

On Originalism and Textualism Mary Had a Little Lamb

Hermeneutics is the art of text interpretation. People who practice this art are hermeneutists. I am such a thinker, and in my hermeneutical theory, I say that understanding a text is an event of interpretation where the meaning of a text is the meanings of a text, where various meanings happen at the intersections of purposive and importive intentionality. In other words, meaning happens when the intention of the writer comes together with what the reader thinks is important. Not all aspects of anything that requires interpretation can be perceived all at once. We pay attention to the aspect of a thing that we think is important. This is intentionality.

During the confirmation hearings for Judge Amy Coney Barrett to join the Supreme Court, there was much talk about her legal philosophy of originalism. The idea is that the Constitution and statutes ought to be understood according to the intentions of the writers at the time that it was written. Textualism says that one ought to pay attention to the ordinary accepted meaning of the words.

Some people think that these methods of interpretation will necessarily render a conservative legal opinion. Thus, supporters of Barrett talk about reading the Constitution as it was intended and judges not legislating from the bench. However, such is not always the case as Barrett herself observed. There can be liberal, progressive, or even revolutionary readings of texts according to both originalist and textualist methods.

Let us not forget that Martin Luther King, Jr. and others in the civil rights movement used the Constitution to make the case for the end of American apartheid. Huey P. Newton and other founders of the Black Panther Party were inspired by the Declaration of Independence. I use both the Constitution and the Declaration of Independence to argue for health care and for the rights of women to have power over their own bodies. (See the chapter on health care in my book *Just Peace Theory Book One: Spiritual Morality, Radical Love, and the Public Conversation*)

I say that the missing element in conventional thinking about originalism and textualism is the element of intentionality.

Let us consider the poem "Mary's Lamb".

Mary's Lamb

Mary had a little lamb,

Its fleece was white as snow,

And everywhere that Mary went

The lamb was sure to go;

He followed her to school one day –
That was against the rule,
It made the children laugh and play,
To see a lamb at school.

And so the Teacher turned him out,
But still he lingered near,
And waited patiently about,
Till Mary did appear;
And then he ran to her, and laid
His head upon her arm,
As if he said – ‘I’m not afraid –
You’ll keep me from all harm.’

‘What makes the lamb love Mary so?’
The eager children cry –
‘O, Mary loves the lamb, you know,’
The Teacher did reply; --
‘And you each gentle animal
In confidence may bind,
And make them follow at your all,
If you are always *kind*.’

The first line of the poem is:
“Mary had a little lamb.”

What is important about this sentence? Is Mary important because we are talking about a girl named Mary and not a boy named Bob? Is it important that she “had” a lamb? Does this mean that she no longer has the lamb? Is it important that we are talking about a “little” lamb and not a big lamb? Is it important that we are talking about a lamb and not a cow or a pig or a snake or a bat?

This is where the context and the intentionality of the reader is important in understanding the meanings of a text.

An originalist would investigate the history of this poem. According to Wikipedia, Sarah Josepha Hale, a school teacher, published the poem in 1830. It memorialized an incident where one of her students named Mary had a pet lamb that followed her to school. When the teacher did not allow the lamb inside the school, the lamb waited nearby for Mary. When the other students wanted to know why the lamb waited for Mary, the teacher wrote the poem to teach a lesson about kindness. A controversy arose when the little girl Mary grew up and said that the teacher did not write the poem, but it was the nephew of a local clergyman who learned of the incident with the lamb and wrote the poem and gave it to her. Still, this story does not tell us what the poem means.

Suppose we think of the poem as a parable written by a teacher to instruct her students about kindness to animals. We would look to the text of the poem that says further down:

“‘What makes the lamb love Mary so?’
The eager children cry –
‘O Mary loves the lamb, you know,’
The Teacher did reply; --
‘And you each gentle animal
In confidence may bind,
And make them follow at your call,
If you are always *kind*.’”

Or, suppose we read the text within the historical possibility that it was a poem written by a young man and given to Mary. We have no idea how old she or the young man was. The poem could have been a love note.

Suppose the reader interprets this poem from the perspective of a vegan and wants to use it as a rationale not to eat meat. One could use the poem as evidence that one ought not to eat a creature that demonstrates its devotion as did the little lamb. Kindness would require that human beings not eat animals. Another interpretation, from the perspective of a meat-eater, could read the poem as saying that the lamb loved Mary so much that it would be willing to give its life if it meant that Mary would not starve.

So, what the poem means depends upon intentionality.

I say, we understand intentionality within a fusion of past, present, and future horizons. Intentionality is not only where we direct our attention, but it is also our goals. If the poem was written by the school teacher to teach kindness to animals, a vegan goal of a future where we do not eat meat could lead to a way to teach children the virtue of veganism. Suppose the poem was written by a young man in love, an interpreter could read the poem within the

context of a future where a lover understands the lamb as a symbol of devotion for the beloved.

So, neither originalism nor textualism can tell us what a text means. It means what we want it to mean within the context of the fusion of past, present, and future horizons. This is why Judge Barrett's refusal to answer most of the questions of the senators of the Judiciary Committee was so deeply disappointing. This is also why it is right for the senators to look to her previous writings and to her activism to glean her intentionalities.

She is opposed to abortion. She has said that there could be many laws that restrict access to abortion while keeping the basics of *Roe v. Wade* intact. There is much that we can know from her writings and from her opinions as a judge that can give us clues about how she will rule. We know that she has said that our vocations ought to advance the kingdom of God. What does this eschatological intent tell us about her jurisprudence?

In her confirmation hearings, Ruth Bader Ginsburg was clear about her position regarding woman's power over her own body. She made her intentions known. RBG said:

"It is essential to woman's equality with men that her choice, that she be the decision-maker. This is something central to a woman's life, to her dignity, and when government controls that decision for her, she's being treated as less than a fully adult human responsible for her own choices."

The only ray of hope that I found in Judge Barrett's testimony is her willingness to hold off rendering a legal opinion until she has heard the various arguments and engaged in a conversation with her colleagues. Conversation is important to the event of understanding. German philosopher Hans-Georg Gadamer, writing in his book *Truth and Method* says:

"Conversation is a process of coming into an understanding. Thus it belongs to every true conversation that each person opens himself to the other, truly accepts his point of view as valid and transposes himself into the other to such an extent that he understands not the particular individual but what he says. What is to be grasped is the substantive rightness of his opinion, so that we can be at one with each other on the subject. Thus we do not relate the other's opinion to him but to our own opinions and views." (385)

I say: such an openness requires courage. It requires the courage to change one's mind. If Judge Barrett is confirmed to the Supreme Court, her intentionalities will become evident fairly quickly. Theories of originalism and textualism notwithstanding, time will reveal whether or not she has the courage to listen and to allow herself to be changed as her decisions have the power to change life for millions of Americans for good or for ill.