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# Conducting the Constitution: Justice Scalia, Textualism, and the Eroica Symphony

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# Conducting the Constitution: Justice Scalia, Textualism, and the *Eroica* Symphony

*Ian Gallacher**

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The more one studies the debate surrounding modes of Constitutional interpretation,[1] the more dismaying the experience

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1. 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

becomes. Lurking close to the surface of the coded discourse of Constitutional scholars is the aggressive tone and cultural dynamic of the playground. Reduced to its essence, the substance of the debate seems more akin to a Monty Python sketch[2] than to the scholarly exchange of ideas one would hope for in this area.[3]

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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).

2. 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 a 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!
M: Oh, this is futile!
B: No it isn't.

MONTY PYTHON, MONTY PYTHON'S PREVIOUS RECORD (Charisma Records 1972), *transcript available at* http://www.mindspring.com/~mfpatton/sketch.htm (last visited Dec. 15, 2006).

3. 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 an 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 dismissed 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* note 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* to SCALIA, *supra* note 1, 115, 115. Later in his comment, Professor Dworkin refers to Justice Scalia's translation of the Eighth Amendment's meaning as "bizarre." *Id.* at 121. Justice Scalia further claims that "[i]n some sophisticated circles, [textualism] is considered simpleminded – 'wooden,'

Justice Scalia has adopted a particularly strident tone for those who disagree with him: at a recent meeting of the Federalist Society, Justice Scalia made a statement to the effect that one would have to be an idiot to believe in a "Living Constitution."[4] 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 scholars need to step back from this *ad hominem* abyss and take a more dispassionate view of the interpretative techniques they employ to understand the Constitution.

One way to accomplish this is to look beyond the law 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, scholars might be able to make more reasoned conclusions about the means used to achieve that result. Other than literature, which already has a full body of scholarly work devoted to its relationship with the law,[5] two promising fields of intellectual inquiry for this experiment are religion and music.[6] Religion is, for me at least, disqualified because it brings into play numerous moral and ethical issues I would rather avoid here.[7] But music offers a more neutral and potentially helpful forum for the purpose of this article.

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'unimaginative,' 'pedestrian,'" SCALIA, *supra* note 1, at 23, although his failure to cite to sources of those descriptions makes verification of them impossible.

4. 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,'* CBS NEWS, Feb. 14, 2006, http://www.cbsnews.com/stories/2006/02/14/supreme court/main1315619.shtml. 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.*

5. 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, see, for example, INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux, eds., 1988); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

6. Like the law, both religion and music have texts that must be interpreted and orthodox and reform branches that juxtapose fundamental textualism with liberal interpretation.

7. For a valuable discussion into the interweaving of religious and legal doctrine, see PELIKAN, *supra* note 1.

This is admittedly not new ground. Timothy Hall has traced scholarly comparisons between legal and musical interpretation back to the Fourteenth Century.[8] In more recent times Jerome Frank,[9] Richard Posner,[10] Hall himself,[11] and perhaps most significantly, Sanford Levinson and J.M. Balkin,[12] among others,[13] have all written about the ways in which musical 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.

The goal of this article is a very modest one: to use one piece of music, the first movement of Beethoven's *Eroica* symphony,[14] to

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8. 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)).

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

10. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (book review).

11. Hall, *supra* note 8.

12. 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) [hereinafter Levinson & Balkin, *Interpreting Law and Music*]; Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991) [hereinafter Levinson & Balkin, *Law, Music, and Other Performing Arts*]. Not only is Levinson and Balkin's work significant in its recognition that lawyers and musicians (as well as textual interpreters in other fields) have much to teach each other, Levinson & Balkin, *Law, Music, and Other Performing Arts*, *supra* at 1656-58, it also has some points of intersection with this article. Levinson and Balkin consider questions of pitch in musical performance, *id.* at 1619-21, the significance of a seemingly wrong note in a Beethoven work, *id.* at 1598-99 (noting that the work in Levinson and Balkin's case is the first movement of Beethoven's first piano concerto), and the role of the early music movement, *id. passim* (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 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, which I believe makes this article complimentary to Levinson and Balkin's work.

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

14. 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

consider how legal scholars, using the doctrinal principles they have developed to interpret the Constitution, would interpret the piece as conductors.[15] This article makes 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, this article suggests that musical interpretative "doctrines" – if so loose a collection of practices merits the term – share some common elements with legal doctrines. Further, by viewing the law through the different lens that music provides, scholars might gain some new insight into their own doctrinal landscape.

This article focuses most of its attention on Justice Scalia and his "textualist" approach to interpretation. Justice Scalia's relationship with the Constitution is analogous to that of a conductor of an orchestral score: he is the principal advocate for a single theory of Constitutional interpretation, and he is a Supreme Court Justice who has put his interpretative theory into practice. Both conductor and Justice must approach the text with an interpretative theory in mind and then apply that theory in a specific context that equates to a "performance."[16] In particular, Justice Scalia's conviction that a

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eroica." ALEXANDER THAYER, THAYER'S LIFE OF BEETHOVEN 348-49 (Elliot Forbes ed., Princeton Univ. Press 1973) (1921). The *Eroica Symphony* is an ideal choice for this analysis because it inspires the same sense of awe to many musicians as the Constitution does for lawyers and judges. Written at approximately the same time (*Eroica* was written in 1804, *id.* at 348, 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 250 (2d ed. 1998) ("With [*Eroica*] we know that we have irrevocably crossed a major boundary in Beethoven's development and in music history as well."). The length of the first movement alone, *see* ROBERT SIMPSON, BEETHOVEN SYMPHONIES 19 (1970) (noting that it is "one of the longest first movements in existence"), 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, *supra* at 674.

