

Verdi's High C

Jack M. Balkin^{*}

I. Introduction: A Judgment from the Balconies

In December of 2000, Riccardo Muti, one of the most distinguished Verdi interpreters of his generation, opened the new opera season at Milan's La Scala Opera House with a performance of Verdi's *Il Trovatore*.¹ The opening night at La Scala is not only the most eagerly awaited musical event in Italy; it is also one of the country's most important social occasions.² The usual attendees include politicians, aristocrats, movie stars, and upwardly mobile businesspeople, as well as the *loggionisti*, the diehard opera fans who wait in line for hours for standing-room tickets at La Scala, and who "are known for shouting out their candid appraisals of the singers from the upper galleries."³ Muti's performance was important for another reason: it began a yearlong celebration of the one hundredth anniversary of Verdi's death, featuring many performances of the beloved composer's operas.⁴ Muti's *Il Trovatore* featured the thirty-two-year-old tenor Salvatore Licitra, whom some critics had dubbed "the new Pavarotti."⁵ (Licitra, blessed with the most golden and powerful voice, was, sadly, to die eleven years later from injuries sustained in a motor-scooter accident.)⁶

Jay McInerney, writing in *The New Yorker*, reported that the new season was off to a flying start until the end of the third act, when Licitra delivered one of the opera's famous arias, the rousing cabelleto "Di quella pira."⁷ At the end of the aria the crowd suddenly erupted with loud booing and cries of "Shame!" emanating from the upper galleries.⁸ The well-heeled patrons in the lower boxes and orchestra seats tried in vain to quiet the offenders.⁹ "Then, in a voice nearly as loud as any heard from the stage that night, one of

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Sanford Levinson for his comments on a previous draft.

1. Jay McInerney, *Milan Notebook: A Night at La Scala*, NEW YORKER, Dec. 25, 2000 & Jan. 1, 2001, at 60, 60.

2. *Id.*

3. *Id.*

4. *Id.*; Wilborn Hampton, *Domingo's Voice Fails; Return Brings Cheers*, N.Y. TIMES, Dec. 15, 2001, <http://www.nytimes.com/2001/12/15/arts/domingo-s-voice-fails-return-brings-cheers.html>.

5. McInerney, *supra* note 1.

6. Zachary Woolfe, *Salvatore Licitra, Operatic Tenor at Met, Is Dead at 43*, N.Y. TIMES, Sept. 5, 2011, http://www.nytimes.com/2011/09/06/arts/music/salvatore-licitra-tenor-at-the-met-dies-at-43-after-crash.html?ref=salvatorelicitra&_r=0.

7. McInerney, *supra* note 1.

8. *Id.*

9. *Id.*

the *loggionisti*, a bank teller named Mauro Fuolega, shrieked, ‘It’s the conductor’s fault!’”¹⁰ Muti indignantly stopped the performance and glared up at his critic in the gallery.¹¹ “Let’s not turn Verdi’s centennial into a circus,” he declared, and he resumed conducting the opera over the murmurings of the shocked audience.¹²

What had just happened? It turns out that it was a dispute about interpretation. Licitra did not sing a high C, “the famous *do di petto*, with which tenors have traditionally ended” the aria.¹³ (The term *do di petto* means “C from the chest,” the idea being that the tenor employs his chest register—a difficult feat—rather than using his head register and singing falsetto.)¹⁴ As Mr. Fuolega’s exclamation suggested, the problem was not with Salvatore Licitra, who could no doubt have produced the high C with aplomb. Instead, Licitra was following the orders of Maestro Muti, who had told him to sing the G below the high C. Muti’s reason was simple: The G, and not the C, appears in Verdi’s original score.¹⁵ Verdi’s high C, it turns out, is not Verdi’s at all; it was added to the opera by later interpreters.¹⁶

At a post-performance dinner Muti “explained that the *do di petto* [in the aria] had originated with the nineteenth-century French tenor Carlo Baucardé.”¹⁷ Other tenors adopted the practice because they wanted to end the third act with an impressive vocal display guaranteed to bring down the house.¹⁸ Eventually it became the traditional method of performing the aria on stage, in concerts, and in recordings.¹⁹ Muti, on the other hand, “said that he had considered it his duty to honor the composer’s intentions by leaving out the high C.”²⁰ This was not, in fact, the first time that Muti had performed *Il Trovatore* this way. In 1977, at the Teatro Comunale in Florence, Muti had also insisted on the G, and, as Verdi scholar Philip Gossett reports, “all that anyone talked about was the end of ‘Di quella pira.’”²¹

Well, who is right? Is it Mauro Fuolega and other members of the audience, who expect their thrilling high C, or Riccardo Muti, who can point to the text? And how should we go about deciding the question?

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. RICHARD MILLER, NATIONAL SCHOOLS OF SINGING: ENGLISH, FRENCH, GERMAN, AND ITALIAN TECHNIQUES OF SINGING REVISITED 109–10 (1997) (distinguishing the *do di petto* from the use of falsetto).

15. PHILIP GOSSETT, DIVAS AND SCHOLARS: PERFORMING ITALIAN OPERA 124 (2006).

16. *See id.*

17. McInerney, *supra* note 1.

18. GOSSETT, *supra* note 15, at 124.

19. *See* McInerney, *supra* note 1.

20. *Id.*

21. GOSSETT, *supra* note 15, at 124.

Contrast this story with a second one. In 1954, the U.S. Supreme Court decided a series of school desegregation cases from Virginia, Kansas, South Carolina, and Delaware collectively called *Brown v. Board of Education*.²² At the same time, it also heard a case from the District of Columbia, *Bolling v. Sharpe*.²³ The issue in *Bolling* and *Brown* was the same: the constitutionality of segregated schools.²⁴ But the problem was that *Bolling* involved the District of Columbia, a federal territory, not a state.²⁵ The Supreme Court decided *Brown* under the Equal Protection Clause of the Fourteenth Amendment, which says that “no state shall . . . deny . . . the equal protection of the laws.”²⁶ The text of the Equal Protection Clause of the Fourteenth Amendment does not seem to mention the federal government, although the text of the Fifteenth Amendment does, and the Thirteenth Amendment, which outlaws slavery throughout the United States, also binds the federal government.²⁷

Thus, Justice Warren and his colleagues were faced with a genuine problem. The text does not seem specifically to mention an equality guarantee against the federal government. Hence Chief Justice Warren and his brethren read an equal protection guarantee into the Fifth Amendment's Due Process Clause.²⁸

So we have two cases. In 2000 Riccardo Muti refuses to read the customary high C into Verdi's score when a G appears there. In 1954, Earl Warren and his brethren read an equal protection guarantee into the Fifth Amendment's Due Process Clause.

22. 347 U.S. 483, 486 (1954).

23. 347 U.S. 497 (1954).

24. *Id.* at 498.

25. *Id.* at 499.

26. U.S. CONST. amend. XIV, § 1; *Brown*, 347 U.S. at 495.

27. Of course, depending on how broadly one reads the Thirteenth Amendment—for example, as a general prohibition on nondomination, or as a general guarantee of equality in civil society—it could form the basis for *Bolling*. See Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1470 (2012) (noting that the principle against nondomination could extend to many different areas of social life); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1816 (2010) (noting that many Reconstruction Republicans assumed that once blacks were free, they enjoyed full and equal civil rights). The Citizenship Clause of the Fourteenth Amendment also applies to both the states and the federal government and might be an alternative basis for *Bolling*. See Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166569. Both of these solutions, however, would raise interpretive questions of their own, akin to the debates discussed in the text.

