

Gorsuch and Originalism: Some Lessons from Logic, Scripture, and Art

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I. Gorsuch and Logic

I recognize that “Originalism” covers many divergent approaches.¹ In this brief essay, I want to explore one of these approaches, an unworkable one Justice Neil Gorsuch has espoused at least once over the course of his life. He has lauded judges who claim to “apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be”² On its face, this is at best an odd sort of praise.

Laws are generally forward looking in their desire to govern future behavior.³ And even if we could always focus back to determine legal meaning, why would we want to disconnect meaning from ongoing life in such a way? Why, for example, should the absence of email in George Washington’s day mean our modern use of email isn’t covered by our modern notions of “speech”? Excluding email from “speech” today would be silly, and we have refined “speech” to include email in both law and in life.⁴ Justice Scalia himself conceded that “general terms may embrace later technological innovations.”⁵ Of course, if we refine meaning for “speech” and “email,” why shouldn’t we do the same for other things in other contexts as they change with time? How does Gorsuch’s “focusing backward, not forward” even permit us to apply rules in such a forward manner?

Unsurprisingly, such a form of Originalism raises further questions. By focusing on the understanding of a contemporaneous “reasonable reader,” Gorsuch’s above form of Originalism confuses audience understanding of speaker meaning with speaker meaning itself. This is a big

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¹ Originalism, for example, not only includes the views explored in this brief essay but also includes such views as the “living originalism” expressed by Jack Balkin. See for e.g. JACK M. BALKIN, *LIVING ORIGINALISM* (2011). I express here no views on other forms of Originalism except to the extent they may include errors addressed in this brief essay.

² Lauren Russell and Nina Totenberg, *Trump's Supreme Court Pick Is A Disciple Of Scalia's 'Originalist' Crusade*, NPR (March 3, 2017, 7:37 p.m.), <http://www.npr.org/2017/02/02/512891485/trumps-supreme-court-pick-is-a-disciple-of-scalias-originalist-crusade>.

³ See, e.g., DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 717 (1980) (“Law, in general, is a regime of adjusting relations and ordering human behaviour through the force of a socially organized group.”)

⁴ See, e.g., *Meagher v. Andover Sch. Comm.*, 94 F. Supp. 3d 21, 37 (D. Mass. 2015) (addressing email as citizen speech).

⁵ ANTONIN SCALIA & BRYAN GARNER, *READING LAW* 16 (2012).

mistake. To see why, first imagine that I write the following: “I will point to a monarch tomorrow.” (For the fun of it, I’ve made this statement’s truth and meaning turn on a future context.) If I mean a butterfly when I use “monarch” in the text, that is by definition what I mean. Even if every other current “reasonable” person in the world thinks I meant to point to a king since a king is to be in town tomorrow, “monarch” still means a butterfly here. To claim otherwise turns expression on its head: the audience becomes the speaker. Originalism would similarly turn law on its head. The ruled would effectively trump the rulers since audience meaning would trump ruler meaning (no pun intended). How can this make sense?

Another problem with such Originalism is that speaker meaning includes references, concepts, and understandings that speakers *may or may not* mean to be updated and corrected over time. If speakers want the terms to be updated, how much updating do they want and what standards do they want to be used? Imagine, for example, that I endowed a fund in 1990 “to explore the planets in our solar system.” If another planet is discovered tomorrow, let’s say I would consider that additional planet to be covered by my initial term “planet” even though I couldn’t have known of the additional planet back in 1990. I could of course have meant for the list to be limited to planets known in 1990 but, for purposes of the example, let’s just say that I didn’t. (Similar questions could also be raised for the inclusion or exclusion of Pluto given Pluto’s later exclusion by current science.) Readers must now choose which definition I meant. If I’m available, the reader could try to ask me which I meant. However, let’s say I’m not available. What is the seeker of speaker meaning then to do? To increase the chances of getting at the truth here, I would say we should ask what a speaker like me in my contemporaneous context would have likely meant. If I were a reasonable, farsighted speaker, the more flexible view of planets would seem more likely. If I were not such a thoughtful person, perhaps the more limited interpretation would be the appropriate one.