15. 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.

16. Levinson and Balkin's description of law as a "performing art" is, it seems to me, precisely correct. *See* Levinson & Balkin, *Law, Music, and Other Performing Arts*, *supra* note 12.

textualist approach to Constitutional interpretation[17] is the only coherent and legitimate approach to statutory interpretation[18] lends itself to examination by applying it to interpretation of a document from a different field. The benefits and problems of a textualist approach might stand out in clearer relief when projected against a musical rather than a legal background.

## I. CONSTITUTIONAL INTERPRETATION

A fully integrated discussion of the various modes of Constitutional interpretation is beyond the scope of this article. Thus, an abbreviated and admittedly simplistic identification of the three principal theories of Constitutional interpretation in contemporary American jurisprudence will have to suffice. These three theories include Justice Scalia's "textualist" approach, in which the analyst limits interpretation to the ordinary meaning of the words that constitute the text,[19] the "intentionalist" approach, in which the interpreter seeks to discern and apply the text drafter's original intent,[20] and the "contextualist" approach, or the interpretative practice of allowing the contemporary context in which the text is being analyzed to inform the text's meaning.[21]

### *A. Textualism*

In a sense, the name of this approach is its own description; textualism requires a devotion to the text above all other considerations.[22] Justice Scalia, the most influential of textualists

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17. 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* note 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*.

18. "The text is the law, and it is the text that must be observed." *Id.* at 22.

19. "I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: 'Only a day or two ago – when counsel talked of the intention of a legislature, I was indescreet enough to say that I don't care what their intention was. I only want to know what the words mean.'" *Id.* at 22-23 (citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947)).

20. *See infra* notes 30-32 and accompanying text.

21. *See infra* notes 33-36 and accompanying text.

22. *See, e.g.*, SCALIA, *supra* note 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.

because of his role as Supreme Court Justice, insists that textualism not be confused with either what he calls "strict constructionism" or with what this article refers to as intentionalism. Justice Scalia has stated: "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."[23]

An unabashedly formalist approach to interpretation,[24] textualism has several distinct features. It eschews the use of canons of construction[25] and legislative history.[26] Textualism also rejects the notion of a "flexible" Constitution[27] in favor of restraining interpretation to the limited range of meanings associated with the words that comprise the text.[28] Any interpretation going beyond the text's meaning is impermissible.[29]

### *B. Intentionalism*

I use this term to mean the familiar strategy wherein the interpreter seeks to glean the text's meaning as imparted by its creator or creators.[30] Although the text in question might be the

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One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.")

23. *Id.*

24. "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.

25. *Id.* at 25-29.

26. *Id.* at 29-37.

27. *Id.* at 41-47.

28. To explain what he means by this, Justice Scalia uses an example from Smith v. United States, 508 U.S. 223 (1993). *See id.* 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 23-24. 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.

29. *Id.* at 24-25.

30. Justice Scalia prefers the term "originalist" to describe this method of interpretation. *See* Scalia, *supra* note 3, at 851-52 (describing Chief Justice Taft's approach to Constitutional interpretation in Myers v. Unites States, 272 U.S. 52 (1926), in which the Chief Justice examined not just the text of the Constitution, "but also the contemporaneous understanding of the President's removal power (particularly the understanding of the First Congress and of the leading participants in the Constitutional Convention), the background understanding of what 'executive power' consisted of under the English constitution, and the nature of the executive's removal power under the various state constitutions in existence when the federal Constitution was adopted"). A more recent example of Supreme Court intentionalism can be found in Justice Souter's opinion in Ortiz

primary tool used to derive this meaning,[31] the intentionalist interpreter can (and often does) go outside of the text, usually to look at the legislative history surrounding the text's creation, in order to fully understand the text's original meaning.[32]

### *C. Contextualism*

Contextualism is the term I use 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 is informed by the values of contemporary society.[33]

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v. Fibreboard Corp., in which the Court was asked to construe the meaning of Federal Rule of Civil Procdure 23(b)(1)(B) regarding class actions. 527 U.S. 815 (1999). After considering such sources as letters written by members of the 1966 Advisory Committee to one another and a law review article written by the Committee reporter in order to determine what the Committee "must have assumed would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede," *id.* at 838, the Court interpreted the rule from the perspective not of the plain meaning of the text, but rather of its perception of the rule's legislative history. *Id.* at 841-42 (noting that "[t]he Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with [certain] characteristics would satisfy the limited fund rationale cognizable under that subdivision," even though the term "limited fund" appears nowhere in the language of the rule).

