

Towards a Dramaturgical Theory of Constitutional Interpretation

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ABSTRACT

Like legal texts, dramatic texts have a public function and public responsibilities not shared by texts written to be appreciated in solitude. For this reason, the interpretation of dramatic texts offers a variety of useful templates for the interpretation of legal texts. In this Article, I elaborate on Jack Balkin and Sanford Levinson’s neglected account of law as performance. I begin with Balkin and Levinson’s observation that both legal and dramatic interpreters are charged with persuading audiences that their readings of texts are “authoritative,” analyzing the relationship between legal and theatrical authority and tradition. I then offer my own theory of constitutional interpretation organized around realizing the potential of the text. I test this theory against provisions of the U.S. Constitution written at varying levels of abstraction, using dramaturgical analogies to identify an appropriate interpretive framework for each type of provision. In doing so, I discover parts of the Constitution where merely applying the text “as written” in an originalist sense would be impossible. I argue that a dramaturgical approach to constitutional interpretation has advantages over previously proposed literary criticism-inflected approaches because dramaturgy answers to the demands of the present where these other approaches mainly look backward.

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INTRODUCTION

James Boyd White has observed that one of the principal virtues of the study of law as literature is that this approach to legal interpretation recalls us to an awareness of the mortal status of our laws and legal institutions.¹ When we consider a poem, we do not treat the words as though they have been transmitted from on high and etched in stone. Rather, we treat them as the product of a mind of limited means bound by the particularities of a time and a place. We ask why the author chose this word over that. Scholars pore over available evidence of successive drafts and revisions. We ask what it means that it came out this way when it could have been otherwise. We are perpetually in dialogue with the possibilities of this “otherwise.” To look at the ways in which a poem “makes and remakes its language,” says White, “is to conceive of oneself, whether teacher or student, as a maker of compositions too, as one who also remakes language and reconstitutes form.”²

This type of training benefits students of law, White says, because to treat a legal text—like a constitution—as a composition rather than a product of divine inspiration “thus at once both informs and confirms one’s own capacities for composition and language-making—for making expressions of one’s own, a language of one’s own, that will work in the world in new ways.”³ Reading a constitution like a composition, he says, “affirms the power of the individual imagination: the possibility of an originality that can work a change in our cultural circumstances.”⁴ The task of the student of law, White says, “is not simply to understand and describe the law, but to make it and remake it in practice; the work of the

1. James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in *LAW AND LITERATURE: TEXT AND THEORY* 5, 10 (Lenora Ledwon ed., 1996).

2. *Id.* at 9.

3. *Id.*

4. *Id.*

critical reader is not merely to understand and to describe the poem but to give it new meaning and a new place in his or her own world.”⁵

In perhaps no literary medium do the demands of the contemporary world make themselves felt on the interpretation of a work as insistently as in the theater. The text of a play can be consumed in solitude by individual readers, but we know that those readers are only granted access to something partial and preliminary. The play can only be fully realized in performance. Because the law has an analogous public function, the law has been learning from the theater for decades thanks to the efforts of scholars of law and the humanities.⁶ Like theater studies, itself something of a mongrel discipline, the literature on theater and law is international. In the United States, Julie Stone Peters has traced the role of performance in the historical production and reception of the law.⁷ In the U.K., Alan Read has identified principles of performance within law that, in his view, show how law is a performative mode of practice.⁸ Australian scholar Marett Leiboff has called for a “theatrical jurisprudence.”⁹ According to Leiboff, “[l]aw’s preferred mode, to shoehorn what is new into what already exists, is its temperamental orientation, and is exemplary of the antitheatrical legality.”¹⁰ A theatrical jurisprudence, Leiboff argues, would attend more fully to the present, fulfilling its responsibility to the bodies of the living.¹¹

These recent interventions offer compelling challenges to law’s logocentrism. When it comes to using the tools of theater to aid in the

5. *Id.* at 9–10.

