

# CONDUCTING THE CONSTITUTION: JUSTICE SCALIA, TEXTUALISM, AND THE HEROIC SYMPHONY

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## 1. INTRODUCTION

The more one studies the debate surrounding modes of Constitutional interpretation<sup>1</sup>, the more dismaying the experience becomes. Lurking close to the surface of the coded discourse of Constitutional scholars is the aggressive tone and cultural dynamic of the playground, and the substance of the debate, reduced to its essence, seems more akin to a Monty Python sketch<sup>2</sup> than the scholarly exchange of ideas for which one would hope in this area.<sup>3</sup>

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<sup>1</sup> Some believe that “interpretation” is the wrong word to use to describe the process of applying the Constitution. Jaroslav Pelikan summarizes the issue in relation to biblical interpretation: “For biblical exegesis, the technical term ‘to interpret’ in various languages (including English) can mean either ‘to translate’ or ‘to expound,’ also because translation necessarily involves interpretation. For constitutional interpretation, too, the situation may sometimes be obscured by the technical vocabulary of legal hermeneutics. Rather than ‘to interpret,’ the technical term used in the language of the Supreme Court during the nineteenth century (and even beyond) is often the grammatical term ‘to construe,’ for which the cognate noun is ‘construction. . . .” JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION*, 11-12 (2004). I have taken my cue from Justice Scalia, who uses “interpretation” in the title of his book. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

<sup>2</sup> The example that comes readily to mind is Monty Python’s “Argument Sketch.” In the sketch, a man (“M”) comes to an office seeking an argument, and is directed to speak with Mr. Barnard (“B”). A portion of their discussion gives the flavor for the entire sketch:

M: Oh look, this isn't an argument.

B: Yes it is.

M: No it isn't. It's just contradiction.

B: No it isn't.

M: It is!

B: It is not.

M: Look, you just contradicted me.

B: I did not.

M: Oh you did!!

B: No, no, no.

M: You did just then.

B: Nonsense!

Justice Scalia has been particularly strident in the tone he has adopted for those who disagree with him, and recently told a meeting of the Federalist Society that you'd have to be an idiot to believe in a "Living Constitution."<sup>4</sup> No clearer example of the recess rhetoric into which this important debate can so quickly slide is necessary, and there is no better illustration of why we need to step back from this *ad hominem* abyss and take a more dispassionate view of the interpretative techniques we employ to understand the Constitution.

One way to accomplish this is to look elsewhere to see how others tackle similar questions of interpretation. This perhaps allows for a less passionate inquiry into the interpretative process, stripped of the life changing outcomes of doctrinal orthodoxy; without being so concerned about the end result, we might be able to make more reasoned conclusions about the means used to achieve that result.

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M: Oh, this is futile!

B: No it isn't.

JOHN CLEESE, ET AL, MONTY PYTHON'S PREVIOUS RECORD (The Famous Charisma Record Label 1973), *transcript available at* <http://www.mindspring.com/~mfpatton/sketch.htm> (last visited August 2, 2006).

<sup>3</sup> Speaking about "nonoriginalist" opinions, Justice Scalia observed that, in the past, they "have almost always had the decency to lie, or at least to dissemble, about what they were doing – either ignoring strong evidence of original intent that contradicted the minimal recited evidence of original intent congenial to the court's desires, or else not discussing original intent at all, speaking in terms of broad constitutional generalities with no pretense of historical support." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 852 (1989). Justice Scalia later dismisses the theoretical underpinnings of "nonoriginalism" by claiming that it is "incompatib[le] with the very principle that legitimizes judicial review of constitutionality." *Id.* at 854. Justice Scalia is hardly less sympathetic to "originalism," a theory which, he claims, is "also not without its warts" (*id.*, at 856) whose adherents are "faint-hearted" and whose theory of interpretation is no different from the moderate nonoriginalist, "except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous." *Id.* at 862. Some years later, Justice Scalia's views had hardened, describing what he now called "strict constructionism" as "a degraded form of textualism that brings the whole philosophy into disrepute." Scalia, *supra* n.1, at 23. On the other side of the debate, Ronald Dworkin criticizes Justice Scalia as having "seriously misunderstood the implications of his general account for constitutional law, and . . . his lectures therefore have a schizophrenic character." Ronald Dworkin, *Comment*, in Scalia, *supra* n.1, at 115. Later in his comment, Professor Dworkin refers to Justice Scalia's translation of the Eighth Amendment's meaning as "bizarre." *Id.* at 121. And Justice Scalia claims that "in some sophisticated circles, [textualism] is considered simpleminded – 'wooden,' 'unimaginative,' 'pedestrian'" (Scalia, *supra* n.1, at 23), although his failure to cite to sources of those descriptions makes verification of them impossible.

<sup>4</sup> Justice Scalia made this comment at a meeting of the Federalist Society held in Puerto Rico in February, 2006. Associated Press, *Scalia Raps 'Living Constitution,'* February 14, 2006, *available at* <http://www.cbsnews.com/stories/2006/02/14/supremecourt/main1315619.shtml> (last visited March 8, 2006). According to the Associated Press report, Justice Scalia said that "[t]he argument of [Constitutional] flexibility . . . goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. . . . But you would have to be an idiot to believe that." *Id.*

Other than literature, which already has a full body of scholarly work devoted to its relationship with the law,<sup>5</sup> the most promising fields of intellectual inquiry for this experiment are religion and music.<sup>6</sup> Religion is, for me at least, disqualified because it brings into play numerous moral and ethical issues I would rather avoid here.<sup>7</sup> But music offers a neutral and potentially helpful forum for my purpose.

This is admittedly not new ground. Timothy Hall has traced scholarly comparisons between legal and musical interpretation back to the 14th Century<sup>8</sup>, and in more recent times Jerome Frank,<sup>9</sup> Richard Posner,<sup>10</sup> Hall himself,<sup>11</sup> and, perhaps most significantly, Levinson and Balkin,<sup>12</sup> among others,<sup>13</sup> have all

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<sup>5</sup> I will not even attempt to summarize the goals of the law and literature movement here, nor will I attempt to provide a bibliography of its work; either attempt would swamp this little article. For those interested in the subject, and who are as yet unaware of the many valuable insights provided by the study of law and literature, and the many trenchant and well-articulated objections to this way of looking at the law, some simple research will generate copious amounts of material on both sides of the debate.

<sup>6</sup> Both religion and music, like the law, have texts which must be interpreted. And both areas have their orthodox and reform branches, juxtaposing fundamental textualism with liberal interpretation.

<sup>7</sup> For a valuable discussion into the interweaving of religious and legal doctrine, see Pelikan, *supra* n. 1.

<sup>8</sup> Timothy S. Hall, *The Score as Contract: Private Law and the Historically Informed Performance Movement*, 20 CARDOZO L. REV. 1589, 1589-90 (1999), citing, ANONYMOUS, ARS CANTUS MENSURABILIS MENSURATA PER MODOS IURIS [THE ART OF MENSURABLE SONG MEASURED BY THE MODES OF LAW] (C. Matthew Balensuela ed. & trans., 1994).

<sup>9</sup> Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

<sup>10</sup> Richard Posner, *Bork and Beethoven*, 42 STAN L. REV. 1365 (1990)(book review).

<sup>11</sup> Hall, *supra* n.8.

<sup>12</sup> Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L.REV. 1597 (1991); Sanford Levinson & J.M. Balkin, *Interpreting Law and Music: Performance Notes on "The Banjo Serenader" and "The Lying Crowd of Jews,"* 20 CARDOZO L. REV. 1513 (1999). Not only is Levinson and Balkin's work significant in its recognition that lawyers and musicians (a well as textual interpreters in other fields) have much to teach each other (Levinson and Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L.REV. at 1656-58), it also has some points of intersection with this article; as does this article, Levinson and Balkin consider questions of pitch in musical performance, (*id.* at 1619-21), consider the significance of a seeming wrong note in a Beethoven work (*id.* at 1598-99; the work in Levinson and Balkin's case is the first movement of Beethoven's first piano concerto), and consider the role of the early music movement (their article is, at least on the surface, a book review of AUTHENTICITY AND EARLY MUSIC (Nicholas Kenyon ed. 1988)). There are, however, significant differences between Levinson and Balkin's approach and mine. Levinson and Balkin are more interested than am I in the theory of interpretation, the doctrinal underpinnings of the interpretative process. By contrast, I focus here more on the result, the practical effect of those doctrines when applied to a text, making this article, I believe, a compliment to Levenson and Balkin's work.

written about the ways in which musical interpretative practices and legal interpretative practices can inform each other.

