
DOES MEANING MATTER?

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I am very grateful to Professor Richard Fallon for his *Taking the Idea of Constitutional “Meaning” Seriously*,¹ which commented on my Foreword.² I learned a lot from Fallon’s article, as I do from everything he writes, and his comments on my paper were, characteristically, very generous. As he says, he and I do not have any major disagreements. Where we do seem to disagree, I suspect that the disagreement is mostly terminological.

Still, it might be worth considering, a little more, whether the notion of the “meaning” of the Constitution is really important to U.S. constitutional law. Fallon is entirely right that my article, *Does the Constitution Mean What It Says?*, never squarely answers the question posed in its title. The point of the title was, as he suggests, really just that the relationship between the meaning of the words of the text, on the one hand, and constitutional law, on the other, is more complex than it appears.

More specifically, I am not sure how useful it is to think that constitutional law is about determining the “meaning” of provisions of the Constitution. What we need, roughly speaking, is not a theory of meaning but a theory of action. That is, when we’re faced with a constitutional issue, the question is not what the text of the Constitution means. Instead the question is: what are we required to do? (The “we” could be a judge, another public official, or a citizen, and of course the answer to the question might depend on one’s role.) The text is obviously one of the things we have to consider in answering that question. But other things have to be taken into account, too — notably judicial and nonjudicial precedent, and considerations of policy and fairness. Saying that constitutional law is a matter of trying to figure out the meaning of the text might not be that helpful; the necessary inquiry is more complicated, and considers more factors, than that question suggests. And describing constitutional law as a matter of ascertaining the meaning of the Constitution is potentially misleading, because it obscures the extent to which, and the ways in which, nontextual elements (like precedent and policy) are central to constitutional law.

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¹ Richard H. Fallon, Jr., *Taking the Idea of Constitutional “Meaning” Seriously*, 129 HARV. L. REV. F. 1 (2015).

² David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

I can try to support this claim by borrowing the ingenious hypothetical example that Fallon used in an earlier paper on legal meaning.³ Fallon took the “chestnut of legal debates about statutory interpretation: ‘No vehicles in the park.’”⁴ He imagined, though, that a sign with those words was posted, not by the government, but by the private owner of a large tract of land who had opened his property to the public to use for recreation.⁵ Fallon then supposed that a gatekeeper had to resolve various problematic cases in which something that might be called a vehicle tried to enter the park: a baby carriage, a tricycle, an ambulance that had been dispatched to pick up a sick person inside the grounds, or an ice cream truck that had entered the park many times in the past and was popular among people who used the park.⁶

Fallon argues that it is a mistake to suppose that the sign has just one “meaning.” The “literal” or “semantic” meaning of the sign might be different from the “contextual” meaning, which is based on shared understandings among a group of individuals; both might be different from, among other things, what Fallon calls the “reasonable meaning” (which incorporates a sense of the purpose of a provision) and the “interpreted” or “precedential” meaning, which, for example, might justify someone in saying that the meaning of “no vehicles in the park” is consistent with allowing the ice cream truck to enter, if there is a long-standing and generally accepted practice of doing so.⁷

All of this seems right. I am not sure, though, that the gatekeeper will actually ask herself about the “meaning” of the sign. I think she will ask what her obligations are — that is, what she is required to do, considering not just the sign but also all the other relevant facts. If, for example, there is an established practice of allowing cars and trucks into the park in certain circumstances, she will ask herself whether she has an obligation to discontinue the practice. The fact that there are certain words on the sign matters, of course; those words will ordinarily affect what obligations she has. But the question, for the gatekeeper, will be whether it is consistent with her obligations, to the owner and perhaps to others, to allow that established practice to continue. She won’t get the answer to that question from the words of the sign alone.

After the gatekeeper resolves that question, she might say that she has ascertained the true “meaning” of the sign. The gatekeeper might say, for example, that the term “vehicles,” when given its proper mean-

³ Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).

⁴ *Id.* at 1255.

⁵ *Id.*

⁶ *See id.* at 1255–63.

⁷ Fallon, *supra* note 1, at 8; *see also* Fallon, *supra* note 3, at 1255–63.

ing, does not include bicycles, or emergency vehicles, or the cars of parents who are dropping off small children in bad weather. I agree with Fallon that that is not an eccentric way to talk about “meaning.” But it seems like the end point, not the starting point. It is a way of stating a conclusion that was reached after, potentially, a fairly complex normative inquiry into the gatekeeper’s obligations. To say that the objective of that inquiry is to determine the “meaning” of words on the sign might not be wrong, but it does not seem very helpful.

