

Of Constitutions and Concertos

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Kevin Toh, *Authenticity, Ontology, and Natural History: Some Reflections on Musical and Legal Interpretation*, in **Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy** (Lisa Crawford, Patrick Emerton, & Dale Smith, eds., 2018), available at [SSRN](#).

Kevin Toh's *Authenticity, Ontology, and Natural History: Some Reflections on Musical and Legal Interpretation* offers a fresh and lucid discussion of the relationship between constitutional interpretation and musical performance. Toh is by no means the first scholar to have observed the connection between the two pursuits: [Jerome Frank](#), [Richard Posner](#), [Sanford Levinson](#) and [Jack Balkin](#), and others have noted and analyzed the shared nature of the challenges that judges and [musicians confront](#). But Toh's article, written in honor of the Australian philosopher Jeff Goldsworthy, offers a welcome contribution to this intriguing line of inquiry, mining the music-law analogy for rich and revealing insights about the values of authenticity and fidelity as they apply to both of these interpretive endeavors.

Toh begins his discussion by highlighting an oft-analyzed issue within the philosophy of music—namely, that of the “ontological status” of musical works (P. 3.) When we talk about songs, sonatas, symphonies, and the like, what exactly are the objects to which we refer? Toh dismisses the possibility that a musical work is equivalent to the physical score that demarcates it. (Scores, after all, can be annotated, shredded, or left at home, and that is hardly true as to a “cantata” or “concerto.”) He also rejects the possibility that a musical work equates to a “score-type”—an abstract representation of the score's particular instructions (P. 3.) Score-types often fail to specify important components of a musical performance, including components that are “important enough to be considered nonoptional if the performances are to count as performances of the relevant works” (P. 4.) And he further rejects the possibility of treating the musical work as equivalent to the “meaning” of the score, where the score's meaning is understood to be the performance that the score as a whole prescribes (P. 5.) This conception too, Toh argues, fails to acknowledge the fundamental incompleteness of the score's demands. Plodding through the notes on a page is not the same thing as performing the piece. A “true” and “authentic” version of the piece requires phrasings, voicings, dynamics, and other expressive elements that the score does not always convey.

That leads Toh to another possibility: Perhaps a musical work corresponds to the “pragmatically-enriched meaning” of a score. If a work encompasses something more than the score's abstract instructions, then that “something more” might be the “traditions or conventions governing interpretation and performances of the relevant music” (P. 5.) This expanded definition would no doubt narrow the gap between what a song consists of and what a score connotes. All the choices necessary to ensure an authentic performance might not appear within the four corners of the score, but the norms of a musical tradition might still be seen as incorporated by reference. And thus, the argument would go, when a performer has adhered to both the score's instructions and the stylistic expectations of the relevant musical tradition, that performer can be said to have rendered a faithful representation of the work itself.

To Toh, however, even this expanded conception of a musical work would remain incomplete. The problem, as he sees it, is that some musical performances could still qualify as fully “authentic” even

when they depart from the broader, “pragmatically-enriched” meaning of a score (P. 5.) Sometimes, that is, musicians who “take some liberties with the score, even in the pragmatically enriched . . . sense” will deliver performances that are “truer or more faithful to the relevant musical work, more authentic, than any that would adhere strictly to such a score” (P. 6.) Toh refers to such performances as “radically authentic musical performance[s],” or “RAMPs” for short.

Toh illustrates the concept of a RAMP with a hypothetical. Suppose that:

[t]he composer of a musical work and his audience had formed certain anticipations for performances of a work based on what he wrote, what the performance traditions or conventions for the relevant kind of work had been up to that point, and the instructions and tips that the composer had given to some musicians earlier. Then a new musician or ensemble comes along and delivers an electrifyingly new, even revolutionary interpretation. All, including the composer, are initially scandalized. The newcomers persist undaunted, however, and after a period of time, some critics, and the composer himself, are brought around. Eventually, the composer opines, and many agree, that the new interpretation is a ‘revelation’, and has enabled him and others to see the aspects or even the nature of the work that had hitherto eluded him and others. (P. 6.)

Toh offers some examples of RAMPs in action, but let me hazard an additional one from the domain of popular music. I (and I suspect others) have sometimes come across cover versions of songs that don’t just sound better than the original versions, but also, strangely, seem to adhere more faithfully to the “song” being performed. We can quibble about what entries belong on this list, but the general idea is that one musician might sometimes perform another’s work in a way that, while sounding quite different from the original recording, nonetheless better “captures the essence” or “gets to the core” of the source material. Hearing these covers evokes the thought: “Now that’s what that song was meant to be.” And by this we mean not that the cover conveys the performance the songwriter had always intended, but rather that the cover conveys a performance that better befits the song itself.