31. 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.'" SCALIA, *supra* note 1, at 31. (citing Green v. Bock Laundry Machine Co., 490 U.S. 504, 530 (1989) (Scalia, J., concurring) (quoting Brief for Petitioner at 21, Jett v. Dallas Indep. Sch. Dist. 491 U.S. 701 (1989)).

32. 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* note 1, at 31-32.

33. 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* note 1, at 46; *see infra* text accompanying notes 64 & 65. 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, 227 (1976) (Brennan, J., dissenting), *id.* at 231 (Marshall, J., dissenting)) and 1994 (Callins v. Collins, 510 U.S. 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Rather than continue to coddle the Court's delusion that the desired level of fairness has

Although Justice Scalia believes that one must be an "idiot" to believe in a living Constitution,[34] distinguished jurists from other countries are more sympathetic to the contextualist 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, however, 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 interpretation, seeking synthesis and harmony between past intention and present principle.[35]

In addition, 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."[36]

## II. MUSICAL INTERPRETATION

Interpretative practices in the musical world are similar to methods of Constitutional interpretation, 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.[37] 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.[38]

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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.")).

34. *See supra* note 4.

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

36. The Hon. Michael Kirby, J. of the High Ct. of Austl., Sir Anthony Mason Lecture at the Meeting of the University of Melbourne Law Students' Society: Constitutional Interpretation and Original Intent – A Form of Ancestor Worship? (Sept. 9, 1999), *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_ constitu.htm.

37. *See infra* note 39.

38. Some have taken the analogy even further, writing of the "fierce Manichean struggles of good versus evil," BERNARD D. SHERMAN, INSIDE EARLY MUSIC: CONVERSATIONS WITH PERFORMERS 4 (1997) (quoting Bernard Holland, *A Streak in the Heavens Has Become a Straggler*, N.Y. TIMES, Oct. 31, 1993, at 31), between "mainstream musicians" and the "history-minded upstarts." *Id.* The contest has also been described as

### *A. Musical Contextualism*

Musical contextualists are musicians who interpret music without regard to the performance practices or conventions of the time in which the music was written[39] and instead offer an idiosyncratic response to the music. In essence, musical contextualists[40] encourage the audience to experience the musician's personal reaction to the musical text. This is not to say that the musical contextualist's performance is unthinking or anti-intellectual.[41] To the contrary, a contextualist performance can be the subtly nuanced product of intense textual analysis and careful rehearsal designed to clarify the musician's intentions. But a contextualist performance is, at its heart, a performance of the musician's interpretation of the work, not a strict adherence to the soundworld[42] that the composer might have had in mind when the piece was written.

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a "war." *Id.* And while music is no stranger to "wars" between groups of opposite-minded individuals (the most famous, perhaps, being the Guerre, or Querelle, des Bouffons, "[a] partisan squabble concerning the respective merits of French and Italian music, in particular opera, which was fought out in Paris between 1752 and 1754. . . ." Arnold Whittall, *Bouffons, Querelle des, in* 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 96, 96 (Stanley Sadie, ed., 1980)), the rhetoric is indicative of the passions that can be stirred by the question of interpretative practice. And while Sherman notes that the "turf wars appear to be subsiding," SHERMAN, *supra* at 6, he also notes an interview with Pinchas Zukerman, the noted violinist, in which he was quoted as saying that historically-informed performance is "asinine STUFF . . . a complete and absolute farce * * * AWFUL. . . . Nobody wants to hear that stuff. I don't." *Id.* at 7 (quoting David K. Nelson, *An Interview with Pinchas Zuckerman*, FANFARE, Mar./Apr. 1990, at 38).

39. 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 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).

40. 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.

41. Charles Rosen, in my opinion 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 the birds." SHERMAN, *supra* note 38, at 3 (quoting CHARLES ROSEN, THE FRONTIERS OF MEANING 72 (1995)).

42. 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.

### *B. Musical Textualism*

Standing in direct contrast to the contextualist approach is the musical textualist approach.[43] Under this approach, the composer's soundworld is very much an element of the performance.[44] Musical textualist performances are characterized by their attention to the performing styles and conditions that prevailed at the time that the musical text was written.[45] Such performances usually use instruments of the time or modern recreations of those instruments.[46]

Textualist performances are not identical, because musicians are almost always instrumentalists first and scholars second,[47] and they will often disagree as to the meaning of the historical record.[48] 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 made by instruments of the piece's composition period.[49]

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43. 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.

44. *See infra* note 49.

45. This approach to musical interpretation was often called the "early-music revival," *see* SHERMAN, *supra* note 38, at 3, but this term is no longer valid (if, indeed, it ever was) in light of performances of Brahms, *see* JOHANNES BRAHMS, SYMPHONY NO. 1, OP. 68 (Roger Norrington, Conductor, EMI Classics 1991), Wagner, *see* RICHARD WAGNER, ORCHESTRAL WORKS (Roger Norrington, Conductor, EMI Classics 1995), and Verdi, *see* GIUSEPPE VERDI, MESSA DA REQUIEM (John Eliot Gardiner, Conductor, Phillips 1992) that bring contemporary textualist-based performances to the threshold of music written during the sound recording era.