I worry that insisting on “a reasonable reader’s understanding” in light of contemporary dictionary meanings can downplay the various choices speakers can make and can provide tempting cover for activist judges to pick definitions of words that best suit their politics in reaching a result. In fact, the problem is even more complex since different words can share the same spelling thereby compounding the problem further. For example, imagine a man who was both a gun collector and an owner-president of a lead mine. Imagine further that the man penned on his deathbed the following two-line holographic will: “I leave my lead to my oldest son. The remainder of my estate I leave to all my children to share and share alike.” Did the testator mean for his oldest son to inherit the lead mine, a stash of lead, bullets, the presidency (a leadership or “lead” position) of the mine, pencils, or some combination of the foregoing or of some other possible definitions of at least two same-spelled words “lead” and “lead”?⁶ If one is conservative to the extent of favoring primogeniture, for example, can’t that at least subconsciously lead (once more no pun intended) one to pluck out the meanings that give the most to the oldest child if one is constrained only by a dictionary and the two lines of text? Gorsuch does refer to “history” in his Originalism above but history in any broad sense seems to provide little guidance here since some testators have favored primogeniture and some have not throughout history. More troubling, the judge’s understandings of history may well be colored

⁶ See *Lead and Lead*. THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007).

by his politics and judicial philosophy. And, again, why would we want to elevate dictionaries in ways that encourage judicial activism in light of such a tinted history?

Of course, by “history” Gorsuch may mean the “context” in which the will was written. If so, Gorsuch should realize that context is slippery ground for him here since, in addition to textual or internal context, contexts involves such things as cognitive context; physical and temporal context; social, cultural, and human context; discourse context; purpose context, and policy context. The speaker of course has many choices he could make among these various contexts and it’s the speaker’s meaning that should control.⁷ For example, the above testator’s concept of the mine can be one of the mine as it develops over time (including additions of adjacent tracts of land) or it can be a concept of the tracts of land comprising the mine at the time the will was written. The driving force here is what the speaker meant, not what a “reasonable” reader thought he meant. A court must weigh all the available evidence to find the actual speaker meaning here. In doing so, a court must take care not to substitute a reader’s meaning for the testator’s meaning. “Reasonable” readers can get this wrong and we should always be struggling to get this right even where previous “reasonable” readers have erred. All other things being equal, why can’t the testator will his property as *he* would choose not as contemporaneous “reasonable” readers would think he chose?

II. Originalism and the Ten Commandments

Let’s again look outside the law for further instruction. Originalism in the Gorsuch form noted above just doesn’t fail with legal texts like fund endowments and holographic wills. It fails with *any* text where the textual meaning is not simply an audience’s interpretation of the text. This not only includes trivial texts such as my statement about a butterfly above. It also includes quite serious texts such as Scripture. Since many of us believe we are familiar with the text and meaning of the Ten Commandments, let’s try such a form of Originalism with the Ten Commandments. How does such Originalism fit with a conviction that there are *Ten* Commandments setting out God’s clear message to the world? Since Originalism elevates contemporaneous “reasonable-reader” meaning (here ancient people reading stone tablets) over speaker meaning (here God’s meaning), the prognosis can’t be good.

In performing our Ten Commandments inquiry, let’s again remember that such Gorsuch Originalism lauds looking backward to “text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be.”⁸ However, when we look “backward” for the text of “Ten” Commandments listed and numbered in the Bible, we won’t find such a list of ten. Instead, we’ll find two places in the Bible (Exodus 20:1–17 and Deuteronomy 5:4–21) which support such a list though we could come up with different numbers and texts of Commandments. Our results will depend on what we choose to include or exclude—for example is the prohibition of bowing down to other gods included in not putting other gods first or is it a separate command? Our results will also depend upon how we group

⁷ See Harold Anthony Lloyd, *Law’s “Way of Words”: Pragmatics and Textualist Error*, 49 Creighton L. Rev. 254-63 (2016).