I tread gratefully in the footsteps of these scholars while also trying to branch out in a slightly different direction. My goal here is a very modest one: to take one piece of music – the first movement of Beethoven’s Eroica symphony<sup>14</sup> – and consider how legal scholars, using the doctrinal principles they have developed to interpret the Constitution, would interpret the piece were they called on to conduct it.<sup>15</sup>

In so doing, I make no pretense of offering a new genre of legal hermeneutics; there is no suggestion here that a “law and musicology” movement will provide a comprehensive analytical framework which we can use to solve problems of Constitutional interpretation. Rather, I suggest that musical interpretative “doctrines” – if so loose a collection of practices merits the term – share some common elements with legal doctrines, and that by viewing the law through the

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<sup>13</sup> Penelope Pether, *Semiotics: Or Wishin’ and Hopin’* 20 CARDOZO L. REV. 1615 (1999); Desmond Manderson, *Et Lux Perpetua: Dying Declarations & Mozart’s Requiem*, 20 CARDOZO L. REV. 1621 (1999); Peter Goodrich, *Operatic Hermeneutics: Harmony, Euphantasy, and Law in Rossini’s Semiramis*, 20 CARDOZO L. REV. 1649 (1999); Judit Frigyesi, *Sacred and Secular – What Can Music Teach us About Jewish Thought*, 20 CARDOZO L. REV. 1673 (1999); Hanne Petersen, *Peripheral Perspectives on Musical Orders*, 20 CARDOZO L. REV. 1683 (1999)

<sup>14</sup> I will use the symphony’s familiar name throughout, even though the work is more accurately known as Beethoven’s Third Symphony, Opus 55. The name “Eroica” became attached to the symphony after Beethoven erased an original dedication to Napoleon Bonaparte from the symphony’s title page and replaced it with the title “Sinfonia eroico.” ALEXANDER THAYER, *THAYER’S LIFE OF BEETHOVEN*, 348-49 (Elliot Forbes ed., Princeton University Press 1973)(1921). The symphony has been known, in English, as the “Eroica” symphony ever since. The Eroica Symphony is an ideal choice for this analysis because it inspires the same sense of awe, to many musicians, as does the Constitution for lawyers and judges. Written at approximately the same time (Eroica was written in 1804 and the Constitution was written in 1787), the Eroica is a work of major significance, not just in Beethoven’s output but for all subsequent musicians. See, e.g., MAYNARD SOLOMON, *BEETHOVEN*, 192 (1977)(“With [Eroica] we know that we have crossed irrevocably a major boundary in Beethoven’s development and in music history as well.”) The length of the first movement alone (it is “one of the longest first movements in existence” ROBERT SIMPSON, *BEETHOVEN SYMPHONIES*, 19 (1970)) marks the work as trail-blazing, and it is the foundation upon which the modern symphonic repertoire is built. Later in life, Beethoven identified the Eroica as his favorite symphony (although he had not yet written his ninth symphony). Thayer, at 674.

<sup>15</sup> I have chosen conducting as the musical metaphor for judicial interpretation simply because, in this case, the interpretative decisions in the Eroica would typically be made by a conductor. This is not to say, of course, that conductors are the ultimate interpreters. Nor is it to say that the Eroica must be interpreted by a conductor in order to work; conductorless orchestras such as the Orpheus Chamber Orchestra could doubtless perform a compelling interpretation of Eroica if they gave themselves enough time to rehearse the piece thoroughly. The choice of a conductor here is merely a reflection of the common practice of performing this particular piece with a conductor.

different lens that music provides, we might gain some new insight into our own doctrinal landscape.

I will be paying most attention here to Justice Scalia and his “textualist” approach to interpretation. Justice Scalia’s dual role as principal advocate for one mode of Constitutional interpretation and as one of the Supreme Court Justices who put interpretative theory into practice places him in a relationship with the Constitution much like that of a conductor and an orchestral score. Both conductor and judge must approach the text with an interpretative theory in mind and then apply that theory in a specific context that is much like a “performance.”<sup>16</sup>

In particular, though, Justice Scalia’s apparent conviction that a “textualist” approach to Constitutional interpretation<sup>17</sup> is the only coherent and legitimate approach to textual interpretation seems worthy of examination, in a very small way, by using it to interpret a text from a different tradition. The benefits and problems of such an approach might stand out in clearer relief when projected against a musical, rather than a legal, background.

## II. CONSTITUTIONAL INTERPRETATION

A fully integrated discussion of the various modes of Constitutional interpretation is beyond the scope of this modest article, so to make sure we are all at least thinking of the same doctrines, I will only make an abbreviated and admittedly simplistic identification of the three principal theories of Constitutional interpretation in contemporary American jurisprudence: Justice Scalia’s “textualist” approach, in which the analyst limits interpretation to the meaning of the words that constitute the text; the “intentionalist” approach, my shorthand description of the familiar “original intent” approach in which the interpreter seeks to discern and apply the text drafter’s original intent; and the “contextualist” approach, by which I mean the interpretative practice of allowing the contemporary context in which the text is being analyzed to inform the text’s meaning.

### A. Textualism

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<sup>16</sup> Levinson and Balkin’s description of law as a “performing art” is, it seems to me, precisely correct. See, Levinson and Balkin, *supra* n.12.

<sup>17</sup> And not just Constitutional interpretation. Justice Scalia makes clear that his textualism is intended to be an “intelligible theory” that applies to all forms of statutory interpretation. Scalia, *supra* n.1, at 14. Thus, while I will continue to use Constitutional interpretation as the benchmark for legal interpretation here, the legal doctrines I discuss are as applicable to other legislative enactments as musical doctrines are applicable to other music than the Eroica.

In a sense, the name of this approach is its own description; “textualism” requires a devotion to the text above all other considerations.<sup>18</sup> Justice Scalia, the most influential of textualists because of his role as Supreme Court justice, insists that textualism not be confused with what he calls “strict constructionism” and with what I will call here “intentionalism:” “I am not a strict constructionist, and no one ought to be – though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”<sup>19</sup>

An unabashedly formalist approach to interpretation,<sup>20</sup> textualism eschews the use of canons of construction<sup>21</sup> and legislative history<sup>22</sup> and rejects the notion of a “flexible” Constitution<sup>23</sup> in favor of limiting textual interpretation to the limited range of meanings associated with the words comprising the text;<sup>24</sup> any interpretation going beyond the text’s meaning is impermissible.<sup>25</sup>

## B. Intentionalism

I use this term to mean the familiar interpretative strategy wherein the interpreter seeks to glean the meaning imparted into the text by its creator or creators. Although the text in question might be the primary tool used to derive this meaning,<sup>26</sup> the intentionalist interpreter can and does go outside of the text,

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<sup>18</sup> See, e.g., Scalia, *supra* n.1, at 23 (“To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.”)

<sup>19</sup> *Id.*

<sup>20</sup> “Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ The answer to that is, *of course it’s formalistic!*” *Id.* at 25 (emphasis in original).

<sup>21</sup> *Id.* at 25-9.

<sup>22</sup> *Id.* at 29-37.

<sup>23</sup> *Id.* at 41-7.

<sup>24</sup> To explain what he means by this, Justice Scalia uses an example from *Smith v. United States*, 508 U.S. 223 (1993). See Scalia, *supra* n.1, at 23. At issue was whether a defendant who sought to purchase cocaine in exchange for an unloaded firearm was subject to a statutorily-imposed sentence enhancement for “using a firearm during and in relation to a drug trafficking crime.” *Id.* at 23-4. Although the majority of the Supreme Court’s justices voted that this was “use” within the contemplation of the language under consideration, Justice Scalia dissented, arguing that “[t]he phrase ‘uses a gun’ fairly connoted use of a gun for what guns are normally used for, that is, a weapon.” *Id.* at 24.