46. The changes in instrument construction can have a profound effect on the way an instrument sounds and on the way an instrumentalist plays the instrument. For example, playing on strings made of gut, as opposed to steel, can have a significant effect on how much vibrato the instrumentalist uses. *See* SHERMAN, *supra* note 38, at 207, 210-11 & n.9 (discussing the changes in string composition and the effect on vibrato).

47. "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." *Id.* at 209 (quoting from an interview with Anner Bylsma).

48. For example, Anner Bylsma, 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. *Id.* at 225, 235-36.

49. Sherman recalls a musician arguing that musicians are "under an *absolute* injunction to try to find out *all* that can be known about the performance traditions and the sound-world of *any* piece that can be performed, and to try to duplicate these as *faithfully as possible*." *Id.* at 5 (quoting Donald Vroon, *in* AM. REC. GUIDE, Mar./Apr. 1993, at 220).

### *C. Musical Intentionalists*

Located somewhere on the continuum between the polar opposites of musical contextualists and textualists are the intentionalists. These are musicians 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. 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."[50] Intentionalist musicians will typically use contemporary instruments, but will be influenced, to some degree, by scholarship about performance practice.[51]

## III. PUTTING THEORY INTO PRACTICE

Having laid out the principal themes, the focus of this article will now shift to examinations of some interpretative problems presented by the first movement of the *Eroica* symphony and how Justice Scalia, as a textualist conductor, would employ his doctrinal philosophy to solve those problems.

This is not a simple process; conductors face an almost incalculable number of decisions over the course of a movement as long as this,[52] and any attempt to discuss each of these possible decisions would bog this discussion down irretrievably. Rather than attempt this impossible task, this article will consider three principle

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50. ERICH LEINSDORF, THE COMPOSER'S ADVOCATE: A RADICAL ORTHODOXY FOR MUSICIANS, at viii (1981).

51. 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.

52. 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. In performance, the conductor must be exquisitely attuned to the sound and energy of the performance, adjusting previously decided-upon interpretative details if necessary.

interpretative elements – pitch, tempo, and textual error – as well as the particular problems raised by the *Eroica*'s first movement coda. Although this approach will leave numerous issues untouched, it should provide an insight into the way legal interpretative doctrines can produce both expected and unexpected results when applied to musical performance.

### *A. Pitch*

The *Eroica* symphony is in E♭ major. It begins with a short but arresting introduction of two E♭ major chords, played *forte* by the entire orchestra, before the first subject begins with a *piano* theme played by the cellos that outlines an E♭ major triad:[53]




This is where the first problem arises: before the orchestra plays a single note, the conductor has to decide which E♭ the orchestra should play. This may, at first impression, appear to be a non-issue. Instrumentalists have a limited number of ways to play a note. While each way might produce a slightly different timbre and therefore might be the subject of discussion during rehearsal, an E♭ seems to be an E♭.

Which E♭ the orchestra should play, however, is a more nuanced question than this, and the answer depends on the A to which the orchestra has tuned.[54] The current standard A was set by

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53. LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3 IN E♭ MAJOR (EROICA), measures 1-7 (Max Unger ed., Ernst Eulenberg 1936) [hereinafter EROICA].

54. 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

the International Standards Organization ("ISO") as 440 Herz ("Hz") in 1955.[55] Many contemporary orchestras, however, prefer the brighter sound given by an A of 441 Hz or even 442 Hz.[56] 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.[57]

But, the intentionalist and textualist would both have to consider the pitch problem more carefully. To accurately predict Justice Scalia's pitch choice, one must look at the original text and try to understand what a composer meant by E♭ in 1804 Vienna (the year and place in which *Eroica* was written).[58] A collection of tuning forks from the early Nineteenth Century provides proof that in 1810 the London Philharmonic Society, as well as opera houses in Dresden, Berlin, and Paris, were all using an A that was "a significant portion of a semitone lower" than the contemporary 440 Hz standard. [59] Although Vienna seems to have welcomed a brighter, higher sound

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because of "a particularly strong fundamental in its harmonic structure, and its vibrant expressiveness. . . ." NORMAN DEL MAR, ANATOMY OF THE ORCHESTRA 169 (1981).

55. Mark Lindley, et al., *Pitch, in* 14 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 779, 785 (1980).

56. 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 (Aug. 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 = 444 Hz for a performance by the Bamberg Symphony Orchestra. Email from Ulrich Gerhartz, Technician, Steinway & Sons, to Ian Gallacher (Nov. 1, 2006, 06:22 EST) (on file with author).

57. The Syracuse Symphony Orchestra's A = 440, for example, is contractually required. Interview with Richard Decker, *supra* note 56. 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.

58. 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* note 1, at 145, 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.