⁸ Russell and Totenberg, *supra* note 2.

what we find. Thus, neither the precise text of the refined rules nor the number “ten” is mandated by these block sections of text from Exodus and Deuteronomy.

Drawing on such Biblical sources, the Vatican, for example, provides [a nice outline of sources](#) to back up one suggested list of “Ten” Commandments to take us forward (not just backward) in life.⁹ This outline also nicely underscores the framing choices required before one can even get to a text to interpret. The Vatican clips off parts of Exodus and Deuteronomy that I think should be included as shown by comparing the Vatican’s citations¹⁰ with mine above. I would ask readers to look at the Scriptures here and come to their own initial judgments. They in fact must do this before they can be sure that they are on solid ground in any further exploration of the Commandments. Before Gorsuch could reasonably purport to find how any “reasonable reader at the time of the events in question” would read the Commandments, he, too, must first ask if he has the right text before him. “Objective” talk of a “reasonable reader at the time of the events in question” can’t hide the flexible framing choices Gorsuch also has to make before he can have any text to interpret. Interpretation and framing of text itself (which process as we see here can be unobjectionably flexible) must precede framing and interpretation of the meaning of that text—how else can we have a text to interpret?¹¹

Once we’ve used our judgment as to the content and number of the list of Commandments (a process where reasonable minds can differ), we next have to interpret the text that we have framed. Purporting to rely on the hypothetical conclusions of a “reasonable reader at the time of the events in question” in light of “text, structure, and history” won’t lead us to any clear answer about what God meant. In addition to our own (modern?) judgment that we must bring to what “reasonable” means here (which opens a whole new line of debate in itself), any such “reasonable” readers of the time would almost certainly disagree on what the text, structure, and history all mean. If you can’t covet your neighbor’s wife, can you covet the wife of someone in another tribe or country? Why use “neighbor” if you meant that as a universal prohibition? In ancient tribal societies whose understandings Gorsuch would presumably find determinative (or at least very strong evidence of meaning), these are not frivolous questions. Is a wife free to covet another’s husband? If not, why wasn’t “spouse” used instead of “wife”? “Kill” can’t be taken literally since, among other reasons, we swat insects that bite us, the Bible speaks of animal sacrifices, we pull up weeds, and we must have reasonable rights of self-defense. Should we therefore take “kill” to mean “murder” as some translators would do?¹² But if we do this, are manslaughter and abuse of animals, for example, then okay? I don’t think this would be reasonable (at least by today’s standards—I’ll leave it to Gorsuch to divine ancient tribal understandings here). But if we reject “murder” as the right term, such rejection doesn’t give us a proper reading. We’re still going to find that reasonable people will differ on what if anything should replace “kill.”

⁹ *Life in Christ* (March 3, 2017, 7:46 p.m.),

http://www.vatican.va/archive/ccc_css/archive/catechism/command.htm.

¹⁰ *Id.* (the Vatican would begin at Exodus 20: 2-17 and Deuteronomy 5:6-21).

¹¹ *See, e.g.*, WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 264 (2007) (“Textualism does not tell you how broadly or narrowly to define the text.”)

¹² *See, e.g.*, 20 *Exodus* 13 (New Oxford Annotated Bible) (“You shall not commit murder.”)

Even worse, wouldn't using "reasonable readers at the time of the events in question" risk leading us to some obviously-wrong answers? Does the prohibition of "strange Gods before me" presuppose there are other gods? Wouldn't the common polytheism of the time¹³ suggest that many reasonable people of the time would say "yes"? But isn't this the wrong answer? And how would the Trinity square with a prohibition of "strange Gods"? "Reasonable readers at the time of the events in question" would have had no inkling of such a notion and would no doubt have found it "strange" to say the least. But this would again lead us in the wrong direction—at least for those of us who are Christians. What does a prohibition of adultery mean to people who condoned multiple wives? Do we really want their understanding driving today's meaning?