<sup>25</sup> *Id.*

<sup>26</sup> This is not necessarily the case, as Justice Scalia notes. “A few terms ago, I read a brief that *began* the legal argument with a discussion of legislative history and then continued (I am quoting it verbatim): ‘Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.’” *Id.* at 31, *quoting*, Brief for Petitioner at 21, *Jett v. Dallas Indep. Sch. Dist.* 491 U.S. 701 (1989), *quoted in*, *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989)(Scalia, J., concurring)(emphasis in original).

usually to look at the legislative history surrounding the text's creation, in order to fully understand the text's original meaning.<sup>27</sup>

### C. Contextualism

"Contextualism" is the term I use here to describe the belief that a Constitution is a living document, and that its meaning must be derived, in part, from the context within which the text is being interpreted. For a contextualist, a text's meaning is derived from its content, but informed by the values of contemporary society.<sup>28</sup>

Although Justice Scalia believes that one must be an "idiot" to believe in a living Constitution, distinguished jurists from other countries are more sympathetic to this approach. Justice Aharon Barak, President of the Supreme Court of Israel, has written an eloquent defense of the contextualist approach to Constitutional interpretation:

The intent of the constitutional authors . . . exists alongside the fundamental views and values of modern society at the time of interpretation. The constitution is intended to solve the problems of the contemporary person, to protect his or her freedom. It must contend with his or her needs. Therefore, in determining the constitution's purpose through interpretation, one must also take into account the values and principles that prevail at the time of

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<sup>27</sup> Thereby earning Justice Scalia's disapproval. "What is most exasperating about the use of legislative history . . . is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one." Scalia, *supra*, n.1, at 31-32 (emphasis in original).

<sup>28</sup> An example used by Justice Scalia to deride this approach works well enough to describe it. Three Supreme Court Justices - Brennan, Marshall, and Blackmun - believed the death penalty to be in violation of the Eighth Amendment, even though (as Justice Scalia believes and, for the purposes of this illustration only, I will accept) the death penalty's use is contemplated by the Constitution. Scalia, *supra* n.1, at 46, n.62 and accompanying text. These Justices reached this conclusion not because a prohibition against the death penalty exists in the text of the Constitution, or because there appears in the legislative history an indication that the Constitution's framers intended for it to be considered as a "cruel and unusual punishment," but rather because the death penalty had become, in their belief, a cruel and unusual punishment by 1976 (when Justices Brennan and Marshall dissented in *Gregg v. Georgia*, 428 U.S. 153, 227, 231 (1976)(Brennan, J., and Marshall, J., dissenting) and 1994 (*Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994)(Blackmun, J., dissenting from denial of certiorari)(" Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."))

interpretation, seeking synthesis and harmony between past intention and present principle.<sup>29</sup>

And the Australian Justice Michael Kirby has neatly summarized the contextualist strategy as requiring that “[t]he meaning and content of the words take colour from the circumstances in which the words must be understood and to which they must be applied.”<sup>30</sup>

### III. MUSICAL INTERPRETATION

Interpretative practices in the musical world are similar, although the political labels one might attach to proponents of the various schools are reversed. The “conservatives” of the musical world are the contextualists, who believe that musical interpretation is an evolving issue and that music should be interpreted based on contemporary interpretative criteria. By contrast, the “radicals” of the musical world are the textualists who believe in devotion to the written note and to reproducing the written score as faithfully as possible.

#### A. Musical Contextualism

I use this term here to balance my use of contextualism in a legal context. It is not a term that would be familiar to musicians, amongst whom musical contextualists made up, until recently,<sup>31</sup> the majority of contemporary performers. They are musicians who interpret music without regard to the performance practices or conventions of the time in which the music was written,<sup>32</sup> and instead offer a idiosyncratic response to the music, in essence

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<sup>29</sup> Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 69 (2002).

<sup>30</sup> The Hon. Michael Kirby, *Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?* 1999 Sir Anthony Mason Lecture, University of Melbourne Law Students’ Society, available at [http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_constitu.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_constitu.htm), (last visited March 19, 2006).

<sup>31</sup> I have no empirical support to justify my claim that musical contextualists no longer make up the majority of performers, nor can I think of any way to test this assertion, which is based on the prevalence of historically-informed performances of music, both in recordings and in live performances. Although such performances are by no means in the majority, most performing musicians have been exposed to them and the principles underpinning them, either as students or later in their careers. And while most might be unpersuaded by the goals of historically-informed performance practice, and therefore continue to perform music in a more “intentionalist” style, some influence of these performances, and the scholarship underpinning them, must influence these performers.

<sup>32</sup> Indeed, they often affirmatively reject the fruits of such study. “How can you recreate the circumstances in which the music was first performed? . . . If you bring back those old, out of tune violins, then why not have the musicians wear breeches and powdered wigs – why not the audience too? Imitating what we imagine the surface details of early performances to have been

encouraging the audience to experience the performer's personal reaction to the musical text.

This is not to say that the musical contextualist's performance is unthinking or anti-intellectual.<sup>33</sup> To the contrary, a contextualist performance can be the subtly nuanced product of intense textual analysis and careful rehearsal designed to clarify the performer's intentions. But a contextualist performance is, at its heart, a performance of the performer's interpretation of the work, with no regard to the soundworld<sup>34</sup> the composer might have had in mind when the piece was written.

## B. Musical Textualism

Standing in direct contrast to the contextualist approach is the musical textualist approach,<sup>35</sup> one in which the composer's soundworld is very much an element of the performance. Musical textualist performances are characterized by their attention to the performing styles and conditions prevailing at the time a musical text was written<sup>36</sup>, usually using instruments of the time or contemporary recreations of these instruments.<sup>37</sup>

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doesn't bring us inside Mozart's heart and mind and it trivializes him. We need a revival of the instruments of that period about as much as we need the kind of dentistry they practiced." Stephen Wigler, *Authenticity, Russian-Style, in Mozart's Requiem*, in OVERTURE: BALTIMORE SYMPHONY ORCHESTRA PROGRAM BOOK 13, 14 (2001) quoting, Yuri Temirkanov, Music Director, Baltimore Symphony Orchestra.

<sup>33</sup> Charles Rosen, one of the most intellectual of musicians, nonetheless rejects the influence of musicology on performance in the deft phrase "musicology is for musicians what ornithology is to birds." CHARLES ROSEN, *THE FRONTIERS OF MEANING*, 72 (1995), quoted in, Bernard D. Sherman, *An Atmosphere of Controversy*, in *INSIDE EARLY MUSIC: CONVERSATIONS WITH PERFORMERS*, 3 (Bernard Sherman ed., 1997).

<sup>34</sup> I use the term "soundworld" here to capture a myriad of technical performance details, such as pitch, instrument choice, articulation, and so on, that collectively make up the sound of the music.

<sup>35</sup> Although I use this term to draw parallels to what Justice Scalia calls a textualist approach in legal interpretation, the two are not mirror images. In particular, while the musical textualist seeks to simulate the composer's soundworld, it would be the rare (and foolhardy) musical textualist who would argue that any performance could accurately portray only those interpretative gestures intended by the composer to the exclusion of all other influences.

<sup>36</sup> This approach to musical interpretation was often called the "early music revival" (see, Sherman, *supra* n.34) but this term is no longer valid (if, indeed, it ever was) in light of performances of Brahms (ROGER NORRINGTON, *JOHANNES BRAHMS, SYMPHONY NO. 1, OP. 68* (EMI Classics 1991)), Wagner (ROGER NORRINGTON, *WAGNER* (EMI Classics 1995)), and Verdi (JOHN ELLIOT GARDINER, *GIUSEPPE VERDI, MESSA DA REQUIEM* (Phillips 1992)) that bring contemporary textualist-based performances to the threshold of music written during the sound recording era.

<sup>37</sup> The changes in instrument construction can have a profound effect on the way an instrument sounds and in the way an instrumentalist plays the instrument. For examples, playing on strings made of gut, as opposed to steel, can have a significant effect on how much vibrato the instrumentalist uses. See, Bernard D. Sherman, *Aladdin's Lamp: Anner Bylisma on the*

Textualist performances are not identical, because performers are almost always instrumentalists first and scholars second,<sup>38</sup> and musicians will often disagree as to the significance of the historical record.<sup>39</sup> While musical textualist performances will differ in detail and sound, however, they are united in the attention they pay to the historical record and the sound instruments of the period of a piece's composition would make.