59. Lindley, *supra* note 55, at 782, 785. The evidence suggests that A was "remarkably close to the 'present-day pitch . . .' recorded by Praetorious 200 years earlier." *Id.* at 785. Praetorious's pitch was "about 3/5 of an equal tempered semitone below the modern standard $a' = 440$. . . ." *Id.* at 781-82.

than other cities,[60] and while this was a period of rapid technological change which allowed a brighter tone and a sharper pitch,[61] it is likely that the Viennese E♭ was still substantially flatter than the note recognized as E♭ today.[62]

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. In other words, he would look to the "semantic intention" rather than the "original intention."[63] To clarify this position, Justice Scalia has used as an example the meaning of the Eighth Amendment's "cruel and unusual" language.[64] In that context, he concluded that the words "cruel and unusual" abstract "the existing society's assessment of what is cruel" rather than "whatever may be considered cruel from one generation to the next."[65] Although this explains his disdain for the contextualist approach, the distinction between semantic and original intention is less clear. Also unclear is how a semantic intention can be determined without an inquiry, as here, into what may be called the legislative history of the meaning of E♭ to 1804 Viennese musical society.[66]

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60. *Id.* at 785 (noting that "[t]he 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. . . .").

61. *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'.").

62. 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. LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (Roger Norrington, Conductor, EMI Records 1989).

63. SCALIA, *supra* note 1, at 144. However, this appears to be a very nice distinction between two facially similar propositions.

64. *Id.* at 145.

65. *Id.*

66. 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 those symbols were written, we might be lured into believing that the meaning they convey has 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 E♭ to the general Viennese musical community of 1804 and the meaning of E♭ to Beethoven specifically. And while distinguishing between "import" ("what the text would reasonably be understood to mean") and "semantic

Either way, we can safely conclude that Justice Scalia would conduct *Eroica* in what Nineteenth Century Vienna would assess E♭ major to mean, rather than what E♭ major has come to mean today. This result condemns Justice Scalia to having to evaluate 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 legislators at the time of drafting.[67] This is the only result consistent with a textualist philosophy.

### *B. Tempo*

Now, the orchestra can play the *Eroica*'s first E♭ major chord, which sounds to contemporary ears like a slightly sharp D major chord. Before the orchestra plays the second chord, the conductor must decide at what tempo the movement will be played. This determination is somewhat more complicated than the pitch issue that was just resolved.[68]

The text itself gives us three clues: 1) the time words "*Allegro con brio*," 2) the metronomic marking of the dotted half note = 60 (quarter note = 180), and 3) a theme that has a swinging, one beat to a measure feel, with some faster rhythmic figures later in the movement:[69]



intention" ("what it was intended to mean"), Justice Scalia acknowledges that "those two concepts chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance." *Id.* at 144. The results of an "import" and "semantic intention" analysis would, in this case, likely be identical.

67. 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-Nineteenth 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), and the methods of articulation used by those instruments, just to name a few, 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.

68. It is also, unlike the pitch determination, one that all conductors must make.

69. EROICA, *supra* note 53, measures 65-68.

However, each of these clues presents additional problems. The words "*allegro con brio*" translate as "fast, with energy."[70] This is not the most illuminating instruction, and it is 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 the concept of how much process is "due," and "energy" is a term that is more helpful in determining expression than tempo.[71]

The metronome marking is, on its face, more helpful. Unlike pitch, the number of beats per minute and the means of measuring them have not changed since the Nineteenth Century.[72] A metronome marking appears to give us a scientific designation of tempo. However, Beethoven first published the metronome markings to his symphonies in 1817,[73] thirteen years after *Eroica* was first performed. This makes the metronome markings akin to an amendment of 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 tempos suggested by the metronome markings that he supplied.[74] 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.[75] Scholars have also established that Beethoven had a taste for very fast tempos that was

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70. "Practically all the lists of tempo marks in musical dictionaries and handbooks give *allegro* as the standard moderately fast tempo. . . ." David Fallows, *Allegro, in* 1 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 268, 268 (1980). "Brio" is an Italian word meaning 'vivacity,' 'energy,' or 'fire,' and "con brio" is "[a] descriptive term for a playing style of brilliance and dash." David Fallows, *Brio, in* 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 286, 286 (1980).

71. 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* notes 74 & 75 and accompanying text, and is therefore useful as a tempo marking after all, as, of course, Beethoven intended.

72. The modern metronome was patented by Johann Nepomuk Maelzel around 1815. E.G. Richardson, *Metronome, in* 12 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 222, 222-23 (1980).

73. 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* note 14, at 687.

74. Peter Stadlen rejected many of the fast metronome markings in Beethoven's symphonies as "totally unacceptable." Clive Brown, *Historical Performance, Metronome Marks and Tempo in Beethoven's Symphonies*, 19 EARLY MUSIC 247, 249 (1991) (quoting Peter Stadlen, *Beethoven and the Metronome*, 9 SOUNDINGS 38 (1982)) .