6. Marett Leiboff goes so far as to describe recent scholarly attention to the intersection of theater and law as the “performative turn” in law. See MARETT LEIBOFF, TOWARDS A THEATRICAL JURISPRUDENCE 13 (2020).

7. See, e.g., Julie Stone Peters, *Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems*, in NEW DIRECTIONS IN LAW AND LITERATURE 193, 196 (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

8. ALAN READ, THEATRE & LAW 8–21 (2016). Read’s ten principles are as follows: (1) Law must be *seen* to be done—it is not adequate for a legal system to do its work in private; (2) when they take the form of a trial, the workings of the law have at least a rudimentary narrative structure, a beginning, middle, and end; (3) law acts as a form of surrogate; (4) performance needs to be experienced, to be *worked through*; (5) the law operates simultaneously as a reality and as a fiction; (6) justice requires performative force, or “perforcance;” (7) like theater, and often to an even greater extent than theater, the law foregrounds the palpable, open present of its workings; (8) duration; (9) the function of oath statements as performative speech acts; and (10) costumes for barristers and judges. *Id.* (emphasis added).

9. LEIBOFF, *supra* note 6, at 8–9. A theatrical jurisprudence, Leiboff explains, would recognize that “legal bodies are also responsive in both positive and negative ways, to law, to facts, to circumstances, to irritations, to dislikes, likes, that are more likely to attenuate the intellectual premises that we think are operative than we would want to believe: politics, gender, sexuality, race, ethnicity, and so on.” *Id.* at 9.

10. *Id.* at 12.

11. *Id.*

interpretation of legal *texts*, however, some of the most exciting discoveries to come out of the law and literature movement have been left uncultivated for want, I suspect, of appropriate interdisciplinary expertise. In this Article, I concern myself primarily with Jack Balkin and Sanford Levinson's account of law as performance. I elaborate on their contributions, focusing on how a dramaturgical approach to interpretation might enrich our engagement with key legal texts. I draw my examples from the U.S. Constitution, the most important and most contested text in the American legal tradition. In Part II, I introduce Balkin and Levinson's observation that both legal and dramatic interpreters are charged with persuading audiences that their readings of texts are "authoritative." In Part III, I analyze the relationship between legal or theatrical authority and tradition. In Part IV, I offer a theory of constitutional interpretation organized around realizing the *potential* of the text. I test this theory against provisions of the Constitution written at varying levels of abstraction. First, I consider Article II, Section 1, which prescribes the minimum age of the president. Second, I consider Article I, Section 10, the provision dealing with the gold standard. Third, I consider the Eighth Amendment, which prohibits cruel and unusual punishment. Last, I consider the mysterious Ninth Amendment, which seems to approach full abstraction in its invocation of the possibility of as-yet-unarticulated federal rights. I use dramaturgical analogies to identify an appropriate interpretive framework for each of these constitutional provisions. In the final Part of this Article, I briefly conclude.

I. LAW AS PERFORMANCE

In an essay primarily addressing musical performance and its implications for law, Jack Balkin and Stanford Levinson make the tantalizing assertion that law is best understood not as literature entombed on the page but as performance, "the acting out of texts rather than the texts themselves."¹² Legal texts "by themselves do not constitute the social practice of law," Balkin and Levinson argue.¹³ Like music or drama, law requires "transforming the ink on the page into the enacted behaviour of others."¹⁴ Unlike poetry or fiction, "whose texts do not require performance but can be read silently to oneself," drama and law take place "before a public audience to whom the interpreter owes special responsibilities," they say.¹⁵

12. J.M. Balkin & Sanford Levinson, *Law as Performance*, in *LAW AND LITERATURE: CURRENT LEGAL ISSUES VOLUME 2*, at 729 (Michael Freeman & Andrew D. E. Lewis eds., 1999).