Ironically, the Reconstruction Republicans who wrote the Fourteenth Amendment assumed that the Fifth Amendment's Due Process Clause *already* contained a guarantee of equal protection, and they based the language of the equal protection on what was then a familiar nineteenth-century interpretation of the Due Process Clause. See JACK M. BALKIN, *LIVING ORIGINALISM* 251–55 (2011) (“[T]he very words ‘equal protection’ were added to the Constitution based on a widely accepted construction of the Fifth Amendment’s due process clause.” (emphasis omitted)).

28. See *Bolling*, 347 U.S. at 499 (“[D]iscrimination may be so unjustifiable as to be violative of due process.”).

What do these stories have in common? They are both problems of performance—one in music and one in law. When law professors have looked for analogies between law and the arts, they have generally turned to poems and novels.²⁹ Sanford Levinson and I, who were both part of the early law and literature movement,³⁰ have concluded that this analogy is incomplete.³¹ A much better analogy, we think, is to the performing arts—such as music and drama—that perform written texts and to the institutions and ensembles that are charged with the responsibilities and duties of public performance.³² Not all of the performing arts perform written texts, but many of them do, and the performer's obligation to put a text into action before an audience offers the most interesting and fruitful analogy to the problems of legal interpretation.

Different genres of the performing arts, of course, use texts in different ways. This Essay will primarily focus on classical music and opera, in which the score offers a fairly comprehensive—if incomplete—set of directions. In many genres of the performing arts, like improvisatory theatre or jazz, the relevant text may be quite barebones, with most of the work left to the performer. Yet even where the text is the most detailed, it cannot perform itself; it has to be brought to life through performance. There is often more than one way to do this, and the performer's art depends on how this is achieved.

The life of the law, like that of music or drama, is in performance. The American Legal Realists famously distinguished “law on the books” from “law in action.”³³ In fact, law in action is paramount; someone must apply legal texts in order for law to function as an ongoing institution. The social practice of law is more than legal texts, just as the social practice of music is more than written scores and the social practice of drama is more than written scripts.

Poetry and novels can be read silently to one's self. Music and drama are normally performed before an audience. (Sometimes, of course, the performers overlap with the audience, as in a group sing-along.) Performers must decide, often under very imperfect circumstances, how a text should be applied in the social context before them. Performers seek to persuade their

29. J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews,”* 20 CARDOZO L. REV. 1513, 1518 (1999) [hereinafter Balkin & Levinson, *Interpreting Law and Music*]; Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1607 (1991) [hereinafter Levinson & Balkin, *Other Performing Arts*].

30. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373 (1982).

31. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29; Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1608–14.

32. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29.

33. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14 (1910); see also Karl Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 435 n.3 (1930) (reiterating the distinction while criticizing Pound's conception).

audiences that their interpretations are true, valuable, and authoritative. Whether or not they succeed in this task, what they do affects people, for good or for ill.³⁴

Viewing law as a performing art puts in the foreground what is less salient in comparisons between law and literature: the crucial role of the *audience* in performances, whether musical, dramatic, or legal. Law, like music and drama, involves more than a reader and a text. It involves a complex of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances.

The performing arts therefore normally involve a *triangle of performance*.³⁵ There is the person or institution that creates the text: the composer, the framer, or the adopter. There is the performer whose job is to make sense of the text and bring it to life in the real world. And finally, there is the audience before whom the text is performed.³⁶

Why are audiences so important? First, the presence of an audience creates distinctive responsibilities for the performer—responsibilities of faithful performance not only to the author of the text, but also to the audience. Part of the point of being a performer is to perform *before* someone—to move, impress, or affect an audience. Performance is a relationship to another, with effects and responsibilities that come with that relationship.³⁷

Second, the interactions between the members of the audience and the performer may affect how performers behave and subtly or profoundly shape the result. That is why live performance can often be so different from prerecorded or televised performance in terms of energy, spontaneity, and emotional connection. The members of the audience not only affect the performers; they also affect each other's experiences of the work. Expressions of excitement or boredom, applause, booing, laughter—even intrusions like smells, conversation, and background noise—shape the success and reception of a performance.

Third, audiences play a crucial role in validating, authorizing, and legitimating performance. Performances occur within traditions, institutions, and conventions of performance in which the audience plays a part. For example, people behave differently and expect different things at the opera than they do at a rock concert.

34. Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29, at 1519–21.

35. *Id.* at 1520.

36. *Id.* at 1519–20. Note that, under different circumstances, the three legs of the triangle of performance can be combined in different ways. The author or composer can perform his or her own work; the members of the audience can also be the performers; or the performers can perform a work before its author. There is also the limiting case in which the author, performer, and audience are identical.

37. *Id.* at 1519–21.

Fourth, in the broadest sense, the audience for performance is the interpretive community in which performance occurs.³⁸ Traditions, institutions, and conventions of performance generate and enforce evaluative standards about when performances are authentic or inauthentic, legitimate or illegitimate, successful or unsuccessful. When people assess the quality of performances, they employ the conventions, traditions, and assumptions of interpretive communities.³⁹ These communities evaluate, legitimate, and judge performances and, on occasion, even sanction or discipline them.

Standards of good and bad performance, what is authentic and inauthentic, or “on-the-wall” and “off-the-wall,” change and evolve over time, as performers and the various audiences for performance interact, contend, and struggle over the right way to interpret and perform texts. Performance, therefore, always involves negotiation, not only between the performers and the audiences immediately before them, but within the larger interpretive communities in which performance occurs.

The interpretive problems faced by Riccardo Muti and Earl Warren arise because a particular kind of text has to be performed before a particular kind of audience. It has to be put in action and applied to a real, live situation. In law and the performing arts, the combination of a text and an audience create distinctive problems for the performing artist.

As we shall see, it turns out that arguments about how to perform *Il Trovatore*—and other pieces of music and drama—have a remarkable similarity to debates about interpretation in law, and particularly American constitutional law. In this Essay, I will discuss three of these similarities. The first is that both law and the performing arts use very similar modalities of argument for justifying interpretations. Second, in law and the performing arts, not everything goes. Both law and the performing arts are constrained by canonicity, convention, and genre. Third, in both law and the performing arts, evolving conventions of performance depend heavily on what audiences think. There are multiple audiences at work in any performance, and these audiences are mediated by important and sometimes quite powerful institutions. Changes in interpretation and in interpretive conventions depend on gaining the support of various institutions over time.

38. On the theory of interpretive communities, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 14, 171 (1980) (defining interpretive communities as those that share interpretive strategies for reading and writing texts). Although Fish first invoked the idea in the context of literary interpretation, the idea of an interpretive community makes equal sense in the context of the performing arts.

39. See Balkin & Levinson, *Interpreting Law and Music*, *supra* note 29, at 1520 (“Judgments about faithfulness and authenticity . . . occur against the backdrop of the many different communities that help shape the tradition, including the audience of fellow performers and laypersons.”).