The idea of a RAMP suggests that our judgments about musical authenticity cannot be wholly disentangled from a deeper-level set of judgments about the nature of the work being performed. To some this might sound like nonsense: The most authentic performance of a musical work is the one that best aligns with what its author(s) and original audiences expected the work to sound like, period. But in a world that allows for the possibility of RAMPs, the “fidelity,” “purity,” or “truth” of a performance depends on not just the extent to which it sticks to the composer’s original plan, but also the fullness with which it realizes the potential that lies latent within the work. We might characterize such assessments as grounded in a sort of inner “logic” that emerges from the piece after its creation (P. 10.) Or, as Toh elsewhere speculates, we might even characterize such judgments as stemming from “what we find aesthetically valuable and interesting about that work or works of that type” (P. 19.) But however we ultimately communicate the point, a RAMP would represent a performance whose authenticity derives not from its similarity to whatever the composer of the piece envisioned, but rather from the listener’s own sense of what the piece itself demands.

Toh recognizes that our intuitions may vary as to whether something like a RAMP could ever exist. But if the intuition is correct, then it raises an interesting question about judicial work with written constitutions and, indeed, any form of written law. If performers can authentically interpret music while moving beyond a work’s pragmatically-enriched original meaning, then perhaps judges can do the same when they work with written legal texts, including constitutions. Just as musicians might sometimes render radically authentic musical performances, so too might judges render “radically authentic constitutional interpretations” (“RACIs”)— “performances” of a constitution that turn out to be “truer or

more faithful to the constitution” precisely because they do not “strictly adhere” to the text’s “pragmatically enriched meaning” (P. 14.)

Toh’s claim here is not simply the familiar one that judges sometimes have good reason to depart from a constitution’s meaning (even in pragmatically enriched form). That would amount to a straightforward prescription for “non-originalist” judging, and so it would be subject to the standard stock of criticisms that such a prescription invites. Instead, Toh’s claim is that *authentic* constitutional interpretation might sometimes permit, or even require, judicial departures from the pragmatically-enriched constitutional text. And on this view, originalism and non-originalism need not stake out competing positions on the importance of interpretive fidelity as an adjudicatory value. Rather, non-originalists can be just as “committed to fidelity to the constitution as much as originalists,” while simply “believ[ing] that the constitution that judges must accurately reflect is not wholly constituted by the meaning of the constitutional text” (P. 21.) The non-originalist judge is not so much like the performer who decides to ignore the sheet music and play a better song. Rather, she is like the performer who regards the sheet music as only partially constitutive of the “song” to be performed.

It would be too facile, as Toh recognizes, to contend that that RACIs must exist simply because RAMPs exist (or vice versa). Constitutional texts and musical works are different in important respects, and those differences might end up supporting different conceptions of interpretive authenticity within each domain. Constitutions, unlike songs, exert binding force on people and institutions; constitutions, unlike songs, emerge from lawmaking bodies that claim a special authority to create them; constitutions, unlike songs, can be formally altered only through specifically-designated amendment procedures; and so on. But that is, in a way, the ultimate point of Toh’s extended riff on the music-law connection. What the example of musical performance helps to illustrate is that the ideal of interpretive authenticity depends at bottom on how we define the object to be interpreted. And, as Toh once again suggests, the question of how we define the object to be interpreted may depend, at least in part, on what we find “valuable and important” about the object itself (P. 19.)

This last observation tees up the final and most daunting question that Toh takes on: If our surface-level judgments about *constitutional* fidelity depend on deeper, value-laden conceptions of what counts as fundamental law, then is there an “ontology of constitutions, or of laws more generally, that would yield a conception of constitutional or legal authenticity that permits non-originalist adjudication, and at the same time meshes in the right and disciplined way with our normative interests”? (P. 21.) Toh has not fully worked out such an account, but he does here begin to sketch out how it might proceed. The central strategy involves the seeking out a “vindicatory natural history” of non-originalism—a sort of “state of nature narrative” that begins with some “initial situation” and spins out of that situation a tale by which non-originalism might have evolved to serve some salutary or worthwhile human needs (P. 21.) The idea is not to make any particular historical claim about how non-originalism actually came to be, but rather to tease out the most salient practical interests that legal systems help to serve—interests, perhaps, such as the coordination of collective behavior, the facilitation of long-term planning, or the expression of public values—and then to demonstrate, by reference to those practical interests, why and how non-originalism jibes with the most valuable and important features of the law to which it applies.

I won’t here rehash this last part of Toh’s paper, but I will certainly commend it to the reader’s attention. Suffice it to say that Toh’s roadmap of the argument, though tentative, is nuanced, wide-ranging, and challenging, drawing on the work of legal theorists, literary theorists, philosophers of art, social psychologists, and evolutionary biologists. And staying true to the topic at hand, the discussion highlights additional interesting connections between legal and musical interpretation, thus, in my view, further bolstering the case for thinking about these pursuits in tandem.

I'm reserving judgment as to whether this broader jurisprudential project can succeed, but Toh deserves credit for teeing it up in the way he has done so here. His insights about musical and legal authenticity are interesting in their own right and all the more so when considered together. They have left me rethinking some of my own assumptions about the nature of authenticity as an interpretive ideal, and they have raised plenty of follow-up questions that are well worth pondering on their own terms. Having previously assumed that the music-law analogy had run its scholarly course, I was delighted to encounter this powerful new variation on a well-worn theme.

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