The same is true, to an even greater extent, of the words of the Constitution. Our views about, for example, freedom of expression are based on a complex set of factors: history, judicial precedent, judgments about people’s and institutions’ propensities, moral judgments about the importance of expression and of democracy. After we consider those factors, we take the views that we have arrived at and assert that those views reflect the meaning of the First Amendment. Again, it is not necessarily wrong to say that the process is one of determining the “meaning” of the First Amendment. But that terminology risks giving a mistaken impression about what is going on.

In fact, if we wanted to modify Fallon’s hypothetical case to resemble U.S. constitutional law more closely, we would have to suppose that the landowner was an absentee — he posted the sign a century or two ago and has not been seen or heard from since. It is unclear, to say the least, whether the gatekeeper owes any obligation to the long-gone landowner. You can definitely still think of reasons why the sign might matter, but now it is even more clear that the gatekeeper will have to undertake a pretty complex inquiry in order to decide what to do. To say that that inquiry is really an effort to ascertain the true meaning of the sign is, I think, not just unhelpful but faintly mystical — as if the answers are locked away somehow in an ancient artifact, and the main objective of constitutional law is to unlock them.

That conception of constitutional law — that the answers are somehow there in the text — is what I want to resist, and Fallon certainly resists it too. I think some conception like that is pretty common. That view of constitutional law supports the fundamentalist claim that the text has priority over other sources of constitutional law. My concern is that an emphasis on “meaning” lends support to that conception.

Having said all of that, though, I do not want to understate the value and importance of Fallon’s project on “meaning,” or to overstate any differences between us. For one thing, sometimes the normative inquiry that a person has to undertake to determine her obligations is not so complex. Sometimes one’s obligation is simply to follow directions. That is not going to be true very often of U.S. constitutional law, but it is true of a routine bureaucratic situation, in which a lower-level official gets instructions from a superior who has the authority to determine what actions should be taken. Usually the only question will be what the superior official’s instructions mean. Things certainly

might be more complicated than that — for example, when there are changed circumstances that the superior did not take into account in issuing the instructions. Even then, as Professor Fallon shows, it might make sense to describe the subordinate official as determining, and following, the meaning of the regulation or other instruction (it might be the “reasonable” meaning, in Fallon’s terms). Many routine instances of statutory interpretation may fit this model, so that saying the objective is to determine the “meaning” of a provision will be a perfectly appropriate way to describe the process — as long as we are alert to follow Fallon’s careful explanation of the various forms that “meaning” might take.

Constitutional law generally does not follow this model; at least for provisions that were adopted long ago, the relationship between the individuals who are resolving constitutional questions and the people who wrote the relevant provisions is not like the relationship of a bureaucratic superior to a subordinate. Still, though, there is a way in which it might be useful to put the “meaning” of a constitutional provision at center stage. To say the obvious, the U.S. Constitution — the document — has great significance, in the legal culture and in society at large. It is not easy to characterize the kind of significance it has; for one thing, a lot of people who venerate the document probably have only a shaky knowledge of what the document actually says. But still, the cultural importance of the document means that it can serve a settlement function: sometimes it is more important that matters be settled than that they be settled right, and the text of the document can settle matters.⁸ This is a crucial function of constitutional law. And there is a risk that, if constitutional law comes to be seen as having less and less to do with the text, the text will begin to lose its ability to serve this function.

Fallon’s argument, if I understand correctly, is that the apparent gap between constitutional law and the text of the Constitution is only apparent; at least there is less to that gap than one might think. The gap, on Fallon’s account, is an artifact of an unnecessarily constrained idea about constitutional meaning. Fallon’s more fluid and multifaceted conception of meaning can bridge that gap. That’s important because the more sophisticated understanding of “meaning,” if it takes hold in the culture, will mitigate the risk that the settlement function of the Constitution’s text will be undermined. If Fallon is right about the different possible senses of “meaning” — and he certainly seems to be — then he has identified something that is, potentially, centrally important to U.S. constitutional law.

⁸ See Strauss, *supra* note 2, at 55. For a general discussion, see David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717 (2003).