13. *Id.*

14. *Id.*

15. *Id.*

This is a crucial—and neglected—insight, but Balkin and Levinson do not, alas, do justice to their own fine metaphor. They go on to assert that those “special responsibilities” borne by legal and musical interpreters include “persuad[ing] others that the conception of the work put before them is, in some sense, authoritative.”¹⁶ The bulk of the essay in which they elaborate on this theory is then devoted to puzzling over the problem of whether and how to perform such works as Gilbert and Sullivan’s 1885 *The Mikado*, the libretto of which traffics in racial slurs and stereotypes that would be considered offensive by a significant portion of a modern audience.¹⁷ To cut or not to cut? To rewrite or not to rewrite? If neither cutting nor rewriting is deemed to be an acceptable solution, must the three little maids from school be forever consigned to the dust of the archives, their girlish glee never again to delight another community light opera society?

These are not the important questions. Redacting particular inflammatory words from a dramatic text is not, in most cases, a matter of hermeneutics at all. It is a pragmatic matter of assessing community standards and sophistication, considering whether there is more to be gained artistically by including an epithet likely to outrage certain spectators than there is to be lost by excising it. This will always be a slippery, fact-intensive inquiry with no “right” answer, only more or less tolerable compromises.¹⁸

More interesting is Balkin and Levinson’s assertion that the dramatic interpreter is responsible for persuading her audience that her interpretation of a text is “authoritative.” This is a peculiar word to use in the context of the theater. Insofar as we are given to understand “authoritative” to mean something like “authentic,” it is difficult to know how one might assess the “authenticity” of a particular production. With rare postmodern exceptions, the theater is an art that revels in inauthenticity. The theater is a place where we pretend. No one is under any illusions that the actress playing Cleopatra will be unable to join us for the curtain call because the asp’s poison has really killed her. American method acting is premised on the assumption that it is possible and desirable for an actor to “become” the character rather than merely portray the character, but even in this tradition it is artifice that triumphs—Brando

16. *Id.*

17. *Id.* at 730–39.

18. See Jalin P. Cunningham, ‘*Mikado*’ Protesters Call to Shut Down Production, HARV. CRIMSON (Oct. 28, 2016), <https://www.thecrimson.com/article/2016/10/28/criticism-sharpened-against-mikado/> [<https://perma.cc/8NNX-939Z>]; E. Tammy Kim, *An Asian-American Reimagining of Gilbert and Sullivan’s “The Mikado,”* NEW YORKER (Dec. 27, 2016), <https://www.newyorker.com/culture/culture-desk/an-asian-american-reimagining-of-gilbert-and-sullivans-the-mikado> [<https://perma.cc/GPC5-2HRM>].

is still, in fact, Brando underneath, not Stanley Kowalski. It is the transformation that we applaud.

II. ORIGINS, AUTHORITY, AUTHENTICITY

Authenticity may refer to the forensic accuracy that so-called “original practices” enthusiasts are after when they set out to stage a production of a play in conformity with the conditions that prevailed during its first production.¹⁹ This was the goal of, for example, the Globe Theatre in London under Mark Rylance’s artistic direction between 1995 and 2005.²⁰ Their “original practices” productions of Shakespeare’s plays strove to replicate historians’ best estimates of what the performance conventions would have been for Shakespeare’s troupe at the turn of the seventeenth century.²¹ Period-appropriate instruments were reconstructed so that on-stage musicians could play unamplified Early Modern music.²² The actors wore period-appropriate costumes, with none of the Velcro or elastic we use to facilitate contemporary quick-changes. “Even the undergarments,” as the press obsessively noted, “invisible when the actor is fully dressed, are completely authentic.”²³

The Globe’s original practices productions were not, of course, *completely* authentic. It was impossible to use authentic ingredients for stage makeup, as the white face paint some actors are thought to have worn during Shakespeare’s time was made from ceruse, or white lead, and vinegar.²⁴ This poisonous mixture, which was often supplemented with mercury sublimate, ate away at actors’ skin, resulting in disfiguring scars, neurological damage, and sometimes death.²⁵ For the Globe’s twenty-first

19. The historically informed performance movement in the classical music context has drawn illuminating comparisons to originalist legal interpretation. See, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

20. Victoria Lane, *Original Practices at Shakespeare’s Globe*, SHAKESPEARE’S GLOBE (Apr. 30, 2020), <https://www.shakespearesglobe.com/discover/blogs-and-features/2020/04/30/original-practices-at-shakespeares-globe/> [<https://perma.cc/DTC8-454Y>].