### C. Musical Intentionalists

Located somewhere on the continuum between those two polar opposites are the intentionalists, performers who take the printed score as their principal point of departure but who will countenance changes to the text to clarify what they believe to be the composer's intentions. Without any concrete support for this statement, I believe that musical "intentionalists" make up the majority of contemporary performers.

Perhaps the most concise statement of intentionalist principles comes from the conductor, Erich Leinsdorf: "1. Great composers knew what they wanted. 2. The interpreter must have the means at his disposal to grasp the composers' intentions. 3. Music must be read with knowledge and imagination – without necessarily believing every note and word that is printed."<sup>40</sup> Intentionalist performers will typically use contemporary instruments but will be influenced, to a greater or lesser degree, by scholarship about performance practice.<sup>41</sup>

## IV. PUTTING THEORY INTO PRACTICE

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*Cello (and Vivaldi, and Brahms)* in *INSIDE EARLY MUSIC*, *supra* n.34, 207, 210-11 n.9 and accompanying text (discussing the changes in string composition and the effect on vibrato).

<sup>38</sup> "... I think the mastering of an instrument never goes through reading first, and then playing. It goes through playing first, and then reading – and having good colleagues, especially people who play other instruments." Anner Bylisma, *quoted in, Aladdin's Lamp*, *supra* n.37, at 209.

<sup>39</sup> For example, Anner Bylisma, a cellist who plays on baroque cellos, believes that performers should vibrate on dissonances, not consonances. *Id.* at 211. By contrast, Julianne Baird, an American soprano specializing in baroque music, believes that dissonant notes should not be sung with vibrato. Bernard D. Sherman, *Beyond the Beautiful Pearl: Julianne Baird on Baroque Singing* in *INSIDE EARLY MUSIC*, *supra* n.34, 225, 235-36.

<sup>40</sup> ERICH LEINSDORF, *THE COMPOSER'S ADVOCATE: A RADICAL ORTHODOXY FOR MUSICIANS*, viii (1981).

<sup>41</sup> Amongst conductors, Sir Charles Mackerras and Sir Simon Rattle have both conducted period-instrument orchestras and have allowed that experience to inform the performances they give with contemporary-instrument orchestras. David Zinman's recordings of Beethoven symphonies seek to recreate Beethoven's metronome markings and sound as if the conductor has studied, and learned from, the phrasing and articulation typical of period-instrument orchestra performances.

Having laid out the principal themes of this article, we now need to look more closely at the first movement of the Eroica symphony and think about how Justice Scalia, as a textualist conductor, will employ his doctrinal philosophy to the interpretative decisions presented by the piece.

This is not a simple process; conductors face an almost incalculable number of decisions over the course of a movement as long as this,<sup>42</sup> and any attempt to discuss each of them would bog this discussion down irretrievably. Rather than attempt this impossible task, we will consider here three principle interpretative elements – pitch, tempo, and textual error – and will also consider the particular problems raised by the Eroica’s first movement coda. Although this approach will leave numerous issues untouched, it should serve to give us an insight into the way legal interpretative doctrines can produce expected and unexpected results when applied to musical performance.

### A. Pitch

The Eroica symphony is in Eb major and begins with a short but arresting introduction of two Eb major chords, played *forte* by the entire orchestra, before the first subject begins with a *piano* theme that outlines an Eb major triad, played by the cellos:<sup>43</sup>

The musical score consists of two systems. The first system shows measures 1 through 4. Measures 1 and 2 are Eb major chords (E-flat major triad) in both hands, marked 'f'. Measures 3 and 4 show the piano theme in the bass clef (cellos) marked 'p', consisting of a descending Eb major triad (E-flat, G-flat, B-flat) over a sustained Eb major triad in the treble clef. The second system shows measures 5 through 7. Measures 5 and 6 continue the piano theme in the bass clef, and measure 7 concludes the piece with a double bar line.

<sup>42</sup> In addition to the numerous decisions a conductor must make before the first rehearsal – a tiny fraction of which are discussed in this article – the conductor must, at rehearsal, tailor an interpretative conception of a work to the capabilities of the orchestra, incorporating those interpretative decisions made independently by the musicians that fit the conductor’s overall interpretation and rejecting those that do not. And in performance, the conductor must be exquisitely attuned to the sound and energy of the performance, adjusting previously decided-upon interpretative details if necessary.

<sup>43</sup> LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3 IN Eb MAJOR (EROICA) (Max Unger ed., Ernst Eulenberg 1936), measures 1-7. (Transcription by author).

And this brings us to our first problem: before the orchestra plays a note, the conductor has to decide what Eb the orchestra should play.

This would, at first impression, appear to be a non-issue. Instrumentalists have a limited number of ways to play a note, and while each might produce a slightly different timbre, and might therefore be the subject of discussion during rehearsal, an Eb would seem to be an Eb. But which Eb the orchestra should play is a more nuanced question than this, and the answer depends on the A to which the orchestra has tuned.<sup>44</sup> The current standard A was set by the ISO as 440 Hz in 1955.<sup>45</sup> Many contemporary orchestras, however, prefer the brighter sound given by an A of 441 or even 442 Hz.<sup>46</sup> The contextualist would likely be unperturbed by this, and would accept whatever A is on offer or, as is the case in some American orchestras, is contractually required.<sup>47</sup>

The intentionalist and textualist, however, would both have to consider the pitch problem more carefully. To accurately predict Justice Scalia's pitch choice, we must look at the original text and try to understand what a composer meant by Eb in 1804 Vienna, the year and place in which *Eroica* was written.<sup>48</sup> We know

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<sup>44</sup> Orchestras tune to an A given by the oboe before each half of a concert, and usually between pieces as well. The convention of using an A to tune presumably has something to do with A being a convenient tuning note for all string instruments, the majority of instruments in an orchestra. The oboe gives the pitch (unless the orchestra is playing a piano concerto) because it possesses a "high[] degree of sheer cutting power" and because of "a particularly strong fundamental in its harmonic structure, and its vibrant expressiveness. . . ." NORMAN DEL MAR, *ANATOMY OF THE ORCHESTRA*, 169 (1981).

<sup>45</sup> Mark Lindley, et al, *Pitch*, in *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS*, XIV, 785 (1980).

<sup>46</sup> The Boston Symphony Orchestra, for example, tunes to an A of 441 Hz. E-mail from Lucia Lin, first violinist, Boston Symphony Orchestra, to Ian Gallacher (July 29, 2006, 01:54 EST)(on file with author). By contrast, my home orchestra, the Syracuse Symphony Orchestra, tunes to an A of 440 Hz. Telephone interview with Richard Decker, General Manager, Syracuse Symphony Orchestra (August 2, 2006). Orchestras can run into pitch problems when playing in remote locations. The pianos at Carnegie Hall, for example, were tuned at an A of 442 Hz when the Syracuse Symphony played there in 2003. *Id.* This required the orchestra to change its tuning patterns to conform to the hall's requirements. *Id.* An extreme example of this pitch variation was experienced at the 2006 Promenade Concerts in London, where the Steinway piano company was asked to deliver a piano tuned at A = 444Hz for a performance by the Bamberg Symphony Orchestra. *Interview with Ulrich Gerhardt, Steinway & Sons*, (BBC radio broadcast, August 2, 2006).

<sup>47</sup> The Syracuse Symphony Orchestra's A = 440, for example, is contractually required. Interview with Richard Decker, *supra* n.46. A conductor directing an orchestra with a pre-determined A would, of course, have little input into what A the orchestra should use. Any conductor conducting a modern instrument orchestra must expect that all works on the program will be played at a pitch centered on A = 440, with very narrow variances. For most conductors working today, a consideration of which pitch to use would be unnecessary and superfluous.