75. *Id.* at 258.

shared by his contemporaries (and near contemporaries) like Schubert, Rossini, Spohr, and Mendelssohn.[76]

The internal evidence, suggested by the speed of the written notes and orchestra's actual ability to play them at or close to the speed indicated in the movement's passages, was the most important tempo clue for performers in Beethoven's time.[77] And some of *Eroica*'s rapid rhythmic figures can sound rushed to our ears when taken close to Beethoven's designated metronome mark.[78] In fact, very few performers – even those striving to make their performances as historically accurate as possible – actually reach and sustain a tempo of quarter note = 180. An analysis by Eric Grunin of nearly 350 recorded performances of *Eroica* shows only one performance, conducted by Hermann Scherchen in 1958, as having sustained a tempo anywhere close to that metronome mark, at quarter note = 174.6.[79]

For Justice Scalia, however, the internal evidence is likely unhelpful: he would reject as irrelevant any insight into the composer's "intent."[80] Just as Beethoven amended his symphony by adding the metronome marking later, the framers of the Constitution amended their document as well. Once adopted, those amendments

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76. *Id.*

77. *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.'" *Id.*

78. Two recorded performances in particular come close to Beethoven's metronome marking for this movement: those conducted by Norrington, BEETHOVEN, *supra* note 62 (using historical instruments and A = 430 Hz), and Zinman, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3 IN E FLAT MAJOR OP. 55 "EROICA" (David Zinman, Conductor, Arte Nova 1998) (using modern instruments and contemporary pitch).

79. Eric Grunin, An Eroica Project, http://www.grunin.com/eroica (last visited Dec. 15, 2006) (click on the "*tempo*" tab under Eroica Project in the left column). 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. *See id.*

80. SCALIA, *supra* note 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.").

must receive the textualist treatment.[81] Justice Scalia's *Eroica* would presumably be very fast.

### C. Mistakes

It would be presumptuous to assert that Beethoven made "mistakes" in anything he wrote.[82] But mistakes could and did occur in the copying of original holographic manuscripts.[83] These errors can become deeply entrenched in a performance tradition once they are printed.[84] One of a conductor's principal jobs is finding and correcting these mistakes when they occur.[85] The *Eroica* score provides an interesting example of a potential misprint.

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81. *See id., 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.

82. 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 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. . . .").

83. Entire books have been devoted to identifying potential mistakes in scores. *See, e.g.*, NORMAN DEL MAR, ORCHESTRAL VARIATIONS: CONFUSION AND ERROR IN THE ORCHESTRAL REPERTOIRE 22 (1981) (describing some of the common changes made by performers of the *Eroica* symphony to account for possible errors in the original score). Perhaps the most confused situation can be found in the works of Rossini, a composer who wrote quickly and with a pragmatic eye to copying previously-used material when it suited his needs. *Id.* at 171. The circumstances surrounding the state of knowledge as to the authenticity of the overture to "The Barber of Seville" are variously described by Del Mar as "confused," "grotesque," and an "extraordinary hotch-potch." *Id.* at 171-72.

84. 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. MICHAEL KENNEDY, ADRIAN BOULT 159 (1987). Boult suggested that they should check the autograph manuscript, which was upstairs from the rehearsal hall. *Id.* When the orchestra players realized that the slur was not in Mozart's manuscript, they removed it from their parts. *Id.*

85. 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.

In measure 494, the double bass has a quarter rest, followed by a quarter note E♭, and then a quarter rest. In contrast, the first bassoon plays an E♭ of the same octave on the first beat of the bar:[86]



This produces 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 measure differs in the recapitulation from the parallel measure in the exposition. In the exposition, the comparable bass and bassoon notes are played together on the first beat of the measure:[87]



Based on this evidence and on his estimation of the musical sense of the piece, conductor and amateur musicologist[88] Norman Del Mar concludes that the recapitulation bass E♭ "can hardly be correct."[89] He then notes that "[t]he whole section both in the

86. EROICA, *supra* note 53, measures 493-94.

87. *Id.* measures 90-91.

88. As opposed 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. *See* 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 recording of the nine Beethoven symphonies uses it. Zinman, *supra* note 78 ("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.").

89. DEL MAR, *supra* note 83, at 22.

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."[90] 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,[91] not a specialist in the arcana of musicology.[92]

Accepting Del Mar's analysis for the purpose of argument, the path for the intentionalist and the contextualist conductor seems clear. The printed work fails to represent Beethoven's original intention and appears to be a misprint. Both the intentionalist and the contextualist would rewrite the bass part, putting the double bass' E♭ on the first beat where it arguably belongs.

The textualist's position seems equally clear. A textualist would likely ignore the evidence of internal inconsistency from the exposition and disregard Del Mar's subjective and contextualist contention that the note "can hardly be correct." In short, Justice Scalia and other textualists should play the bass E♭ as written in the text.

While Justice Scalia claims to be a textualist and a formalist, however, he denies that he is a literalist.[93] Therefore, he will accept the correction of "scrivener's errors."[94] Justice Scalia 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

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90. *Id.*

91. Norman Del Mar was an English conductor, composer and writer on music. He was, at times, principal conductor of the BBC Scottish Orchestra, the Göteborg Symphony Orchestra and the Academy of the BBC. John Warrack, *Del Mar, Norman (René), in* 5 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 351, 351 (1980). He was the author of several books, including an extensive three-volume critical appreciation of Richard Strauss. *Id.* at 352.