II. The Modalities of Argument in Law and the Performing Arts

How should one go about deciding whether Muti should have left out the high C, the *do di petto*? How should one decide whether Chief Justice Warren should have read an equal protection guarantee into the Due Process Clause of the Fifth Amendment? That is another way of asking how performers establish the legitimacy or the authority of their particular interpretations. Because law, music, and drama involve the performance of texts, the kinds of arguments that people make to justify their interpretations in each activity are remarkably similar.

Philip Bobbitt has offered a well-known list of the modalities of argument in constitutional law: text, history, structure, precedent, consequences, and ethos.⁴⁰ A modality, Bobbitt tells us, is a way of explaining why an interpretation is true or correct.⁴¹ It is a way of justifying what we are doing when we interpret. It turns out that the modalities of argument in debates about performing music and drama are quite similar. This similarity is not an accident. It comes from the fact that all three enterprises require us to put texts into practice, and in doing so, we have to explain why we are interpreting a text in practice in one way rather than another.

Begin with arguments from the text. At first glance, Muti's position might seem particularly strong: The score says G, not C. As Philip Gossett notes, "the [high C] in question never existed in *any* printed edition of the opera. The 'great moment' is in fact an interpolation."⁴² But as most lawyers and musicians will tell you, it's not as simple as that. Much depends on the background conventions through which one reads and interprets texts. We always read texts against a background set of assumptions, practices, and canons for reading them.

Take the example of repeats in a musical score. In the sonata-allegro form, for example, there is normally a repeat sign at the end of the exposition and before the development section.⁴³ Sometimes the composer even writes a little extra music to smooth the transition back to the beginning of the exposition.⁴⁴

40. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7, 93 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) [hereinafter BOBBITT, *CONSTITUTIONAL INTERPRETATION*].

41. BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 40, at 11.

42. GOSSETT, *supra* note 15.

43. See James Webster, *Sonata Form*, in 23 *THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS* 687, 692 (Stanley Sadie & John Tyrrell eds., Macmillan Publishers Ltd. 2d ed. 2001) (describing the sonata form).

44. See *id.* ("In 18th-century music the exposition is almost always directed to be repeated, with or without a transition back to the opening.").

It turns out, however, that sometimes classical music performers take the repeats and sometimes they don't.⁴⁵ Why would they feel authorized not to take the repeats? After all, the score says "repeat." But as Bill Clinton would put it, it all depends upon what the meaning of "repeat" is.

In fact, there are many reasons why a performer might not take all the repeats written in the score. The performer wants the audience to receive the best aesthetic experience. In a live concert, taking all the repeats might make the work too long and tire the audience.⁴⁶ For the same reason, the full text of Shakespeare's *King Lear*—and many other of his most famous plays—is rarely performed.⁴⁷ In a recording, by contrast, many performers—and many music critics—will insist on taking all the repeats, even if the piece becomes much longer as a result.⁴⁸ However, most music in the standard classical repertoire was written before the advent of musical recordings.⁴⁹ In practice, the repeat sign does not invariably require repeats; it depends on the circumstances of the performance and nature of the audience, and performance practices have changed from the Classical era to the present.⁵⁰

45. See STEPHEN DAVIES, *MUSICAL WORKS AND PERFORMANCES: A PHILOSOPHICAL EXPLORATION* 213–14 (2001) (noting that exposition repeats are often omitted, and "if ignoring them does not unbalance the movement . . . their observance is unnecessary now because the audience is likely to be conversant with the work or to listen intently"); Michael Broyles, *Organic Form and the Binary Repeat*, 66 *MUSICAL Q.* 339, 339 (1980) ("Virtually every performer of the literature of the eighteenth century must face the question whether or not to repeat and often feels compelled to choose between fidelity to the score and artistic intuition."); Hugh MacDonald, *To Repeat or Not to Repeat?*, 111 *PROC. OF THE ROYAL MUSICAL ASS'N* 121 (1984–1985) (noting that although today "[t]he decision whether or not to observe a repeat is shared between current convention and the caprice of the performer," performance practices have changed considerably since the eighteenth century and that it is more likely that repeats were once mandatory).

46. See Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1600–01 (noting the contrasting views of pianist Alfred Brendel and musicologist Neal Zaslaw regarding following repeats in a musical score).

47. See ALAN C. DESSEN, *RESCRIPTING SHAKESPEARE: THE TEXT, THE DIRECTOR, AND MODERN PRODUCTIONS* 12 (2004) (explaining that several "well-known scripts (e.g., *Richard III*, *Hamlet*, *King Lear*) are almost always streamlined so as to avoid four hours in the theatre"); Nelson Pressley, *For Modern Shakespeare, Directors' Adaptations May Be Kindest Cuts of All*, *WASH. POST*, Aug. 12, 2011, http://www.washingtonpost.com/lifestyle/style/for-modern-shakespeare-directors-adaptations-may-be-kindest-cuts-of-all/2011/08/03/gIQAEQJ5AJ_story.html (describing commonplace practices of directors in cutting text and rearranging scenes).

48. See, e.g., IVAN MARCH ET AL., *THE PENGUIN GUIDE TO RECORDED CLASSICAL MUSIC* 2010, at 635–37 (2009) (praising Leopold Stokowski, Claudio Abbado and Claus Peter Flor for including the first movement exposition repeats in Mendelssohn's symphonies and criticizing Herbert von Karajan for omitting them); GUNTHER SCHULLER, *THE COMPLETE CONDUCTOR* 207 (1998) ("I think it is mandatory for us performers to respect [Beethoven's] decision of a first ending and an exposition repeat.").

49. See TIMOTHY DAY, *A CENTURY OF RECORDED MUSIC: LISTENING TO MUSICAL HISTORY* 2–4 (2000) (noting that "[t]he first cylinder recordings issued commercially in any quantities went on sale in 1890" and "[t]he first grammophone records appeared on the market in 1894").

50. See, e.g., Jonathan Dunsby, *The Formal Repeat*, 112 *J. ROYAL MUSICAL ASS'N* 196, 206 (1986–1987) ("Historically, the non-observance of Classical repeats is largely indefensible . . . [yet] it can be said with confidence that the time will never come when every performer observes all notated formal repeats in tonal music."); MacDonald, *supra* note 45 (arguing that repeats in the eighteenth century were mandatory although performers today often omit them).

Here we see the crucial role of the triangle of performance. Performance is always before an audience, and responsibilities toward the audience and the need to communicate to an audience shape conventions of performance and expectations about how to read and interpret a musical score.

Thus, Muti cannot justify his performance merely by pointing to the text. We have to understand what the text means in the light of performance practices of nineteenth-century Italian opera. To be sure, Muti wants to be scrupulous about the score, but that is a scrupulousness born of the late twentieth/early twenty-first centuries. It reflects the influence of a number of scholarly and performance movements in classical music, of which the most famous is the movement for “authentic” or historically informed performance.⁵¹ What seems obvious to a late twentieth-century maestro might not be obvious to a nineteenth-century conductor, performing before a restive (and often talkative) audience in a provincial opera house in Italy. The opera of the nineteenth century was much more of a popular entertainment than it is today, even in Italy itself, and performers adjusted accordingly.⁵²

It was commonplace for artists to add ornamentation and grace notes to arias and sometimes even to transpose arias to keys that were easier to sing.⁵³ (In fact, as Hillary Poriss has shown, well into the nineteenth century singers sometimes inserted entire arias by other composers.)⁵⁴ Composers expected some alteration, but they did not want too much of it, and hence there was always a creative tension between authors, conductors, and singers.⁵⁵ In the twenty-first century we might assume that the composer's views should always prevail, but in the nineteenth century, composers only sometimes got their way, and sometimes, when the piece was performed by an equally temperamental diva or divo, they had to grin and bear it.