21. *Id.*

22. *Id.*

23. Walter Kaiser, *A ‘Twelfth Night’ Epiphany*, N.Y. REV. (Jan. 6, 2014), <https://www.nybooks.com/daily/2014/01/06/twelfth-night-epiphany/> [<https://perma.cc/E2JJ-DEQZ>]; see also J. Kelly Nestruck, *Why ‘Original Practices’ Shakespeare Is Just the Ticket for Status-Seeking Consumers*, GLOBE & MAIL (Jan. 24, 2014), <https://www.theglobeandmail.com/arts/theatre-and-performance/nestruck-on-theatre/why-original-practices-shakespeare-is-just-the-ticket-for-status-seeking-consumers/article16471756/> [<https://perma.cc/7Q7R-9QU8>]; Robert Simonson, *Playbill Picks: The Top Theatre Stories of 2013*, PLAYBILL (Dec. 24, 2013), <https://www.playbill.com/article/playbill-picks-the-top-theatre-stories-of-2013-com-213075> [<https://perma.cc/2DNQ-4D63>].

24. Lane, *supra* note 20.

25. See generally FARAH KARIM-COOPER, COSMETICS IN SHAKESPEAREAN AND RENAISSANCE DRAMA (2006); Diane Mapes, *Suffering for Beauty Has Ancient Roots*, NBC NEWS (Jan. 10, 2008), <https://www.nbcnews.com/id/wbna22546056> [<https://perma.cc/4QR3-GUBK>].

century productions, a safe substitute was instead derived from chalk and almond oil.²⁶ Because Shakespearian audiences were thought to have munched on hazelnuts during performances, the Globe experimented with covering the floor in hazelnut shells, an idea that was rejected after the shells interfered with drainage and caused a flood in the open-air theater.²⁷ Since women were not permitted to perform on stage during Shakespeare's time, the Globe's original practices productions initially featured all-male casts, but then feminists objected.²⁸ The Globe's solution was to initiate some all-female productions.²⁹

Such original practices productions can be fascinating and delightful. To the extent that they are able to achieve their objectives, they have much to teach the student of theater history about a set of circumstances that have had an outsize influence on the development of Western drama. They can help contemporary practitioners solve textual problems that once seemed inscrutable. Such productions can also even be full, rich, and successful works of art on their own terms, though this is arguably due to the contributions of the particular, flesh-and-blood performers, who most certainly were not components of the sixteenth and seventeenth century "originals."

Fascinating and delightful as such productions may be, the "original practices" approach is a distinctly marginal one within the panoply of approaches to making theater employed by practitioners today. No serious person believes that the Globe's approach is the One True Way to do Shakespeare and that all other approaches are inferior bastardizations. When Ben Brantley, then chief theater critic for the *New York Times*, rhapsodized that the Globe's original practices *Twelfth Night* "makes you think, '[t]his is how Shakespeare was meant to be done,'" he was stating a tautology rather than applying criteria for evaluation.³⁰ Even the Globe itself referred to these productions as part of "a unique and radical experiment," suggesting that an original practices approach is very far indeed from being either mainstream or so perfected as to render all other approaches obsolete.³¹ The Globe's productions were, in the end, curiosities that served as exquisite vehicles for Rylance, the greatest Shakespearian actor of his generation (which is, incidentally, not Shakespeare's generation).