III. Originalism and the Fall of Icarus



Can we also learn some lessons here from art? How does such a form of Originalism fit with notions that artists can convey messages with their art, with notions that an artist painting the fall of Icarus can convey a message with that painting? We communicate with signs, and signs include symbols (words and other signifiers arbitrarily assigned meanings), icons (signs that

¹³ See *The Oxford Companion to the Bible* 496 (Bruce M. Metzger & Michael D. Coogan, eds., 1993) ("Although monogamy may have been the ideal, polygamy was accepted and practiced throughout Israel's history"); 21 *Deuteronomy* 15 ("If a man has two wives . . .")

resemble what they signify) and indexes (signs that participate in what they signify such as a weathervane indicating a north wind).¹⁴

What might such Originalism therefore learn from an old painting that tells a message with icons and with symbols other than words? What might it learn from “Landscape with the Fall of Icarus,” a work often attributed to Bruegel?¹⁵ Viewed on its face alone, the work is a hodgepodge of images such as those of a man with his horse and plow, of more people, of furrows, of sheep, of a tree, of rocks, of a sailboat, of a leg sticking out of the water, and of a sun diffused by clouds and sea. What is fascinating about all that? How could that odd medley have inspired such great poetry as Auden’s “Musée Des Beaux Arts”?¹⁶ Here is Auden’s text:

About suffering they were never wrong,
The old Masters: how well they understood
Its human position; how it takes place
While someone else is eating or opening a window or just walking dully along;
How, when the aged are reverently, passionately waiting
For the miraculous birth, there always must be
Children who did not specially want it to happen, skating
On a pond at the edge of the wood:
They never forgot
That even the dreadful martyrdom must run its course
Anyhow in a corner, some untidy spot
Where the dogs go on with their doggy life and the torturer's horse
Scratches its innocent behind on a tree.

In Breughel's Icarus, for instance: how everything turns away
Quite leisurely from the disaster; the ploughman may
Have heard the splash, the forsaken cry,
But for him it was not an important failure; the sun shone
As it had to on the white legs disappearing into the green
Water; and the expensive delicate ship that must have seen
Something amazing, a boy falling out of the sky,
Had somewhere to get to and sailed calmly on.¹⁷

¹⁴ See Harold Anthony Lloyd, *Crushing Animals and Crashing Funerals: The Semiotics of Free Expression*, 12 FIRST AMEND. L. REV. 247-56 (2013).

¹⁵ See Musées Royaux des Beaux-Arts de Belgique, *La chute d'Icare* (March 3, 2017, 7:16 p.m.) <https://www.fine-arts-museum.be/fr/la-collection/pieter-i-bruegel-la-chute-dicare?artist=bruegel-brueghel-pieter-i-1>.

¹⁶ W. H. AUDEN, COLLECTED POEMS 179 (Edward Mendelson, ed. 1991)

¹⁷ *Id.*

The painting must have “spoken” to Auden in profound ways but how do we find the message or messages of the painting?¹⁸

Do we find the message by looking up dictionary definitions from Bruegel’s time of “man,” “horse,” “plow,” “furrows,” “sheep,” “other people,” “tree,” “rocks,” “sailboat,” “leg,” “diffuse sun,” “clouds,” and “sea”? Of course not. That would just leave us with a disconnected list of multiple possible definitions for each such term. Additionally, the definition lists would vary by dictionaries consulted. If we were interpreting a similar modern painting, for example, the current fourth edition of the American Heritage College Dictionary has no fewer than 15 definitions of “man” as a noun.¹⁹ So many choices across terms facilitates rather than limits interpretive “activism.” The conservative interpreter can pick the definitions that fit the conservative interpreter’s worldview, ignore conflicting alternative definitions of terms, and yet still claim to follow the “original” sense of the terms defined. The liberal interpreter can do the same and reach a conflicting result that also claims to follow the “original” sense of the terms. It’s hard to see how this can be a serious interpretive philosophy. In any case, it encourages rather than discourages interpretive “activism.”