51. For introductions to the historically informed performance movement of the late twentieth century, see *AUTHENTICITY AND EARLY MUSIC* (N. Kenyon ed. 1988); JOHN BUTT, *PLAYING WITH HISTORY* (2002); BERNARD D. SHERMAN, *INSIDE EARLY MUSIC: CONVERSATIONS WITH PERFORMERS* (1997).

52. See Prudence Dunstone, *Italian Vocal Music in the Early Nineteenth Century: Historical Versus Modern Interpretive Approaches*, in *MUSIC RESEARCH: NEW DIRECTIONS FOR A NEW CENTURY* 40, 45–46 (Michael Ewans et al. eds., 2004) (“Composers’ scores of this period were never intended to be definitive documents. On the contrary, they were plastic, and constantly adapted to the practical needs of the performers at hand. . . . [R]estoring a composition to its original autograph form . . . does not necessarily produce a performance in accordance with the expectations or even the intentions of the composer.”).

53. GOSSETT, *supra* note 15, at 293 (noting Verdi’s assumption that singers would ornament unless he gave explicit instructions to the contrary); Dunstone, *supra* note 52, at 51 (“Transposition and alterations to provide interest and to suit individual singers were commonplace.”).

54. See HILARY PORISS, *CHANGING THE SCORE: ARIAS, PRIMA DONNAS, AND THE AUTHORITY OF PERFORMANCE* 3–4 (2009) (describing the phenomenon of “‘aria insertion[.]’ . . . the practice that allowed singers to introduce arias of their own choice into opera productions”).

55. See *id.* at 23–24 (explaining that although “[l]ike his predecessors, Verdi allowed star performers to influence the shape and contents of his operas, particularly early on in his career,” he increasingly sought to prevent theaters, performers, and censors from mangling his operas).

Textual arguments, therefore, must always be understood in the larger context of performance conventions. To know what the text means, we also have to know what kinds of glosses and forms of improvisation conductors and performers are allowed within the tradition—or, if we are devotees of historically informed performance, were allowed in the relevant period.

Moreover, we might also have to look at the purpose behind the text to see what kinds of glosses are reasonable and permissible. The reason why Verdi wrote a G might have less to do with what he actually wanted and more to do with the cast of characters he had to work with at the premiere. Philip Gossett explains that “Verdi wrote the role of Manrico for Carlo Baucardé, a tenor whose effective range it presumably reflects.”⁵⁶ Verdi “did not feel that Baucardé had a usable high *c*, nor a high *b*, and only a most uncertain high *b*[-flat].”⁵⁷ If Verdi had believed that Baucardé could regularly hit the high C with confidence, Verdi might have included it in the original score. Today, however, given that the best tenors can sing the high C (and bring down the house) perhaps it is more consistent with Verdi’s intentions to allow the interpolation. This is an argument from hypothetical original intention. An analogous argument in constitutional law would be that if the Framers were alive today, and understood modern markets and modern telecommunications and transportation technologies, they would have accepted an expansive power to regulate interstate commerce.

Baucardé, it turns out, was more confident of his abilities than Verdi was, and he began throwing in high Cs shortly after *Il Trovatore*’s premiere.⁵⁸ In his study of Verdi’s operas, Julian Budden relates that Baucardé supposedly added not one but two high Cs—one at the end of the aria and one at the words “O teco almeno”—in a performance in Florence in 1855.⁵⁹ Another tradition states that they were introduced by the famous mid-nineteenth-century tenor Enrico Tamberlick.⁶⁰ Tamberlick, it seems, really liked to show off his range. He once tried to astonish the composer Gioacchino Rossini by producing a high C-sharp.⁶¹ Rossini was not amused. He told Tamberlick that he could hang his C-sharp in the hall of the opera house and pick it up on the way out after the performance.⁶²

By contrast, Budden explains, “Verdi was more complaisant.”⁶³ Before approaching Verdi with a request to include the *do di petto*,

56. GOSSETT, *supra* note 15, at 125.

57. *Id.* at 126.

58. 2 JULIAN BUDDEN, *THE OPERAS OF VERDI* 98 (1978); HERBERT LINDENBERGER, *SITUATING OPERA: PERIOD, GENRE, RECEPTION* 11 (2010).

59. BUDDEN, *supra* note 58.

60. *Id.* at 98, 531.

61. *Id.* at 98, 530.

62. *Id.* at 98.

63. *Id.*

Tamberlick had already experimented with it in various provincial theatres where, he told the composer, it was in great demand with the public. “Far be it from me,” Verdi had answered, “to deny the public what it wants. Put in the high C if you like provided it is a good one.”⁶⁴

This famous anecdote contains a wealth of possible interpretive arguments. For example, modern tenors might argue that Verdi had sanctioned the high C if it was performed properly. The best interpretation of the score, then, is “sing the high C if you can do it really well; otherwise, stick to the G.” This could either be an argument from original intentions (Verdi actually approved of a C by the right singer), or an argument for interpreting open-ended texts in a way that produces the best results. When the conventions of performance allow for some leeway, the singer may choose the interpretation that produces the best aesthetic consequences. Put in Dworkinian terms, when the conventions of musical practice allow it, we should attempt to make the score the best it can be.⁶⁵

On the other hand, one might argue that it doesn't matter what Verdi intended after the fact; what matters is the score he actually wrote. Original public meaning should trump original intentions, and what Verdi thought later on cannot change the nature of the work he actually composed. But this simply brings us back to what original public meaning was. Any opera composer writing in Italy knew that the singers would interpolate notes to show off their skills, and that the audience would expect and even demand this.⁶⁶ Conversely, “[p]erformers of Italian opera have been making internal cuts in musical numbers since the operas were written, and it seems unlikely that they will stop in the foreseeable future.”⁶⁷ Therefore we cannot understand the original public meaning of a nineteenth-century Italian opera score in the same way we might approach one written in the twenty-first century. The original public meaning might include the convention that the score is always subject to tasteful embellishments.⁶⁸

64. *Id.* at 98–99.

65. See RONALD DWORKIN, *LAW'S EMPIRE* 52–55, 421–22 n.12 (1986) (arguing that in constructive interpretation, social practices should be understood in their best light).

66. See GOSSETT, *supra* note 15, at 293 (explaining that more than any other form of classical music, nineteenth-century Italian opera retained eighteenth-century performance conventions in which composers “expected soloists (vocal and instrumental) to ornament lyrical lines” and that “only in Italian opera was ornamentation integral to the performance of newly composed notated works”). Gossett offers the example of the first performance of Rossini's most famous opera, *Il barbiere di Siviglia* (*The Barber of Seville*), in which the lead tenor Manuel García “was paid three times as much for singing the work as Rossini was for composing it,” and Rossini was required by contract “to make where needed all those alterations necessary either to ensure the good reception of the music or to meet the circumstances and convenience of those same singers, at the simple request of the Impresario, because so it must be and no other way.” *Id.* at xv.

67. *Id.* at 263.