26. Lane, *supra* note 20.

27. *Id.*

28. *Id.*

29. *Id.*

30. Ben Brantley, *Boys Will Be Boys (and Sometimes Girls)*, N.Y. TIMES (Nov. 10, 2013), <https://www.nytimes.com/2013/11/11/theater/reviews/twelfth-night-and-richard-iii-with-mark-rylance.html> [<https://perma.cc/R8JB-VEBK>].

31. Lane, *supra* note 20.

III. THE POTENTIAL OF THE TEXT

Historical exactitude is then a poor way to measure whether the vast majority of productions succeed in laying claim to the “authoritativeness” that Balkin and Levinson deem essential to theatrical interpretations. Even the examples that come closest inevitably fall far short of the mark. What else might “authoritative” mean? Perhaps it could refer to an interpretation that realizes the intentions of a text’s author. This seems sensible if (1) there is a text, (2) it has an author, and (3) she had intentions. But none of these things can be taken for granted as easily as Balkin and Levinson seem to think. Plenty of theater is devised through collective improvisation.³² Plenty of ensembles elect to stage “found” texts that have no known or knowable author.³³ Plenty of performance “texts” never calcify into a final, set form.³⁴

When there is a clear author of a clear text, if the goal of a production is to conjure an authoritative realization of the playwright’s intentions for the play, the most obvious route to that end would seem to be for the playwright to undertake the direction of her own play. And yet, most contemporary playwrights do not direct either the premiere production or subsequent productions of their own texts. Some playwrights go so far as to deny having any vested artistic interest in what becomes of the play once they are through writing it.³⁵ When a playwright does direct her own work, critics have no compunction about comparing her interpretation with those of other directors and finding the playwright’s wanting.³⁶ Most contemporary playwrights are only too eager to preemptively withdraw from this competition—they are often the first to acknowledge that their imagination extends only so far, that they are possessed of only a limited set of skills, and that the skills of a director are required in order to effectively translate their texts into time and space.³⁷

32. See generally DEIRDRE HEDDON & JANE MILLING, *DEVISING PERFORMANCE: A CRITICAL HISTORY* (2006).

33. See, e.g., Amanda Hess, *Staging Reality Winner: An F.B.I. Transcript Becomes an Offbeat Thriller*, N. Y. TIMES (Dec. 30, 2018), <https://www.nytimes.com/2018/12/30/theater/reality-winner-tina-satter-half-straddle.html?action=click&module=RelatedLinks&pgtype=Article> [<https://perma.cc/8UGY-Q2W2>].

34. See generally DAVID SAVRAN, *BREAKING THE RULES: THE WOOSTER GROUP* (1988).

35. See ARTHUR GELB & BARBARA GELB, O’NEILL 559 (1960). (Eugene O’Neill is reported to have once said, “I hardly ever go to the theatre, although I read all the plays I can get. I don’t go to the theatre because I can always do a better production in my mind than the one on the stage. I have a better time and I am not bothered by the audience. No one sneezes during the scenes that interest me. Nor do I ever go to see one of my own plays.”).

36. See David Kaufman, *When the Author Insists on Directing the Play, Too*, N.Y. TIMES (Feb. 11, 2001), <https://www.nytimes.com/2001/02/11/theater/theater-when-the-author-insists-on-directing-the-play-too.html> [<https://perma.cc/FU6Y-AA86>].

37. See *id.*

There are, however, certain auteur figures in theater history who are today regarded as prophets, their artistic visions never fully realized in their own time, yet enduring in the imaginations of subsequent generations. These visions continue to guide practitioners today, daring these contemporary artists to rise to the challenge issued in the auteurs' theoretical writings. Bertolt Brecht belongs in this category. Brecht sought to create an "epic theater" that would persuade the spectator to rise up against the scourge of capitalism by engaging her on an intellectual level, but during his lifetime he struggled to eradicate distracting pathos from his productions.³⁸