That said, to seek the artist’s meaning, we must of course consider the images. However, we must also look at *all* the available evidence of the artist’s meaning when we interpret those images. The title tells us the painting is about the fall of Icarus. This points us to a conceptual and literary context that supplements, for example, the plowman focusing on his plowing. Now and only now can we see the likely “literal” subject of the painting: a world focused on its own pursuits while missing the exuberant rise and tragic fall of a boy who briefly flew. Thus, the painting has no “literal” meaning in itself. We have to go out and reconstruct what the painter meant. Nor does the painting in itself simply give us a likely deeper meaning intended by the artist. To find that deeper meaning, we must further contextualize the images. As moral yet ephemeral agents, how should we react to what we know is the ignored tragedy of Icarus? Morally, shouldn’t the plowman regret his indifferent behavior? Additionally, having only brief and fragile lives, shouldn’t we be horrified, chilled, and humbled by what happened to Icarus? If the world doesn’t care about a child who amazingly flew and then streaked down the sky, how can it care about us? Isn’t there therefore a deeper message that we should notice the suffering of others, that we should help them to the extent we can (an ability which of course can change as eras progress), and that this is in our own self-interest lest we, too, be left to drown?

Like legislatures which would govern future behavior, artists paint forward, not backwards. Artists know that those who come next are the ones who view their paintings. Those who came before of course cannot be viewers. If the artist’s purpose is to speak to the future including us, why would we freeze the artist’s message in the past? If the artist meant a general principle of charity, wouldn’t we be foolish to say, for example, that the artist’s message wouldn’t laud such helpful programs as Medicare since the artist couldn’t have known of Medicare, a government

¹⁸ For those who doubt that paintings can speak profoundly, see ROBERT D. DENHAM, *POETS ON PAINTING* (2010) (cataloguing around 2500 poems about paintings as well as around 2000 entries on secondary sources of ekphrasis).

¹⁹ See *Man*, THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2007).

program that might not fall within any more-limited charity principle of people helping people directly? Wouldn't that contradict the artist's very moral message? Such a principle of charity and kindness is not limited to the means of charity and kindness available at the time the principle happens to be uttered. Does a modern artist have to repaint the exact same image of Icarus falling so any such deep message can now laud Medicare? And must someone repaint the exact same painting every moment thereafter to keep it current with all the latest ways to notice the suffering of others, and to help them to the extent we can (an ability which of course can change as eras progress)? I would think few artists who comprehend time's forward movement would see their "original" messages so limited and of so little enduring value in themselves. Of course, I don't rule out more limited artists' messages and again would stress we need to focus on the artist's meaning rather than contemporaneous "reasonable" viewers perceptions to increase our chance of getting any real meaning of the painter.

IV. Conclusion

Taking care not to confuse speaker meaning with reader meaning, I at least have no trouble saying that the First Commandment's prohibition of "strange Gods" doesn't prohibit faith in the Trinity despite what a "reasonable reader at the time of the events in question" would have thought. The fact that "reasonable reader[s] at the time of the events in question" wouldn't have known of the Trinity and would have had different notions of marriage from our own doesn't mean that God's meaning did not embrace the Trinity and the monogamous marriage concepts we have today.²⁰ Similarly, the fact that people considered to be "reasonable" readers in our earliest history (and even at such later times as the Lincoln-Douglas debates) could not see blacks as fellow souls "created equal" who were also "endowed by their Creator with certain unalienable Rights" including "Life, Liberty and the pursuit of Happiness" doesn't mean that blacks ever lacked or lack such status.²¹

As the above problems show, Originalism in the form described by Gorsuch above just cannot work. A "reasonable" contemporaneous reader's "understanding" of "equal protection" or other law simply cannot trump a differing actual meaning of such law any more than ancient audiences' understandings of the Decalogue can trump God's meaning. This impossibility is a good thing. People considered "reasonable" at any given point in history (such as Senator Douglas²²) can be terribly wrong, and their errors must always be correctable if we are to have a just and rational legal system. An Originalism mired in *audiences* of the past like Senator Douglas cannot provide such justice and correction.

²⁰ See *supra* note 13.

²¹ See ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858 794-95 (Library of America 1989) (rejecting "the astounding sentiment that the term 'all men' in the Declaration did not include the negro.")

²² See *id.*