<sup>48</sup> Just as Justice Scalia believes that the Eighth Amendment is "rooted in the moral perceptions of the time [in which it was written]" (Scalia, *supra* n.1, at 145 (emphasis in original)),

from a collection of tuning forks that in 1810, opera houses in Dresden, Berlin, and Paris, as well as the London Philharmonic Society, were all using an A that was “a significant portion of a semitone lower” than the contemporary 440 Hz standard.<sup>49</sup> Although Vienna seems to have welcomed a brighter, higher sound than other cities,<sup>50</sup> and while this was a period of rapid technological change, allowing for brighter tone and a sharper pitch,<sup>51</sup> it is likely that the Viennese Eb was still substantially flatter than the note we recognize as Eb today.<sup>52</sup>

In selecting a pitch for his performance, Justice Scalia would likely look to what the text could reasonably be understood to mean, rather than what it was intended to mean – the “semantic intention” rather than the “original intention,”<sup>53</sup> even though this appears to be a very nice distinction between two facially similar propositions. Seeking to clarify his position, Justice Scalia has used as an example the meaning of the Eighth Amendment’s “cruel and unusual” language, concluding that the words abstract “the existing society’s assessment of what is cruel” rather than “whatever may be considered cruel from one generation to the next.”<sup>54</sup> Although this explains his disdain for the contextualist approach, the distinction between semantic and original intention is less clear, as is how a semantic intention can be determined without an inquiry, as here, into what we may call the legislative history of the meaning of Eb to 1804 Viennese musical society.<sup>55</sup>

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so can we be sure that he would seek to interpret the Eroica symphony with a pitch decision rooted in the pitch perceptions of its time.

<sup>49</sup> Lindley, *supra* n.45, at 782. The evidence suggests that A was “remarkably close to the ‘present-day pitch . . .’ recorded by Praetorius 200 years earlier. *Id.* at 785. Praetorius’ pitch was “about 3/5 of an equal tempered semitone below the modern standard  $a' = 440$ . . . .” *Id.* at 781-82.

<sup>50</sup> *Id.* at 785 (noting that the flautist A.B. Fürstenau is known to have bought his first Viennese flute – presumably built at the higher pitch popular in Vienna – from Koch in 1821. . . .”)

<sup>51</sup> *Id.* (“The availability of better gut strings for the violin and the concurrent alterations to the structure of the instrument . . . accommodated a change in taste involving the need for competing instrumentalists and orchestras to produce the ‘larger’ sound necessary to fill larger concert halls and opera houses. In descriptions of high pitch levels, disparaging terms like ‘strident’ gave way to appreciative ones such as ‘brilliant.’”)

<sup>52</sup> The difference in pitch might seem arithmetically small, but the difference in sound can be dramatic. Recordings go in and out of print so rapidly these days that it is impossible to state with certainty that a particular recording demonstrating this difference will be available, but a relatively recent recording by Roger Norrington offers a performance pitched at A=430 Hz. ROGER NORRINGTON, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 “EROICA” (EMI Records 1989).

<sup>53</sup> Scalia, *supra* n.1, at 144.

<sup>54</sup> *Id.* at 145.

<sup>55</sup> The symbols on the page of the Eroica have not changed in the intervening 200 years, just as the words “cruel and unusual” look the same to us as when they were first written in the context of the Eighth Amendment in 1791. Without an understanding of the context in which

No matter. We can safely conclude that Justice Scalia would conduct Eroica in what 19th Century Vienna would assess Eb major to mean, rather than what Eb major has come to mean today. This is, of course, a difficult result, and condemns Justice Scalia to make an evaluation of the pitch information for every piece he conducts, just as he should consider every statute as “meaning” what the words meant when chosen by the drafters at the time of drafting.<sup>56</sup> But it is the only result consistent with a textualist philosophy.

## B. Tempo

So now the orchestra can play the Eroica’s first, Eb major chord, even though it sounds to contemporary ears like a slightly sharp D major. But before the orchestra plays the second chord, a conductor must decide in what tempo the movement will be played. And this determination is somewhat more complicated than the pitch issue we have just resolved.<sup>57</sup>

The text itself gives us three clues: the time words “Allegro con brio;” the metronome marking of a dotted half = 60 (quarter note = 180); and a theme that has a swinging, one beat to a measure, feeling about it, with some faster figuration passages later in the movement.<sup>58</sup>

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those symbols were written, we might be lured into believing that the meaning they convey had not changed either. Yet as we have seen, a study of pitch reveals far greater ambiguity than might at first have been apparent, and the “meaning” of the Eroica’s text, at least as to pitch, was far different from that which we might understand and hear today. This “meaning,” however, can only be revealed by a study of the historical record. The difference between the textualist and intentionalist approach appears to be the difference between studying the meaning of Eb to the general Viennese musical community of 1804 and the meaning of Eb to Beethoven specifically. Since the two seem likely to render similar, if not identical results, Justice Scalia’s insistence on one over the other would seem odd when viewed in a musical context.

<sup>56</sup> As even this fleeting glimpse into the issue demonstrates, coming to a definitive sense of what pitch “means” for a particular piece requires study into not just the year of composition, but also the location of composition and the practices then prevalent. And the pitch issue stands as a proxy for a host of additional interpretative decisions a conductor must make. Issues like what types of instruments will generate the pitches (violins, for example, have changed radically through the years and pre-19th century instruments have all been physically altered to accommodate these changes), the balance of different instrument groups (how many first violins, second violins, and so on the orchestra should contain), the methods of articulation used by those instruments, just to name a few of the concerns, must be considered and resolved by a conductor seeking to recreate the semantic intentions of the original soundworld contemplated by a musical text as faithfully as possible.

<sup>57</sup> It is also, unlike the pitch determination, one that all conductors must make.

<sup>58</sup> Eroica, *supra*. n. 43, measures 65-68.



Each of these clues presents some problems. The time words “Allegro con brio” translate as “fast, with vigor.” Not the most illuminating instruction and one that, like much of the Constitution’s text, is open to a substantial amount of interpretation: the concept of “fast” is as variable from person to person as is the concept of how much process is “due,” and “vigor” is a term that is more helpful in determining expression than tempo.<sup>59</sup>

The metronome marking is, on its face, more helpful. Unlike pitch, the number of beats per minute, and the means of measuring them, has not changed since the 19th century,<sup>60</sup> and a metronome marking appears to give us a scientific designation of tempo. But Beethoven added the metronome markings to his symphonies only in 1817,<sup>61</sup> 13 years after *Eroica* was first performed, making them more like an amendment to the original text.

In fact, the metronome marking complicates rather than simplifies the tempo problem because it designates a very fast tempo, leading some to believe that Beethoven could not have intended the tempi suggested by the metronome markings he supplied.<sup>62</sup> Yet scholars who have studied the issue have concluded that the metronome markings for *Eroica* are consistent with the markings Beethoven gave for other music he wrote, and that he had a taste for very fast tempos that was shared by his contemporaries and near contemporaries like Schubert, Rossini, Spohr, and Mendelssohn.<sup>63</sup>

The internal evidence, suggested by the orchestra’s ability to play the figuration in some of the movement’s passages, was the most important tempo clue for

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<sup>59</sup> At least on a superficial reading. In fact, however, the notion that the movement is to be played “with vigor” might go some way to explaining the character, and therefore the tempo, of the faster moving portions of the movement, discussed *infra* at nn. 51-52 and accompanying text, and is therefore useful as a tempo marking after all as, of course, Beethoven intended.

<sup>60</sup> The modern metronome was patented by Johann Nepomuk Maelzel around 1815. E.G. Richardson, *Metronome*, in *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS*, XII, 222-23 (1980).

<sup>61</sup> Beethoven’s table of metronome markings for the eight symphonies he had written to that point (Beethoven wrote the Ninth Symphony in 1824) was published in December, 1817. Thayer, *supra* n.14, at 687.

<sup>62</sup> Peter Stadlen rejected many of the fast metronome markings in Beethoven’s symphonies as “totally unacceptable.” Peter Stadlen, *Beethoven and the Metronome*, 9 *Soundings* 38 (1982), quoted by, Clive Brown, *Historical Performance, Metronome Marks and Tempo in Beethoven’s Symphonies*, 19 *Early Music* 247, 249 (1991).

<sup>63</sup> Brown, *supra*, n.62, at 258.

performers in Beethoven's time.<sup>64</sup> And some of Eroica's rapid figuration passages can sound rushed, to our ears, when taken close to Beethoven's designated metronome mark.<sup>65</sup> In fact, very few performers – even those striving to make their performances as historically informed as possible – reach and sustain a tempo of quarter = 180. An analysis by Eric Grunin of nearly 350 recorded performances of the piece shows only one performance, conducted by Hermann Scherchen in 1958, as having a sustained tempo anywhere close, at quarter = 174.6.<sup>66</sup>

For Justice Scalia, however, the internal evidence is likely unhelpful – an insight into the composer's "intent" he would reject as irrelevant.<sup>67</sup> And while Beethoven added the metronome marking later, the framers of the Constitution amended it as well and once adopted, those amendments must receive the textualist treatment.<sup>68</sup> Justice Scalia's Eroica will likely be very fast.