When a Brecht play is performed today, it is common to evaluate it in terms of whether or not it succeeded in fulfilling what we imagine to have been its author's hopes and dreams, whether it has lived up to the *promise* of its author's vision. This is why it made sense for one critic to praise an excellent recent production of Brecht's *Good Person of Szechwan* as "Authentically Brechtian!"³⁹ By this the critic did not mean that the production was a faithful reproduction of the original 1943 production at the Zurich Schauspielhaus. The production in question, mounted by the New York theater company the Foundry, was undeniably an American creation of the twenty-first century. The text was translated into English and peppered with contemporary interpellations.⁴⁰ Incidental "indie pop-rock" music, a genre that had not yet caught on in Switzerland in the 1940s, was composed and performed by a hipster band from Brooklyn.⁴¹ The cast featured actors of different races.⁴² At times, the play required them to canoodle, and no one minded.⁴³ Most strikingly, the play's title role, typically played by a cisgender woman, was in the Foundry's production played by Taylor Mac, a performance artist who has made a career out of ridiculing cis-heteronormative gender strictures.⁴⁴ Mac is male-presenting, but frequently performs in drag, and uses the

38. See generally BERTOLT BRECHT, *BRECHT ON THEATRE: THE DEVELOPMENT OF AN AESTHETIC* (John Willett ed. & trans., 1964).

39. Charles Isherwood, *To Earth, Seeking Goodness*, N.Y. TIMES (Feb. 8, 2013), https://www.nytimes.com/2013/02/09/theater/reviews/good-person-of-szechwan-with-taylor-mac-at-la-mama.html?_r=0 [https://perma.cc/N4BD-YCMD].

40. See *id.*

41. *Id.*

42. See *id.*

43. See *id.*

44. See *id.*; Charles McNulty, *Taylor Mac on Gay History, 'Hamilton' and His Epic 24-hour Extravaganza at the Ace*, L.A. TIMES (Mar. 14, 2018), <https://www.latimes.com/entertainment/arts/la-et-cm-taylor-mac-los-angeles-20180314-story.html> [https://perma.cc/3GFZ-T9LD].

personal pronoun “judy.”⁴⁵ How could such a staging be hailed as “authentically Brechtian?”

Balkin and Levinson might say that the Foundry production was authentic in the sense of “genuineness.”⁴⁶ This is a good start, but for Balkin and Levinson, “[t]he notion of authenticity as genuineness is deeply tied to the concept of tradition and one’s relation to the past.”⁴⁷ The authentic performance, they say, “is immersed in a tradition, so that the tradition springs from within it unself-consciously; it is the living embodiment of tradition, of the past. That is why it is sufficient to itself, and needs authority from no outside source.”⁴⁸ For Balkin and Levinson, the theatrical present still derives its authority and legitimacy from the theatrical past. The present owes everything to the past, will forever be in debt to the past. Here I cannot agree. While the past is always with us, the theater’s highest responsibility is to the present.

When we say that a production—a theatrical interpretation—feels authentic or authoritative, I believe we mean that it has *lived up to the potential of its text*. When we say that a legal interpretation—in the form of, say, a judicial opinion—is authoritative, I believe we mean the same thing.

The “potential” of a text may seem like a hopelessly indefinite quantum to assess, but to exclude it from an assessment of a dramatic or legal interpretation would be to do away with that which makes drama and law different from poetry or fiction, that is, to do away with law and drama’s very *raison d’être*. Law and drama have a public existence, practical possibilities, and social responsibilities that other kinds of text do not possess.

In the theater, what we are pointing to when we say that a production is “Brechtian” long after Brecht himself has passed on is the production’s dramaturgy, the way in which it structures experience in order to produce meaning.⁴⁹ How does this interpretation emphasize certain values and neglect others? To what end? Does it portray the world of the play as immutable or as socially constructed and therefore subject to change? How does it do that? Does it invite the audience to feel pity for certain characters, but not others, or does it discourage empathy and identification

45. See McNulty, *supra* note 44 (“My gender is performer and my gender pronoun is ‘judy’ because I wanted a gender pronoun that is an art piece, that makes people pause and consider and laugh because everyone is so uptight about getting it right.”).

46. Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1587, 1632 (1991).

47. *Id.*

48. *Id.*

49. See generally THE ROUTLEDGE COMPANION TO DRAMATURGY (Magda Romanska ed., 2015).

altogether? With what result? Does it implicate the audience in the outcome of the play, or does it refuse any connection to the world beyond the proscenium? These are dramaturgical questions.

While there will often be multiple workable answers to such questions, not all answers will result in equally “right” interpretations, in equally “good” productions. Even in a world that has made peace with artistic pluralism, we are quite comfortable declaring that a production is dreck because it has squandered the potential of its text, misunderstood the potential of its text, or chosen an interpretation of the text that it was not competent to execute. We do not stop at saying that a production was “bad.” We say that a production got it *wrong*. Crucially, we also say, as Brecht often said, “the proof of the pudding is simply in the eating.”⁵⁰ The most dazzling theory is worthless if it fails when tested in practice.

Questions of constitutional interpretation can profitably be thought of as dramaturgical questions. In taking a dramaturgical approach to constitutional interpretation, one would be concerned with ensuring that, year after year, various provisions of the Constitution live up to their potential.⁵¹ Naturally, some of the questions we might ask of a constitutional provision will be rather different from those we would ask of a theatrical production. Some, however, will be surprisingly similar.

Let’s give it a try.

The first thing we have to do when we analyze a constitutional provision from a dramaturgical perspective is figure out what genre we are in, what kind of constitutional provision we are dealing with. They are not all created equal. As Ronald Dworkin and others have observed, different parts of our Constitution are written at different levels of abstraction.⁵² Some parts are quite literally descriptive—they come close to explicitly saying all that they mean. Their possible interpretations and applications are relatively circumscribed. In other places, the Constitution speaks in “majestic generalities.”⁵³ In these provisions, the text communicates the importance of certain broad commitments or values while leaving the details of their realization and implementation to be worked out by the

50. BRECHT, *supra* note 38, at 119.

51. Leiboff makes a related point when she suggests that a dramaturgical approach to legal texts can restore law’s lost presence. *See* LEIBOFF, *supra* note 6, at 59. “What dramaturgy does,” she says, is delve into the text, challenging a closed and perfected exegesis, to rethink those productions of ‘antiquarian interest,’ and challenge slavish repetitions of what we think the text is *meant* to mean, not just as analysis or history but to render the text dramaturgically as a means by which it will be theatricalised and brought back into ourselves as a practice of response and responsibility to law.

Id.

52. *See* Ronald Dworkin, *Comment in* ANTONIN SCALIA: A MATTER OF INTERPRETATION 115, 124 (1997).

53. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

interpreter. Different kinds of performance texts are also written at different levels of abstraction, and they require different degrees of interpretive intervention. I say “require” rather than “allow for” because, as we will see, there are performance texts that are so abstract that they would be literally unstageable without the muscular intervention of a director or dramaturg. They would make no sense. Their possibilities would remain unexplored, their potential squandered. The Constitution contains text like this as well.

A. Painting by Numbers: Neil Simon and the Age of the President

But not all performance texts, and not all constitutional provisions, require much in the way of interpretation at all. Article II, Section 1, for example, provides that the President of the United States must be at least thirty-five years old.⁵⁴ This is about as concrete and prescriptive as it gets. It would be pretty hard to mess this one up. A provision like this is basically the *Odd Couple* of the Constitution. Recall the simple premise of that oft-revived 1965 slapstick comedy by Neil Simon: neat freak Felix Ungar moves in with his friend Oscar Madison, a prodigious slob.⁵⁵ Both men are recently divorced because each man is insufferable in his own special way.⁵⁶ Hijinks ensue.⁵⁷ The play is essentially a collection of one-liners that exploit the two-dimensional characters’ fundamental incompatibility.⁵⁸ They are foolproof comic foils. Uptight Felix gets upset because slovenly Oscar forgets to use a coaster under his drink.⁵⁹ Easygoing Oscar gets fed up with Felix’s controlling and judgmental ways.⁶⁰ This dynamic gets recapitulated dozens of times. In the end, we see that, in spite of everything, the pair have managed to rub off on one another. Felix is beginning to show signs of loosening up and Oscar is beginning to show interest in fulfilling a few of the obligations of being an adult male.⁶¹ That’s it. That’s about all there is to the play.

