cases, there may be more than two linguistically available meanings, each of which might subtly invoke or appeal to a different sense in which we sometimes speak of what an utterance (including a written statement or legal provision) means. For example, in considering the meaning of the Equal Protection Clause, we might say that equal protection, like equality itself, is a concept with moral con-

---

<sup>26</sup> Strauss, *supra* note 1, at 42.

<sup>27</sup> See Fallon, *supra* note 23, at 1245, 1255.

<sup>28</sup> See *Protection*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/protection](http://www.oxforddictionaries.com/us/definition/american_english/protection) [http://perma.cc/T6TL-GBC8].

<sup>29</sup> Cf. *United States v. Virginia*, 518 U.S. 515 (1996).

tent and that when a constitutional provision incorporates moral terminology, its meaning depends on what I have called the “real conceptual meaning” of its terms.<sup>30</sup> In other words, the meaning of a moral concept encompasses what morality objectively requires, even if no one understands the full implications at the time when a statement is made or a legal provision enacted. If so, there is a linguistically as well as a legally possible conception of the meaning of the Equal Protection Clause — that is, an available understanding of what it says linguistically — that requires states to accord all people within their borders what the moral ideal of equal protection dictates, regardless of what would naturally or straightforwardly seem to be the case to someone who had not thought through the underlying moral issue.

Consider another of Strauss’s examples of anomalies, this one involving the Fourth Amendment. According to him, the straightforward meaning of the Fourth Amendment does not apply to the interception of many electronic communications.<sup>31</sup> Once again, I believe there is a sense of meaning — which I would call “reasonable meaning” — that requires language to be understood purposively, not always strictly literally.<sup>32</sup> For example, if I tell friends whom I have invited to a party to bring any guests that they wish, the reasonable meaning of my utterance would not include armed gang members or robed, epithet-spewing Ku Klux Klansmen — even if an invitee might covet the amusement of seeing how my other guests and I would react if gangsters or Klansmen arrived unannounced. Understanding that what we sometimes mean by “meaning” can be reasonable or purposive meaning, we might similarly say that the meaning of the Fourth Amendment extends to the interception of electronic communications — not because we choose to ignore what the Fourth Amendment says, but because ordinary linguistic meaning is more flexible or variable than fundamentalists sometimes assume.

Finally, let me say something about precedent and what I would call “interpreted” or “precedential” meaning.<sup>33</sup> In life as much as in law, I think we encounter situations in which we would say that an utterance has both an original meaning and an interpreted or precedential meaning. Imagine that a golf or tennis club has a longstanding written rule that says only members may eat in the dining room. Further imagine that a practice develops under which members are routinely permitted to bring guests into the dining room as long as they personally accompany those guests. At some point we might begin to say that, whatever the rule originally meant, it has acquired an inter-

---

<sup>30</sup> See Fallon, *supra* note 23, at 1248, 1257.

<sup>31</sup> Strauss, *supra* note 1, at 36–37.

<sup>32</sup> See Fallon, *supra* note 23, at 1250, 1260.

<sup>33</sup> See *id.* at 1251, 1262.

preted or precedential meaning under which guests are in fact permitted into the dining room as long as members personally accompany them. If so, we might similarly say — more nearly in parallel with than in defiance of extralegal linguistic practice — that whatever the original meaning of the Due Process Clause, it has acquired a precedential meaning, which bears on what it now says, that subjects the federal government to equal protection norms.

Precedential meanings can of course track semantic, real conceptual, or reasonable meanings. I do not mean to suggest that we should think of the possible meanings of “meaning” in terms of rigid, mutually exclusive categories. To the contrary, my point involves linguistic flexibility and fluidity, including with respect to ascriptions of nonlegal meaning and determinations of what constitutional provisions say as well as what they mean.

When the protean complexity of linguistic meaning comes into view, we achieve a better frame of reference for determining the sense, if any, in which Strauss’s anomalies are indeed anomalous. Certainly they involve deviations from “fundamentalist” commitments to crabbed views of what the Constitution, as a linguistic matter, says. But it is far less clear that they all represent deviations from intelligible senses of the Constitution’s linguistic meaning or that they would support the conclusion that the Constitution, today, does not mean what it says or say what it means. To put the point a bit differently, I disagree with fundamentalists not only about what the Constitution means, but also about what it says.

In sum, it may frequently be as complex a challenge to determine what the Constitution says (or means linguistically) as to determine what it means legally. And until we understand the complexities, judgments, and choices that sometimes attend the ascription of linguistic meaning, we lack the resources to think incisively about whether the Constitution’s linguistic and legal meanings diverge. For the most part, as indicated, I believe that the Constitution means what it says — or at least that its meaning is not inconsistent with what it says — though I do not deny that divergences could occur in some instances.

## V. CONCLUSION

David Strauss’s Foreword rightly insists that we should think of law as a socially and culturally situated institution, not always driven by linguistic meanings. But if we want to understand law as a social phenomenon in all of its relevant complexity, we need to understand that issues of linguistic meaning can sometimes be as complex as issues of legal meaning. Accordingly, if we are to make substantial progress in exploring the relationship between linguistic meaning and legal

meaning, we need to begin with a richer understanding of linguistic meaning than the fundamentalists offer.

In particular, in thinking about whether the Constitution means what it says, we would do well to recognize that many constitutional debates involve which of the various linguistic senses of meaning that I identified above — including contextual meaning, literal meaning, true conceptual meaning, reasonable meaning, and precedential meaning — optimally would, or legitimately can, take priority. The debate about whether precedential meaning should ever prevail over the original, straightforward, or contextual meaning of constitutional language — on which fundamentalists seek to fixate us — is one such debate, but by no means the only one. There are parallel debates about when courts appropriately rely on what I have called literal, reasonable, and real conceptual meanings in preference to what Strauss typically calls the ordinary, natural, or straightforward meaning of constitutional language, as I have sought to demonstrate in my discussions of some of his “anomalies.”

In short, given multiple senses of meaning in the linguistic sense, judges often need to determine which should control the legal outcome in particular cases. The choices that language often leaves to law in this respect are crucial to understanding language, law, and their relationship to one another. At least implicitly, Strauss so recognizes when he equivocates about, rather than full-throatedly embracing, what he presents as the fundamentalist account of linguistic meaning. In offering a sketch of the complexities of the idea of linguistic meaning that I hope Strauss might be willing to accept, this Response is less a criticism of his splendidly illuminating Foreword than an attempted complement.