### C. Mistakes

It would be presumptuous for me to assert that Beethoven made "mistakes" in anything he wrote.<sup>69</sup> But mistakes could and did occur in the copying of the

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<sup>64</sup> *Id.*, at 252 ("As well as [the meter and tempo terms], the character of the particular piece – its mood, the nature of its themes and especially the types of figuration employed in its fastest notes – would have a significant bearing on the tempo. . . . But perhaps the most important additional factor was the proportion of fastest notes within a given section. As Schulz observed: 'If a piece in 2/4 is marked Allegro and contains only a few or even no [sixteenth notes], then the movement of the meter is faster than when it is full of [sixteenth notes]; the case is the same with the slower tempos.'")

<sup>65</sup> Two recorded performances in particular come close to Beethoven's metronome marking for this movement; those conducted by Norrington (*supra* n.52: historical instruments and A=440 Hz) and Zinman (DAVID ZINMAN, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3 IN E FLAT MAJOR OP. 55 "EROICA" (Arte Nova 1998): modern instruments and contemporary pitch).

<sup>66</sup> Available at <http://www.grunin.com/eroica> (last visited August 2, 2006). Grunin's study, which tracks tempi and repeat observance in 351 performances of Eroica from the 1920s to the present-day, suggests that "fast" tempi in Eroica's first movement have remained relatively constant, ultra-slow performances have gone out of fashion today, and that ultra-fast performances are slowing down as well, having reached a peak in the late 1980s. *Id.*

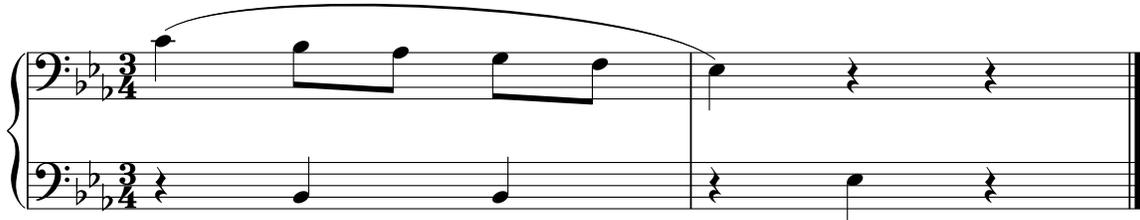
<sup>67</sup> Scalia, *supra* n.1, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.")

<sup>68</sup> See, Scalia, *supra* n.1, *passim*. As we know, most of the action in Constitutional interpretation revolves around the Bill of Rights, and Justice Scalia's textualist philosophy is grounded in an approach to the interpretation of those first ten amendments to the Constitution.

<sup>69</sup> The same might also be true for other composers considered to be in the "great composers" pantheon, like Bach and Mozart, but lesser composers are much less fortunate. Perhaps the most famous example is Schumann, a composer whose orchestral music was rewritten almost as a matter of course by Nineteenth and Twentieth century conductors on the grounds that his orchestrational skills were weak. See, e.g., HANS GÁL, SCHUMANN ORCHESTRAL MUSIC, 20 (1979) ("One glance at the scores of Schumann's late years . . . reveals a desperate anxiousness to secure every melodic and harmonic detail by extensive doubling, the result of

original holographic manuscript and can become deeply entrenched in a performance tradition once they are printed.<sup>70</sup> One of a conductor's principal jobs is finding and correcting these mistakes when they occur,<sup>71</sup> and there is an interesting example of a potential misprint in the Eroica score.

In measure 494, the double bass has a quarter rest, a quarter note Eb, and then a quarter rest, in contrast to the 1st bassoon, which plays an Eb of the same octave on the first beat of the bar.<sup>72</sup>



This is an odd result, a syncopated effect that bears no apparent relationship to the musical texture that Beethoven has established up to this point. Most significantly, this recapitulation passage differs from the parallel measure in the exposition; the first time the companion to this measure was heard, the comparable bass and bassoon notes are both together on the first beat of the measure.<sup>73</sup>

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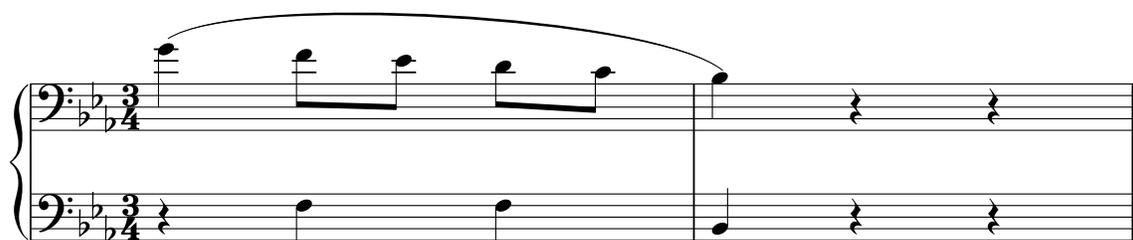
which is sometimes an oppressive dullness and sluggishness of sound. Schumann has always been abused for this and his scores have been subjected to arbitrary retouchings. . . .")

<sup>70</sup> Even orchestras with ready access to original source material can fall prey to this tendency. In 1933, Adrian Boult, an English conductor, noticed that the Vienna Philharmonic's string section slurred the first two notes of the second movement of Mozart's G minor symphony, K. 550. Boult suggested that they should check the autograph manuscript, which was upstairs from the rehearsal hall. When the orchestra players realized that the slur was not in Mozart's manuscript, they removed it from their parts. MICHAEL KENNEDY, ADRIAN BOULT, 159 (1987).

<sup>71</sup> At least this is one perspective of a conductor's function. Others might argue that since these mistakes have become entrenched in the soundworld of a piece, they should be preserved as if they were the composer's original intent. A cynic might argue that conductors only change the mistakes they can hear, meaning that most mistakes continue to be performed by virtue of incompetence rather than intention. I choose to take the high road here and assume that conductors will identify all potential mistakes and will correct those that, upon reflection, appear to be genuine errors rather than textual novelties.

<sup>72</sup> Eroica, *supra*. n.43, measures 494-95.

<sup>73</sup> *Id.*, measures 90-1.



Based on this evidence, and on his estimation of the musical sense of the piece, the conductor and amateur musicologist<sup>74</sup> Norman del Mar concludes that the recapitulation bass Eb “can hardly be correct.”<sup>75</sup> And he notes that “[t]he whole section both in the exposition and recapitulation seems to have been scribbled in hastily, being the last passages to be composed and inserted into spaces left blank for the purpose long after the rest of the movement was complete.”<sup>76</sup>

Unfortunately, del Mar left no indication as to how he reached his conclusions regarding the compositional history of the movement; he cites no authority and he was known as a conductor,<sup>77</sup> not a specialist in the arcana of musicology, as is his son.<sup>78</sup> But accepting, for purposes of argument, his analysis, the path for the intentionalist and the contextualist conductor seems clear – the printed work fails to represent Beethoven’s original intention and, in any case, appears to be a

<sup>74</sup> In distinction to his son, Jonathan del Mar, whose critical edition of the Beethoven symphonies is the latest word in the practical musicological study of these works. LUDWIG VAN BEETHOVEN, SYMPHONIES 1-9 (Jonathan del Mar ed., Bärenreiter 1996-2000). I have not used the del Mar edition in preparing this article because it has not yet, I believe, become the standard performing edition of the Eroica symphony. For those interested in hearing the differences wrought by the del Mar edition, David Zinman’s recordings of the nine Beethoven symphonies uses the del Mar edition. Zinman, *supra* n.65 (“ARTE NOVA is the first label to produce all of the Beethoven symphonies based upon the new critical Bärenreiter Edition by Jonathan Del Mar on modern instruments, under the baton of a world-class conductor.”)

<sup>75</sup> NORMAN DEL MAR, ORCHESTRAL VARIATIONS: CONFUSION AND ERROR IN THE ORCHESTRAL REPERTOIRE, 22 (1981).