68. One might argue that the original expected application of Verdi's score is less important than whether the text of the score gives later interpreters discretion to add interpolations. On the other hand, the score itself does not tell us how much discretion it affords; we may need to

Here again, the triangle of performance matters greatly to interpretation. When Verdi explained that he would not “deny the public what it wants,”⁶⁹ he was adverting to the duty of both composers and performers to the audience. Ultimately, the audience—or audiences, for there are always multiple audiences implicit in any performance—would be the judge of which interpretation was the best one. “At the time of Muti’s *Trovatore* in Florence [in 1977],” Gossett reports, “one Italian critic commented that the high *c*, even if not written by Verdi, was a gift that the people had given to Verdi.”⁷⁰ Such a gift, once given, could not easily be refused. This looks remarkably like an argument for popular or democratic constitutionalism. Under the same reasoning, it does not matter that the framers and adopters of the Fourteenth Amendment did not intend or expect that the Equal Protection Clause would one day require integrated public schools, the legality of interracial marriage, or equal rights for women and gays. These rights are a “gift” to the Constitution from later generations of the American people.

Verdi’s remark might also form the beginning of an argument from *precedent*. If tenors regularly sing the high C, and audiences have come to expect it, at some point this gloss appropriately becomes part of the score *as performed*, regardless of what the text—viewed in isolation from performing practices—might say. Perhaps Verdi would not have wanted the C initially, but the regular interaction of performers and audiences has authorized a tradition of performance that audiences expect and appreciate.⁷¹ For them, the real and true *Il Trovatore* is the version with the high C. These expectations are worth respecting. As noted above, they are a gift of the Italian people to Verdi, and to spurn them would be both ungracious and impolite.

Under this account, Maestro Muti is not a traditionalist, and merely the humble servant of Giuseppe Verdi. His insistence on following the literal text is revolutionary. It is designed to shock the audience and arouse it from its dogmatic slumbers. The audience has gotten lazy and too used to judging the musical merits of the opera based on a few high notes. By returning to the original text, Muti wants to push back at them, perhaps even teach them a lesson about musical excellence.

This example is by no means unusual. Arguments for discarding traditional interpretive glosses and returning to an imagined origin (like the original meaning of a text) are usually revolutionary, not conservative.

understand mid-nineteenth-century performance practices to help us answer this question. Cf. BALKIN, *supra* note 27, at 46 (arguing that “fidelity to a written constitution requires that we do our best to respect the text’s allocation of freedom and constraint for future constitutional construction,” which may require us to understand “how language was generally and publicly used”).

69. BUDDEN, *supra* note 58 at 98–99.

70. GOSSETT, *supra* note 15, at 127.

71. See, e.g., LINDENBERGER, *supra* note 58 (“Do not these practices have the authority that attaches to long-standing precedent? Does one want to allow an audience accustomed to the high *c* to feel let down as Act III comes to its dramatic conclusion?”).

Protestantism, with its desire to return to scripture alone, and to the pure Christianity of the early church fathers, is a good example.⁷² American conservatives' turn to originalism was part of a revolutionary mobilization for political change—movement conservatism—which was not conservative in the Burkean sense but sometimes quite radical in its political goals.⁷³

The idea that the high C is the gift of the people to Verdi brings us to the next of Bobbitt's modalities—arguments from ethos. Mauro Fuolega and his fellow critics in the audience were not merely invoking precedent. They were, in effect, accusing Muti of defacing an honored symbol of Italian art. By its nature, they might have argued, Italian opera celebrates bravura display—it revels in emotional excess and feats of artistic one-upmanship. By ordering Licitra to suppress the natural instincts of every red-blooded Italian tenor, Muti had been false to the ethos and character of a longstanding, transgenerational institution. In the same way, defenders of the result in *Bolling v. Sharpe* might argue that the arc of the American Constitution bends toward justice, that the deep meaning of the American constitutional tradition is the fulfillment in history of the Declaration's guarantee that all persons are created equal. A judge who refuses to integrate the District of Columbia schools because of a too-narrow construction of the Constitution's words does not really understand the meaning of America or the great narrative of American progress.

In addition to arguments about text, history, precedent, consequences, and ethos, there are also arguments about structure. In constitutional law, structural arguments concern how the various parts of a constitution fit together and how institutions created by the text should properly interact. Because they often invoke historical sources, structural arguments are sometimes confused with arguments from original intention or original meaning, but they are actually quite different. They are arguments about a constitution as a system, and about how the parts must work together in order to achieve a constitution's larger goals. Structural principles may arise from the interaction of different parts of the Constitution, and they do not have to be intended by anyone in particular.⁷⁴

72. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889 (1985) (noting that Protestant emphasis on *sola Scriptura* “rejected the rich medieval tradition of interpretation . . . [and] spurned the medieval acceptance of Pope and council as authoritative interpreters”).

73. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 238 (2011) (“The conservative movement’s turn to originalism was natural for a revolutionary political movement. . . . Arguments for a return to origins, for stripping away encrustations of existing practice and looking to the original meaning of past commitments are the familiar language of dissenters.”).

74. BALKIN, *supra* note 27, at 142 (“Structural principles do not have to have been intended by anyone in particular; indeed, they may only become apparent over time as we watch how the various elements of the constitutional system interact with each other.”); *id.* at 262 (“[S]tructural principles might emerge from the constitutional system that no single person or generation

Chief Justice Warren offered a structural argument in *Bolling v. Sharpe* when he said that it would be “unthinkable” to bind the states to a guarantee of racial equality but not the federal government.⁷⁵ The point of the Civil War and Reconstruction was to establish a single national standard for basic civil rights and civil liberties.⁷⁶ If *Brown v. Board of Education* was correct that racial equality (at least in public education) was a basic right of national citizenship, *a fortiori* it had to apply to the national government. The same structural logic justified another of the Warren Court’s most important achievements—its decision to apply almost all of the Bill of Rights to the states through the Due Process Clause.⁷⁷

Philip Gossett offers structural arguments both for including and for not including the *do di petto* in *Il Trovatore*. “Looking exclusively at the end of the aria,” he explains, “the interpolated note is nothing but harmless pyrotechnics. As assertive a cabaletta as Verdi ever wrote, the piece closes the third act, brings down the curtain, and moves the opera precipitously to the final catastrophe.”⁷⁸ In fact, Gossett argues, “Verdi’s conclusion demonstrates his wish to preserve an unusual level of tension.”⁷⁹ Ordinarily the tenor would have descended from the G to a lower C at the aria’s conclusion; however, Verdi keeps the tenor on G, “so that [the tenor] Manrico concludes on the fifth of the *C major* chord, while the first tenors [in the chorus] take the *e* below it and the second tenors and basses sing middle *c*. The result is a full tonic triad, with Manrico alone on the highest note.”⁸⁰

But if creating tension was Verdi’s structural goal, why not “intensify this effect further, by giving *c*, *e*, and *g* to the male chorus, with [the tenor] free to ascend to high *c*?”⁸¹ As noted above, Gossett believes that Verdi did not choose this path in part because he was worried about Baucardé’s range and consistency. But modern tenors can routinely hit the note confidently and powerfully.⁸² Thus there is a structural argument for heightening dramatic impact—and fulfilling the opera’s larger purpose—when a tenor is available to sing the high C.

intended. . . . We must look to other generations as well as the founding generation to understand how constitutional structures should work (and how they might fail to work).”).

75. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

76. Balkin, *supra* note 27, at 1809.

77. *See* *Duncan v. Louisiana*, 391 U.S. 145, 148–51 (1968) (applying the Sixth Amendment jury trial right to states and listing cases applying different portions of the Bill of Rights to the states).

78. GOSSETT, *supra* note 15, at 124–25.

79. *Id.* at 125.

80. *Id.*

81. *Id.*

82. *See* 3 RICHARD TARUSKIN, *THE OXFORD HISTORY OF WESTERN MUSIC: THE NINETEENTH CENTURY* 579 (2005) (“[S]ingers since Caruso have treated the composer’s notation as a minimum expectation. Indeed, any singer who does not have a version of that final roulade up to Caruso’s high C runs the risk of being hissed off the stage.”).

But there is also a structural argument in the opposite direction. “The real disaster of the interpolated high *c*,” Gossett argues, “is its effect on the choice of an appropriate tenor to sing the role of Manrico. The *sine qua non* for an opera house today, as it casts the part, has become the ability of a tenor to let loose a stentorian high *c* at the end of ‘Di quella pira.’”⁸³ The musical tail has begun to wag the operatic dog. “The interpolated note has come to dominate the conception of the part, and everything else is planned around an effect that Verdi never intended.”⁸⁴ In order “[t]o produce the high *c*, furthermore, singers generally cut the cabaletta by half and omit the notes that they should be singing with the chorus, so as to preserve breath and energy for the final pitch.”⁸⁵

Whichever way one reasons, Gossett believes that the structure—or the artistic integrity—of the opera is ultimately more important than scrupulous adherence to the written text:

[W]hether Manrico does or does not produce a high *c* is of little artistic importance. What is artistically devastating is that the perceived need to hit the stratospheric note has transformed our conception of the role. Give me a tenor who can sing Manrico as Verdi conceived the part and chooses to add a ringing high *c*, and I will join the *loggione* in applauding him. Failing that, let Manrico, in Rossini’s famous words to the same Tamberlick, leave his high *c* on the hat rack, to be picked up on his way out of the theater.⁸⁶

III. Constraint in Performance: Off-the-Wall and On-the-Wall

At a conference on law and music held at the University of Texas in 2001, the *do di petto* produced an interesting conversation about interpretive constraint, genre, and power. Comparing music to law, the distinguished musicologist Lewis Lockwood noted that opera singers were constrained by “the laws of music” and harmony.⁸⁷ Whether or not a high C was acceptable in 1850, surely a tenor could not get away with singing an F-sharp. At the aria’s conclusion, the tenor and the chorus are singing a C major chord.⁸⁸ The tenor can sing a G, or an E, or a C (the notes of the C major triad).⁸⁹ But, Lockwood explained, “[i]t cannot be any other pitch. It might be A if you want to turn it into Kurt Weill. . . . But nobody in his right mind would try that. My fear is if somebody did do it, the gallery gods would rise and

83. GOSSETT, *supra* note 15, at 126.

84. *Id.*

85. *Id.*

86. *Id.* at 127.

87. Lewis Lockwood, What Are the Links Between Law & Performing Arts?, Panel at the University of Texas Law and Art Symposium: From Text to Performance: Law and Other Performing Arts 19 (Mar. 4, 2002) (transcript on file with author).

88. G. VERDI, *IL TROVATORE* 325 (Dover 1994) (1853).

89. GOSSETT, *supra* note 15, at 125.

cheer.”⁹⁰ Then, further analogizing from music to law, Lockwood suggested that “the singing of an F-sharp is musically—pardon the expression—‘illegal,’ whereas singing an E would not be. . . . [Y]ou can not quite treat *Il Trovatore* as if it were that varied.”⁹¹

In fact, Lockwood’s argument is not so much about the “laws of harmony” as about the constraints of canon, convention, and genre. His reference to the twentieth-century composer Kurt Weill—who, among other things, brought jazz influences into European classical music⁹²—is the telltale sign.

Take the question of genre. The kinds of harmonic innovations singers are permitted to interpolate depend on the kind of music *Il Trovatore* is. Jazz singers like Ella Fitzgerald or Sarah Vaughan can add blues notes to a Cole Porter standard, but this would normally be impermissible in Verdi.

Mid-nineteenth-century Italian opera was not particularly daring harmonically, at least in comparison to contemporaries like Richard Wagner or Franz Liszt, much less later composers like Claude Debussy or Arnold Schoenberg.⁹³ Verdi’s musical palate did not employ the complex rhythms, blues notes, or harmonies of mid-twentieth-century American jazz. In a Duke Ellington composition a final C major chord can have a D on top because it is a ninth. One could also have an F-sharp in a serial composition of the early twentieth century, or as part of a chord with an augmented fourth (or a diminished fifth) in a Wagnerian opera.⁹⁴ (In fact, if the D resolved to a C or the F-sharp to a G, they would be permissible as a passing note or as an *appoggiatura* even in the Italian opera of Verdi’s time.)

Lockwood is correct that under the harmonic conventions of mid-nineteenth-century Italian opera both the D and the F-sharp are out of bounds. They are “illegal,” however, not because the laws of harmony in general demand it, but because the conventions of Italian opera do. As long as performers and audiences agree to abide by those conventions, such interpretations are “off-the-wall.” An “on-the-wall” interpretation, by contrast, is one that is within the genre and conventions of performance, even if it is not the best, the most skillful, or the most riveting interpretation.

90. See Lockwood, *supra* note 87, at 19–20.

91. *Id.* at 21.

92. See JÜRGEN SCHEBERA, *KURT WEILL: AN ILLUSTRATED LIFE* 75 (Caroline Murphy trans., 1995) (describing Weill’s introduction of popular forms and jazz elements in the 1920s).

93. See HARVARD UNIV., *THE HARVARD DICTIONARY OF MUSIC* 381 (Don Michael Randel ed., 4th ed. 2003) (viewing Wagner’s *Tristan und Isolde* as a turning point in the development of western harmony, leading to the “‘total chromaticism’ of the 20th century,” the experimentalism of composers like Claude Debussy, Maurice Ravel, Béla Bartók, and Igor Stravinsky, and, in Arnold Schoenberg, a “chromaticism [that] goes beyond tonality altogether”). Verdi’s *Il Trovatore* premiered in 1853, six years before Wagner finished *Tristan und Isolde*, and some twelve years before *Tristan*’s first performance in 1865. *Id.* at 588–89, 911.

94. See *id.* at 911 (describing the harmonic structure of the “Tristan chord”).

The point, however, is that conventions of appropriate performance can and do change over time. Within Verdi's own lifetime, harmonic conventions were drastically expanded (he died in 1901),⁹⁵ and by the first few decades of the twentieth century composers began experimenting with atonality, serialism, and jazz harmonies.⁹⁶ Today one could interpolate a D or an F-sharp only as a deliberate allusion to other genres of music, or as an attempt to superimpose another harmonic tradition on Verdian opera. Whether this would be successful would depend on whether it was accepted by audiences and adopted by other performers. Like Lockwood, I am dubious that this would work, but in studying the history of artistic interpretation, one learns never to say never.

Put another way, genre and convention shape what performers can do and cannot do in performance, but genre and convention are subject to the history of subsequent performance. Performers sometimes have incentives to stretch or alter conventions, or otherwise push the performative envelope in order to create new effects for audiences.