92. 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. Jonathan Del Mar, *Foreword* to BEETHOVEN, *supra* note 88, *available at* Baerenreiter.com, Download Area, https://www.baerenreiter.com/html/download/download_e.htm#bericht (last visited Dec. 14, 2006) (go to "Critical Reports"; then download "Ludwig von Beethoven, The Nine Symphonies—Supplementary Report"). The discussion of a new source of information about the *Eroica* – orchestral parts found in the Roudice Lobkowicz 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.

93. *See* SCALIA, *supra* note 1, at 20-21.

94. *Id.*

made[,] . . . it [is] not contrary to sound principles of interpretation . . . to give the totality of context precedence over a single word."[95]

This seems a strange position for a textualist to take.[96] Either the text should be taken at face value or it should not.[97] But Justice Scalia is willing to go even further by acknowledging that some words and phrases in a text should be given "expansive, rather than narrow, interpretation[s]."[98] For example, he argues that the First Amendment's "freedom of speech" and "freedom of the press" should include within them the concept of handwritten notes, even though these are neither spoken nor printed words, and the First Amendment makes no mention of them.[99] The concept of handwritten words, apparently, inheres in the limited range of meaning of the word

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95. *Id.*

96. 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, *supra* note 3, 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.

97. 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 measure statement, coming, as it does, before the tonic key of E♭ major has been firmly reestablished for the recapitulation, can sound like a mistake in the part 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.

THAYER, *supra* note 14, at 350 (quoting FRANZ WEGELER & FERDINAND RIES, BIOGRAPHISCHE NOTIZEN ÜBER LUDWIG VAN BEETHOVEN (1845)). 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 Riese'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.

98. SCALIA, *supra* note 1, at 37-38.

99. *Id.*

"speech," even though the word's dictionary meanings suggest otherwise.[100]

This interstitial textualism, where one must look in the gaps between definitions to ascertain a word's complete meaning, seems strangely at odds with a textualist philosophy. This has not gone unnoticed by Ronald Dworkin, who argues that a secret intentionalism must lie at the heart of Scalian textualism.[101] Putting aside any qualms, Justice Scalia would change the double bass part at measure 494, making it align musically with the bassoon line. Thus, in a rare moment of intellectual alignment, all three interpretative doctrines agree that this is the correct result.

But the strange results are not over. Justice Scalia's textualist philosophy has other troubling anomalies, exposed by the last conducting problem I have picked from the many posed by *Eroica's* first movement – one of the most celebrated and controversial conducting problems in the symphonic canon – the coda.

### *D. Coda*

By the time of the first movement coda, every listener to the piece is familiar with the triadic principal theme of the movement, given again here for comparative purposes:[102]



In the coda,[103] Beethoven alters the contours of the theme to give it an appropriately peroratory effect:[104]

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100. *See id.* at 38 ("In this constitutional context, speech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole. That is not strict construction, but it is reasonable construction."). "Speech" carries its familiar meaning of "[t]he action or faculty of speaking; the ability to express thoughts or feelings by articulate sounds, the utterance of words or sentences." THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2975 (4th ed. 1993).

101. Dworkin, *supra* note 3, at 16 ("If judges can appeal to a presumed legislative intent to add to the plain meaning of 'speech' and 'press' . . . why can they not appeal to the same legislative intent [in other circumstances]? Scalia's answer to this objection must not rely on any self-destructive 'practicality' claim. It must rely instead on a distinction between *kinds* of intention, a distinction he does not make explicitly, but that must lie at the heart of his theory if the theory is defensible at all.").

102. EROICA, *supra* note 53, measures 3-6.

103. *Id.* beginning in measure 631.

104. *Id.* 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 E♭, playing in the treble clef.



The new form of the theme is first played *piano* by the horn, then by the first violins, and then again in the lower strings, this time with a *crescendo*. Next, it is played *forte* in the winds and, most prominently, by the trumpets:[105]




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 two-thirds measures of the theme before joining the non-theme-playing instruments in a harmonizing *ostinato*:[106]



The simple reason for this is that the trumpet for which Beethoven wrote could not comfortably reach the high B♭ above the staff, written as a G, that is necessary to play the new version of the theme.[107] Faced with this technical problem, Beethoven probably had the trumpets play as much of the line as they could and then dropped them into the background.

Contemporary trumpets can play this high B♭ with little difficulty. In 1981, Del Mar noted that,

> [a]lthough in these days of purism and scholarship emendations to Beethoven's text are far less often 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

105. *Id.* measures 655-58.

106. *Id.* The example here is given in transposed form. In the score, the E♭ trumpet line is written in C.

107. DEL MAR, *supra* note 83, at 22 ("[T]he upper G on the large E♭ trumpet – now extinct for all intents and purposes – [was] considered too high and perilous for orchestral use. . . .")

> bring fulfillment to the climax by playing the whole statement of the great theme in their turn.[108]

This change to the high B♭ transforms the trumpet line[109] and 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,[110] so perhaps his opinion on this issue is not too surprising. But other conductors, at least conductors from the previous generation, agree with Del Mar.[111] The tradition of rewriting the trumpet part started over 100 years ago with Bülow[112] and is affirmed by such authorities as Weingartner[113] and Markevich,[114] who said that this alteration "is without doubt well-founded."[115] These are classic

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108. *Id.*

109. EROICA, *supra* note 53, measures 655-58, as rewritten.

110. Del Mar studied the horn and composition at the Royal College of Music. Warrack, *supra* note 91, 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* note 83, at ix.