<sup>76</sup> *Id.*

<sup>77</sup> Norman del Mar was an English conductor, composer, and writer on music who was, at times, principal conductor of the BBC Scottish Orchestra, the Göteborg Symphony Orchestra and the Academy of the BBC. He was the author of several books, including an extensive three-volume critical appreciation of Richard Strauss. John Warrack, *Norman Del Mar*, in THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS, V, 351-52 (1980).

<sup>78</sup> Those seeking a taste of how detailed musicological studies can be can gain a glimpse into this world by downloading Jonathan del Mar’s follow-up report (“nachtrag”) to his critical commentary on the Beethoven symphonies, *available at*, [https://www.baerenreiter.com/cgi-bin/baer\\_V5\\_my/baerenreiter?op=newuid&ln=en&wrap\\_html=indexframe.htm](https://www.baerenreiter.com/cgi-bin/baer_V5_my/baerenreiter?op=newuid&ln=en&wrap_html=indexframe.htm) (visited July 30, 2006). The discussion of a new source of information about the Eroica – orchestral parts found in the Roudice Lobkowitz Collection (Nelahozeves Castle, Czech Republic) – includes a lengthy consideration of the significance of orange crayon markings, none of which are by Beethoven, to the publication history of the symphony. *Id.* at 7.

misprint. Both will rewrite the bass part, putting the double bass's Eb on the first beat where it belongs.

The textualist's position seems equally clear. Ignoring the evidence of internal inconsistency from the exposition and disregarding del Mar's subjective and contextualist contention that the note "can hardly be correct," Justice Scalia and other textualists should play the bass Eb as written in the text.

Except that while Justice Scalia claims to be a textualist and a formalist, he denies that he is a literalist, and he therefore will accept the correction of "scrivener's errors."<sup>79</sup> He notes that "where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made[,] . . . it [is] not contrary to sound principles of interpretation . . . to give the totality of context precedence over a single word."<sup>80</sup>

This seems a strange position for a textualist to take.<sup>81</sup> Either the text should be taken on its face value or it should not.<sup>82</sup> But Justice Scalia is willing to go even

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<sup>79</sup> Scalia, *supra* n.1, at 20-21.

<sup>80</sup> *Id.*

<sup>81</sup> Ronald Dworkin questions Justice Scalia's position on this point, noting that "[a] careless reader might object, however, that any coherent account of statutory interpretation *must* be based on assumptions about someone's (or some body's) intention, and that Scalia's own account accepts this at several points." Dworkin, *Comment*, in Scalia, *supra* n.1, at 115. He argues later that such pragmatic exceptions to pure textualism "undermine Scalia's position altogether, because they recognize not only the intelligibility but the priority of legislative intention, both of which he begins by denying." *Id.*, at 116.

<sup>82</sup> In this context, it is perhaps worth noting that composers sometimes make intentional decisions that can seem to others, even those well-attuned to the composer's style, to be mistakes. In the first movement of *Eroica*, immediately before the recapitulation section begins, Beethoven writes a two measure *pianissimo* statement of the theme, in its correct key, for the second horn. This two measures, coming, as it does, before the tonic key of Eb major has been firmly reestablished for the recapitulation, can sound like a mistake in the part or by an inattentive horn player. So, at least, it appeared to Ferdinand Ries, who was at the first playing through of the symphony: "To one unfamiliar with the score this must always sound as if the horn player has made a miscount and entered at the wrong place. At the first rehearsal of the symphony, which was horrible, but at which the horn player made his entry correctly, I stood beside Beethoven, and, thinking that a blunder had been made I said: 'Can't the damned hornist count? - it sounds infamously false!' I think I came pretty close to receiving a box on the ear. Beethoven did not forgive the slip for a long time." FRANZ WEGELER & FERDINAND RIES, *BIOGRAPHISCHE NOTIZEN ÜBER LUDWIG VAN BEETHOVEN* (1845), *quoted by*, Thayer, *supra* n.14, at 350. Beethoven had, in fact, planned this apparent error carefully and a review of his 1803 sketchbook, which contains much of the working-out of the symphony, shows that it had been an integral part of the movement since the early stages of its composition. GUSTAV NOTTEBOHM, *TWO BEETHOVEN SKETCHBOOKS: A DESCRIPTION WITH MUSICAL EXTRACTS*, 72 (Jonathan Katz, trans. 1979). Of course, Justice Scalia the conductor would decline to use the sketches or Ries's comments in making his determination as to whether the seeming "mistake" is or is not a scrivener's error, since both would constitute a form of legislative history.



In the coda,<sup>87</sup> Beethoven alters the contours of the theme to give it an appropriately peroratory effect.<sup>88</sup>



The new form of the theme is first played *piano* by the horn, then again in the 1st violins, then again in the lower strings – this time with a *crescendo* – and then is played *forte* in the winds and, most prominently, by the trumpets.<sup>89</sup>



The problem is that the trumpets – the loudest of the instruments playing this version of the theme – do not actually play the entire theme. Rather, they only play two and 2/3 measures of the theme before joining the non theme-playing instruments in a harmonizing ostinato.<sup>90</sup>



The simple reason for this is that the trumpet Beethoven wrote for could not comfortably reach the high sounding Bb (written G) necessary to play the new version of the theme.<sup>91</sup> Faced with this technical problem, Beethoven had the trumpets play as much of the line as they could and then dropped them into the background.

But contemporary trumpets can play the high Bb with more or less ease, and Norman del Mar, writing in 1981, noted that while “[a]lthough in these days of purism and scholarship emendations to Beethoven’s texture are far less often

<sup>87</sup> Beginning in measure 631.

<sup>88</sup> *Eroica*, *supra*. n.43, measures 631-34. I have transposed the theme to the bass clef here so the differences in the theme can be seen more clearly. In the symphony, this theme first appears at these measures played by a horn in Eb, playing in the treble clef.

<sup>89</sup> *Id.*, measures 655-58.

<sup>90</sup> *Id.* The example here is given in transposed form. In the score, the Eb trumpet line is written in C.

<sup>91</sup> del Mar, *supra* n.75, at 22 (“[T]he upper G on the large Eb trumpet – now extinct for all intents and purposes – [was] considered too high and perilous for orchestral use. . . .”)

made than of yore, it is rare indeed to hear a performance in which the trumpets play as printed . . . and it is . . . customary for the trumpets to bring fulfillment to the climax by playing the whole statement of the great theme in their turn.”<sup>92</sup> This change transforms the trumpet line<sup>93</sup>



and transforms the entire texture of the sound at this point in the coda.

It is true that del Mar was a brass player before he was a conductor,<sup>94</sup> so perhaps we should not be too surprised by his opinion here. But other conductors, at least conductors from the previous generation, agree; the tradition of rewriting the trumpet part started over 100 years ago with Bülow<sup>95</sup> and is affirmed by such authorities as Weingartner<sup>96</sup> and Markevich,<sup>97</sup> who said that this alteration “is without doubt well-founded.”<sup>98</sup>

<sup>92</sup> *Id.*

<sup>93</sup> *Eroica*, *supra* n.43, measures 655-58, as rewritten.

<sup>94</sup> del Mar studied the horn and composition at the Royal College of Music. John Warrack, *Norman Del Mar*, *supra* n.75, at 351. The book that became “Orchestral Variations” had its genesis in del Mar’s time as a brass player. “Already, while still a horn player, I had begun noting down . . . textual enigmas that arose during rehearsals.” del Mar, *supra* n.75, at ix.

<sup>95</sup> See, e.g., FELIX WEINGARTNER, *WEINGARTNER ON MUSIC AND CONDUCTING*, 101 (Jessie Crossland trans., Dover Publications 1969) (1907) (“Bülow here allowed the theme to be played throughout by the trumpets. . .”) Hans von Bülow was a German conductor and pianist of the Nineteenth Century. He studied with Wagner and Liszt and married Liszt’s daughter Cosima in 1857, although Cosima left him in 1869 in order to marry Wagner. As a pianist, he gave the first American performance of Tschaikovsky’s First Piano Concerto, and as a conductor, he conducted the first performances of Wagner’s *Tristan und Isolde* and *Die Meistersinger*. Corneel Mertens, *Hans von Bülow*, in *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS*, III, 451-53 (1980).