Consider Maestro Muti's choice of G instead of C in this light. Although Muti claimed that he was merely acting as the faithful servant of Verdi's text, he was actually confounding the existing conventions of Italian opera, which celebrate bravura display and emotional exaggeration. His "self-effacing deference" might actually be "arrogance cloaked as humility," as Justice William Brennan once said of the philosophy of original intention.⁹⁷

In fact, by deliberately refusing to perform the traditional *do di petto*, Muti's strict adherence to the printed text could be said to be off-the-wall, and the audience let him know it in no uncertain terms. But that judgment can change over time. If enough conductors, performers, and critics get behind Muti's approach, it may eventually become accepted as not only a permissible way to perform Verdi, but the correct way, even in very traditional venues like La Scala.

An important example of how performance practices move from off-the-wall to on-the-wall is the authentic performance movement. At first, audiences and critics resisted the authentic performance movement because they disliked the textures, timbres, and tempi employed by authenticists.⁹⁸ Eventually, however, audiences and critics were won over, and it became expected that performers would play music—especially music of the

95. McInerney, *supra* note 1.

96. See ALEX ROSS, *THE REST IS NOISE: LISTENING TO THE TWENTIETH CENTURY* 33–52, 74–77, 196–97 (2007) (describing the development of atonal and twelve-tone composition and the influence of jazz in early-twentieth century classical music).

97. Justice William J. Brennan, Jr., Speech by Justice William J. Brennan, Jr. at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 14 (1986).

98. Levinson & Balkin, *Other Performing Arts*, *supra* note 29, at 1611 nn.53 & 55, 1616–17.

Baroque and early Classical eras—using “authentic” techniques.⁹⁹ Conductors who continued to use large orchestras with traditional string vibrato in baroque and classical pieces were sometimes described as playing “big band” versions of the classics.¹⁰⁰

Similar points apply to legal interpretation. Constraint in legal interpretation comes from analogous ideas of genre, convention, and canon, which are enforced by a wide range of institutions. Nevertheless, just as in musical performance, things can move from off-the-wall to on-the-wall over time. In fact, the history of American constitutional law is the history of ideas and arguments moving from off-the-wall to on-the-wall and, in some cases, becoming the new orthodoxy of a later era.¹⁰¹

In music, as in law, the most important factor in moving things from off-the-wall to on-the-wall is whether enough people are willing to get behind these new ideas, and whether people who are well-placed in terms of power, position, and influence are willing to put their resources and reputations behind them.¹⁰² The constitutional arguments of the gay rights movement took many years to be taken seriously. In 1986, Justice Byron White dismissed as off-the-wall the idea that the Constitution prevented states from imprisoning people for same-sex relations: “[T]o claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”¹⁰³ At that point, the modern gay rights movement (measured

99. *Id.* at 1611.

100. *See, e.g.*, MARCHET AL., *supra* note 48, at 698 (describing Sir Colin Davis’s performances of Mozart symphonies as “big-band Mozart” that “reflect little or no influence from period performance”).

101. *See* BALKIN, *supra* note 73, at 12, 61, 69–70, 88, 119, 177–83 (2011) (explaining the importance of the ideas of off-the-wall and on-the-wall constitutional arguments to constitutional change).

102. *See id.* at 88. As I have explained elsewhere:

Law, and especially constitutional law, is grounded in judgments by legal professionals about what is reasonable: these judgments include what legal professionals think is obviously correct, clearly wrong, or is a matter of dispute on which reasonable minds can disagree. But what people think is reasonable depends in part on what they think that other people think. Arguments move from off the wall to on the wall because people and institutions are willing to put their reputations on the line and state that an argument formerly thought beyond the pale is not crazy at all, but is actually a pretty good legal argument. Moreover, it matters greatly *who* vouches for the argument—whether they are well-respected, powerful and influential, and how they are situated in institutions with professional authority or in institutions like politics or the media that shape public opinion. The Obama Justice Department has now officially taken the view that discrimination against homosexuals should be subjected to close judicial scrutiny, and the president has recently declared himself in favor of legalizing same-sex marriages. Together these announcements give enormous momentum to the decades-long struggle for constitutional rights for gays and lesbians.

Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

103. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

from the 1969 Stonewall Riots) was only 17 years old.¹⁰⁴ Seventeen years later, however, in *Lawrence v. Texas*,¹⁰⁵ what was once off-the-wall had become on-the-wall. What Justice White thought facetious a majority of the Supreme Court now thought the best interpretation of the Due Process Clause.¹⁰⁶ How did the gay rights movement succeed? It did so through gradually changing public opinion at the national, state, and local levels; through efforts at shaping popular culture; through legislative lobbying; through litigation campaigns; through decisions by gays and lesbians to publicly announce their sexual orientation and live openly; and through repeated arguments made by political, legal, cultural, and academic elites.¹⁰⁷ As more and more people in influential and powerful institutions accepted and argued for equal rights for homosexuals, these ideas became increasingly acceptable to the general public and to legal elites.

In like fashion, the success of the authentic performance movement came slowly, over time, as historically informed performers began to infiltrate and later dominate concert halls and recording studios, win over critics, and reproduce themselves in conservatories and music academies. Like the success of the gay rights movement, the success of the authentic performance movement is a Gramscian-style “march through the institutions.”¹⁰⁸

This offers us yet another way of explaining the idea that the *do di petto* is a gift from the people to Verdi. The “gift” in this case is the result of years of practice and mobilization in various institutions of power and influence that reshape musical common sense and move things from off-the-wall to on-the-wall. The result of this effort is an interpretation that now seems reasonable, obvious, or natural. What the people gave to Verdi—or to the interpretation of Verdi—was a conception of reasonableness; in the same way, what generations of social and political movements have bestowed on the Constitution is a sense of reasonableness about how to make sense of abstract or vague texts like “freedom of speech” or “equal protection of the laws.”

One of the most important sources of power in shaping canon, convention, and genre is the audience. Performers generally attempt to

104. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 15 (1999).

105. 539 U.S. 558 (2003).

106. *Id.* at 578–79.

107. See *supra* note 102 and accompanying text. See generally LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* (2012).

108. See generally ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (describing the “war of position” between intellectuals). The term “march through the institutions,” although often associated with Gramsci, was actually coined in the twentieth century by the German student activist Rudi Dutschke. ROGER KIMBALL, *THE LONG MARCH: HOW THE CULTURAL REVOLUTION OF THE 1960S CHANGED AMERICA* 15 (2000).

influence and communicate with their audiences; if audiences don't like what performers do, it undermines their ability to perform.

The important point is that the audience that happens to be at La Scala at a particular moment is not the only one that matters for shaping the conventions of performance. Perhaps Maestro Muti may not care much for the people in the balconies—indeed, he rebuked them—but there are other audiences about which he cares deeply. Just as there can be multiple authors and multiple performers, there can also be multiple audiences, in different places and at different times, each of whom may place duties, expectations, or constraints on the performer. Audiences exist in institutions, and their views are mediated by these institutions. When we talk about the role of the audience in shaping performance, then, we are really talking about the role of institutions that affect performance and before which performance occurs.

First, audiences may be differentiated by *time* or *space*: When Riccardo Muti conducts at La Scala, his performance may be recorded for later audiences, who may listen or watch it in many different places, and in many different situations—in a movie theatre, sitting at home, or driving in a car. The creation of technologies for recorded performance in the twentieth century greatly multiplied the number of potential audiences for any single performance.