111. *See supra* note 91 and accompanying text.

112. *See* FELIX WEINGARTNER, WEINGARTNER ON MUSIC AND CONDUCTING 101 (Jessie Crosland 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. John Warrack, *Bülow, Hans (Guido) Freiherr von, in* 3 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 451, 451 (1980). 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. *Id.* at 451-52. 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. Id.* at 452.

113. WEINGARTNER, supra note 112, at 101 ("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, *Weingartner, (Paul) Felix, in* 20 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 315, 315-16 (1980).

114. Igor Markevich was an Italian conductor whose parents moved from Russia to Switzerland in 1914, when he was two years old. Noël Goodwin, *Markevich, Igor, in* 11 THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS, 691 (1980). His performances combined "a volatile personality with meticulous attention to the composer's instructions, and . . . [were] never weakened by sentimental indulgence of expression." *Id.*

115. 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

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.[116] It is possible to justify the rewrite on intentionalist grounds as well: Beethoven probably intended the line to go up, as suggested by the rest of the orchestration. The only thing preventing Beethoven from including the trumpet line with the other instruments playing the melody appears to have been the technical limitation placed on him by the trumpet's design. Under this rationale, contemporary technology allows conductors and performers 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.[117]

This presents an interesting problem for the doctrinal textualist like Justice Scalia. The written text itself is clear and unambiguous. The trumpet line literally goes 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 be fairly interpreted as including a non-articulated meaning.[118] Just as "speech" can, in his view, encompass handwritten words,[119] 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

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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.

116. 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 day 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).

117. As demonstrated by his famous 1939 recording of the *Eroica*. LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (Arturo Toscanini, Conductor, RCA Victor Gold Seal 1992) (1939).

118. *See supra* text accompanying notes 93 & 94.

119. *See supra* note 100 and accompanying text.

technologies that did not exist in the 1790s.[120] Perhaps this is no different.

Or perhaps this goes too far. Perhaps this is merely a justification for evolutionary interpretation, something a textualist like Justice Scalia cannot permit. The tradition of rewriting the trumpet line is well established, and Justice Scalia is willing to accept another "pragmatic exception" to his core textualist principles to allow for *stare decisis*.[121] 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."[122] This assumes, 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 B♭.

What we are left with is the strange and slightly unsettling image of Justice Scalia, the radical conductor, thumbing his nose at the conservative musical establishment by leading a rendition of *Eroica* that is faster and flatter than we are used to hearing and is likely performed with period instruments and orchestral proportions, much like the performances recorded by Roger Norrington or John Elliot Gardiner.[123] This leads to a rendition with some puzzling textual deviations that are arguably 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[124] or Karajan.[125] How Justice Scalia would respond to such a performance, were he to hear it, is an interesting question to ponder.

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120. *See* SCALIA, *supra* note 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 . . .").

121. *Id.* at 140.

122. *See supra* text accompanying note 115 and discussion pp. 323-26.

123. BEETHOVEN, *supra* note 62; LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (John Eliot Gardiner, Conductor, Deutsche Grammophon 1994).

124. *See, e.g.*, LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (Wilhelm Furtwängler, Conductor, EMI Classics 2000) (1953).

125. LUDWIG VAN BEETHOVEN, SYMPHONY NO. 3, OP. 55 "EROICA" (Herbert von Karajan, Conductor, Deutsche Grammophon 2003) (1962).

## IV. CONCLUSION

What do we, as lawyers, learn from this brief excursion into a parallel interpretative universe? Perhaps we learn nothing more than the comforting knowledge that we are not alone. Other disciplines have interpretative problems with which they wrestle, and at least musicians 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 a discussion about the appropriateness of different approaches to textual interpretation without a polarizing debate about social issues affected by these approaches' applications to Constitutional decisions.[126] 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.

We have only scratched the surface. This article, as with most others dealing with the issue, focused on performance practice: the decisions a performer makes when deciding how to play a piece of music such as which E♭ we should play when we see a note occupying the place on the stave we associate with E♭. But there are more profound inquiries to be made. For example, we can try to decipher what that E♭ means and how we can discern the deeper meaning of text through close analysis, and we can look at whether that inquiry can tell us anything about deciphering deeper meaning in texts than merely looking to what the words mean.[127] These inquiries will, I hope, be the subject of subsequent work.

Looking at the rise of the historically informed performance practice movement in music[128] 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

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126. 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.

127. That is, of course, the premise behind the law and literature movement as well. As noted *supra* note 5, whether or not this movement has fully realized the promise of its approach is beyond my scope here.

128. 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 generally SHERMAN, *supra* note 38; 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).

practice, a strangely ahistorical process.[129] 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.

129. Levinson and Balkin touch on this aspect of the early music movement. Levinson & Balkin, *Law, Music, and Other Performing Arts*, *supra* note 12, at 1627-33.