<sup>96</sup> *Id.* (“The indistinct character of the theme when played without this correction quite justifies us in adopting it.”) Felix Weingartner was an Austrian conductor who succeeded Mahler as principal conductor of the Vienna Court Opera and is remembered today as “. . . one of the most eminent classical conductors of his day, outstanding for the clarity and economy of his beat, for the lack of exaggeration in his interpretations, [and] for the precision without rigidity of his tempos.” Ronald Crichton, *Felix Weingartner*, in *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS*, XX, 315-16 (1980).

<sup>97</sup> Igor Markevich was an Italian conductor whose parents moved from Russia to Italy in 1914, when he was two years old. His performances combined “a volatile personality with meticulous attention to the composer’s instructions, and . . . [were] never weakened by sentimental indulgence of expression.” Noël Goodwin, *Igor Markevich*, in *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS*, XI, 691 (1980).

<sup>98</sup> IGOR MARKEVICH, *DIE SINFONIEN VON LUDWIG VAN BEETHOVEN: HISTORISCHE, ANALYTISCHE UND PRACTISCHE STUDIEN*, 208 (1983) (“Daß dies wohlbegründet ist, dürfte außer Zweifel stehen.”)(translation by the author). Tastes change relatively quickly. Although it might have been rare to hear the trumpet line in these measures played as written when del Mar was writing in 1981, the opposite is, I think, true today.

These are, of course, classic espousals of the contextualist's "living document" rationale: what once was impossible is now possible and since it is better this way we should do it.<sup>99</sup> But it is possible to justify the rewrite on intentionalist grounds as well: Beethoven intended the line to go up, as the evidence from the rest of the orchestration demonstrates, and the only thing preventing him from putting the trumpets with the other melody instruments appears to have been the technical limitation placed on him by the trumpet's construction. Under this rationale, contemporary technology allows us to restore Beethoven's original intent, making the altered version more "original," in a way, than what Beethoven actually wrote. Even Toscanini, who claimed to be devoted to the purity of the written text over any notions of personal interpretative preference, made this change.<sup>100</sup>

This presents an interesting problem for the doctrinal textualist, like Justice Scalia. The written text itself is clear and unambiguous; the trumpets literally go down, not up. But Justice Scalia, as we have seen, is not a literalist – he will bend a little if a word or a phrase can fairly be interpreted as including a non-articulated meaning.<sup>101</sup> And just as "speech" can, in his view, encompass handwritten words, perhaps the Eroica theme can be interpreted to encompass a note that only technology prevented Beethoven from writing. The First Amendment can be extended to encompass technologies that did not exist in the 1790s.<sup>102</sup> Perhaps this is no different.

Or perhaps it is going too far. Perhaps this is merely a justification for evolutionary interpretation, something a textualist like Justice Scalia cannot permit. But as we have seen, the tradition of rewriting the trumpet line is well established and Justice Scalia is willing to accept another "pragmatic exception"

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<sup>99</sup> Although not speaking specifically about the trumpet line in the Eroica coda, Otto Klemperer, one of the most distinguished conductors of the twentieth century, gave this defense of "retouching" the orchestration in Beethoven symphonies: "I don't do as much as Mahler did, and then only where I find it absolutely necessary. But in some passages it is; if only because, for instance, there were in Beethoven's time no valves in horns and trumpets. Everything had to be played on natural brass instruments which must have sounded terrible. Then again, where there is a melody or a melodic theme in the first violins which I want to bring out, I also give it to the second violins, and the second violin parts I give to some of the violas, so that it is still there. . . . [I]n the Funeral march of the Eroica, I begin with eight violins and use all sixteen only later." CONVERSATIONS WITH KLEMPERER, 35 (Peter Heyworth ed., 1973).

<sup>100</sup> As demonstrated by his famous 1939 recording of the Eroica. ARTURO TOSCANINI, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (RCA Victor Gold Seal 1992).

<sup>101</sup> See, *supra* nn. 83-84 and accompanying text.

<sup>102</sup> See, Scalia, *supra* n.1, at 45 (describing the Supreme Court's application of the First Amendment's "freedom of speech" guarantee "to new technologies that did not exist when the guarantee was created – to sound trucks, or to government-licensed over-the-air television" by following "the trajectory of the First Amendment, so to speak, to determine what it requires. . . .")

to his core textualist principles to allow for *stare decisis*.<sup>103</sup> And while there is no direct doctrinal musical equivalent to the *stare decisis* doctrine, it does not seem too far a stretch to see Justice Scalia the conductor, perhaps grudgingly, accepting this rewrite as something that is well-founded “beyond doubt.” Assuming, of course, that he has made a pitch decision that allows for the inclusion of trumpets of sufficiently recent vintage to allow them to play the high Bb.

## V. CONCLUSION

What do we as lawyers learn from this brief excursion into a parallel interpretative universe? Perhaps nothing more than that it is comforting to know we are not alone: other disciplines have interpretative problems with which they wrestle and musicians, at least, have devised some strategies for resolving those problems that map directly onto the strategies lawyers and judges have adopted. A problem shared is, if nothing else, a problem shared.

Perhaps, though, looking at musical interpretation might allow us to have a discussion about the appropriateness of different approaches to modes of textual interpretation without being drawn into the polarizing debate about social issues affected by Constitutional decisions.<sup>104</sup> Being able to talk about the pitfalls and benefits of textualism, contextualism, and intentionalism without having to consider abortion, school prayer, or any of the other current controversies could be both constructive and refreshing.

And we have only scratched the surface. This paper, as with most other papers dealing with the issue, focused on performance practice – the decisions a performer makes when deciding how to play a piece of music; what Eb we should play when we see a note occupying the place on the staff we associate with Eb. The more profound inquiry, however, is what that Eb means, how we can discern the deeper meaning of text through close analysis, and whether that inquiry can tell us anything about deciphering deeper meaning in texts than merely looking to what the words mean.<sup>105</sup> That inquiry will, I hope, be the subject of subsequent work.

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<sup>103</sup> Scalia, *supra* n.1, at 140.

<sup>104</sup> This is not even remotely to suggest that I do not think these musical decisions are important, or that they “matter” less than Constitutional decisions.

<sup>105</sup> That is, of course, the premise behind the law and literature movement as well. As noted *infra*, whether or not this movement has fully realized the promise of its approach is beyond my scope here.

Looking at the rise of the historically informed performance practice movement in music<sup>106</sup> also raises the intriguing image of a created culture and the invention of an interpretative strategy that owes little, if anything, to the organic development of performance practice, a strangely ahistorical process.<sup>107</sup> Whether such an inquiry can shed insights into the development and intellectual validity of Justice Scalia's neo-textualism is also a matter for further study.

What we are left with at present is the strange and slightly unsettling image of Justice Scalia, the radical conductor, cocking a snook at the conservative musical establishment by leading a performance of *Eroica* that is faster and flatter than we are used to hearing, and likely with period instruments and orchestral proportions – much like the performances recorded by Roger Norrington or John Elliot Gardiner<sup>108</sup> – yet which has some puzzling textual deviations that, it could be argued, are more rooted in an intentionalist or even contextualist approach than a textualist should be willing to accept, much like the performances recorded by, for example, Furtwängler<sup>109</sup> or Karajan.<sup>110</sup> How Justice Scalia would respond to such a performance were he to hear it is an interesting question to ponder.

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<sup>106</sup> For a brief introduction to the rise of the historically informed performance practice movement, and the clashes it generated with the more “contextualist” musical performance mainstream, see Sherman, *supra* n.34; Howard Mayer Brown, *Pedantry or Liberation? A Sketch of the Historical Performance Movement*, in AUTHENTICITY AND EARLY MUSIC: A SYMPOSIUM, 27 (Nicholas Kenyon ed., 1988).

<sup>107</sup> Levinson and Balkin touch on this aspect of the early music movement. Levinson and Balkin, *supra* n.12, at 1627-33.

<sup>108</sup> Norrington, *supra*, n.52.; JOHN ELLIOT GARDINER, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 “EROICA” (Deutsche Grammophon 1994).

<sup>109</sup> See, e.g., WILHELM FURTWÄNGLER, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 “EROICA” (EMI Classics 2000)(originally recorded in 1953).

<sup>110</sup> HERBERT VON KARAJAN, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 “EROICA” (Deutsche Grammophon 2003)(originally recorded in 1962).