Second, audiences may be differentiated by *expertise*. Muti's performance before a live audience at La Scala reaches out to laypersons who know little of opera, to professional musicians in attendance, and to the *loggionisti* who are devoted—and often critical—fans.

Third, audiences may be differentiated by *role*. The same performance may be reviewed by professional music journalists and music critics. It may be evaluated by impresarios and record companies who may want to hire Muti, Licitra, or the other performers for future concerts and recordings.

Fourth, audiences may be differentiated by their respective places in *professional culture*. Most of the members of the audience at La Scala are probably not conductors or opera singers themselves. Nevertheless, well-trained musicians often perform against the background of the expectations and judgments of other professional or professionally trained musicians. Musicians' performances may also be shaped—consciously or unconsciously—by the expectations and judgments of their former teachers, by their peers, or by fellow members of the genre or the “school” of performance to which they belong. Even if these fellow professionals are not in the live audience, they nevertheless shape—sometimes subtly, sometimes profoundly—what a performer believes he or she must do, and what makes for a good, bad, or mediocre performance. Indeed, a performer may regard a standing ovation from the untutored as less important than the judgment of peers or teachers gained over decades of interaction. The internalized audience may be more powerful than the audience immediately before an interpreter.

As these examples demonstrate, the triangle of performance is usually embedded in *institutions*. Whether or not these institutions are salient in any particular performance, their influence is always present. An opera performance, for example, occurs in an opera house paid for by subscriptions or subsidized by taxpayers and managed by a company. The conductors and performers are conservatory-trained and owe debts of influence to teachers and colleagues. Their work is reviewed by journalists and critics, and the artists seek to attract contracts from recording companies and performance opportunities from other opera companies and musical organizations.

The relationships and duties of interpretation between author, performer, and audience, therefore, are always mediated by institutional structures, including the forms of power and the social conventions that come with them. For example, Muti's performance at La Scala either made use of or was the result of, among other things, opera companies, conservatories and apprenticeships, competitions, record companies, and the Internet/YouTube (where a version of Muti's La Scala interpretation currently appears).¹⁰⁹

Similar points apply to the triangle of performance in law. A judge who decides a case is constrained by and responding to a wide range of influences: the appointments process, the party system, legal education and legal culture, the opinions of professional peers, and the multiple social institutions that constitute one's lived experience. (Consider, for example, how desegregation of institutions like the United States Army and Major League Baseball paved the way for *Brown v. Board of Education*.)¹¹⁰ Conventions of interpretation and expectations about proper performance change as a result of controversies and struggles within these various institutions. This is as true for music as it is for law.

IV. Conclusion: Performance and Canonicity

Throughout this Essay I have noted similarities between legal and musical performance, showing how these similarities arise from the fact that in law and in many performing arts performers need to interpret a text and put it into action. For that reason, both law and the performing arts feature a triangle of performance between authors, performers, and audiences, and both law and the performing arts use similar modalities of argument to legitimate the choices made by interpreters.

I close however, with an important area of difference. It concerns canonicity: the kinds of performances that participants deem mandatory or canonical, and how that canonicity is enforced through institutions.

109. Radio Televisione Italiana, *Il Trovatore*, YOUTUBE (Mar. 12, 2013), <http://www.youtube.com/watch?v=6AGQeg0M28Y>.

110. See Jack M. Balkin, *What Brown Teaches Us About Constitutional Interpretation*, 90 VA. L. REV. 1537, 1547 (2004) (noting the importance of Jackie Robinson's and Harry Truman's actions in shaping a political culture in which *Brown v. Board of Education* became possible).

First, note that it is mandatory to interpret and apply laws in a sense in which it is not mandatory to interpret artistic works like *Il Trovatore*. Conductors and opera companies do not have to perform *Il Trovatore* (unless, that is, they are contractually obligated to do so); they can choose to perform another work instead. By contrast, laws presumptively apply to particular situations; ordinarily they must be performed if they are deemed relevant.

Second, when the Supreme Court decides a case like *Bolling v. Sharpe*, its decision is binding on all the lower courts and upon the Supreme Court itself (unless the Court overturns or limits the decision). Lower courts and the Supreme Court are supposed to follow the original decision, or at least give very good reasons why they should not. And if a lower court disobeys the interpretation of a higher court, a higher court has the right to reverse it. On the other hand, when Riccardo Muti decides that he is going to perform the G in the printed score instead of the traditional high C, his decision does not have the same effect. Nothing prevents another opera conductor from performing the high C that very same night in another opera house somewhere in the world. And if another conductor does so, there is very little that Muti can do other than criticize.

In the United States, court decisions are organized hierarchically—with higher courts able to supervise and reverse lower courts—whereas opera performances are not. Interpretations of the highest courts are canonical: They are mandatory guidelines for how lower courts should perform the law.

Indeed, rival interpretations of the Constitution are normally frowned on; the goal, if not the practical reality, is that the judicial system should converge toward a single interpretation even if this is not always realistic. In music and many other performing arts, however, it is possible to have multiple interpretations of the same work. In fact, a multiplicity of interpretations is often encouraged and admired because it allows performers to demonstrate the quality and uniqueness of their particular genius.

By contrast, a legal system like that in the United States has far less patience with idiosyncratic judges who pride themselves on showing off their talents by deciding cases in ways that no other judges would. One might argue for interpretive convergence on rule of law grounds: although in practice it may make a great deal of difference before whom a litigant appears, the ideal is that the law for each person should be the same regardless of the judge involved.

Nevertheless, this difference is not due not to inherent features of law and the performing arts, but rather to how these institutions are structured and to their governing conventions. It is certainly possible to imagine art forms in which the best performance is one that conforms as much as possible to a canonical example. Consider, for example, the desire of many

popular music fans to hear a live version that is as close as possible to the recorded version they know and love.¹¹¹

Conversely, it is possible to have legal systems that are not hierarchically ordered, or that are pluralist, or that countenance a wide range of different interpretive results. To some extent even the American system of law contemplates the possibility that the different branches of government may interpret the Constitution differently. Judicial supremacy may exist in the United States, but it is also controversial.

In fact, the point of comparing law to the performing arts consists precisely in the fact that as soon as we attempt to list clear differences, we begin to see how internally differentiated both categories are. What we discover are a variety of different performance practices within law, music, and drama, with different methods of enforcing genre, convention, and constraint.

The big division, then, is not law versus music or drama. Instead we should ask what kind of practice we are dealing with and how it is organized institutionally. What are the traditions of performance that apply to the practice, and how are these traditions enforced? What are the forms or sources of authority to engage in performance? What degree of variation is permitted or encouraged between different interpreters? How is convergence in interpretation encouraged or enforced? How do the conventions of good and bad, correct and incorrect performance change over time, and what role do institutions play in facilitating or resisting these changes? These questions are as relevant to legal performance as to the performance of music or drama. They are why law, like music or drama, is a performing art.

111. See, e.g., Chris Nelson, *Lip-Synching Gets Real*, N.Y. TIMES, Feb. 1, 2004, <http://www.nytimes.com/2004/02/01/arts/music-lip-synching-gets-real.html?pagewanted=print&src=pm> (“[F]or an increasing portion of the pop music audience, perfection is more desirable than authenticity—especially when they’re paying almost \$100 a ticket for an elaborately choreographed concert.”).