If you interpreted *The Odd Couple* any other way, the play would not work. The pleasures the play offers are limited and straightforward. If you tried to add great depth, complexity, and nuance to the characters’ interactions, you would be doing it wrong. If you decided that, in your production, both Felix *and* Oscar were going to be neat freaks, you would be doing it wrong. If you decided that, in your production, Oscar only

54. U.S. CONST. art. II, § 1, cl. 5.

55. See generally NEIL SIMON, *THE ODD COUPLE* (1965).

56. See generally *id.*

57. See generally *id.*

58. See generally *id.*

59. See generally *id.*

60. See generally *id.*

61. See generally *id.*

failed to keep things tidy because, tragically, he was suffering from advanced multiple sclerosis and frequently found himself incapable of lifting even lightweight objects like dishes or articles of clothing, that would be a terrible production of *The Odd Couple*. If between every scene your production featured a performer dressed in refugee's rags delivering a monologue about the horrors of the Armenian genocide, that would probably be a truly terrible production of *The Odd Couple*.

Similarly, if you interpreted the Constitution to mean that the President can be thirty-four, or thirty-five in dog years, or a dog, you would be doing it wrong. The numbers are there—all the interpreter needs to do is paint by them.

B. Impossible Particularity: Eugene O'Neill and the "Gold Standard"

A few constitutional provisions seem to be concrete and narrowly prescriptive, but their particulars can be essentially ignored without incident, like some of the stage directions in plays by writers with excessively novelistic tendencies. Article I, Section 10, for example, provides that no state shall "make any Thing but gold and silver Coin a Tender in Payment of Debts."⁶² This kind of provision is a little like the many occasions in plays by Eugene O'Neill when the playwright tells us that a character looks older than she really is. In *Where the Cross is Made*, Nat Bartlett "appears much older than his thirty years."⁶³ In *The Web*, we meet Rose Thomas, "a dark-haired young woman looking thirty, but really only twenty-two."⁶⁴ Mrs. Evans in *Strange Interlude* "is only about forty-five but she looks at least sixty."⁶⁵ These directions clearly meant something to O'Neill. Based on his repeated use of this type of direction, they were probably even important to him. They provided texture that helped O'Neill complete the worlds of his plays. These directions also communicated important information to directors, information that actors would know how to use to create rich characters. No sensible person, however, believes that these directions must be taken literally in order to do O'Neill justice.

One reason why no one thinks it is important to render these stage directions literally is that it is impossible to render these stage directions literally. An actress can only ever be one age at a time. There are all kinds of things that an actress might do in order to appear older or younger than

62. U.S. CONST. art. I, § 10, cl. 1.

63. EUGENE O'NEILL, *Where the Cross is Made*, in *THE MOON OF THE CARIBBEES AND SIX OTHER PLAYS OF THE SEA* 147, 148–49 (1923).

64. EUGENE O'NEILL, *The Web*, in *THIRST AND OTHER ONE ACT PLAYS BY EUGENE O'NEILL* 47 (1914).

65. EUGENE O'NEILL, *Strange Interlude*, in *THREE PLAYS OF EUGENE O'NEILL* 59, 102 (1959).

her true age, but she can still only appear to be one age at a time. One could try to split the difference, casting a twenty-six-year-old actress to play a character who looks thirty but is only twenty-two. But she would only look twenty-six, which is not what the stage direction calls for. One could try casting an older actress and dressing her like a younger woman, but a creased face paired with a girlish frock would be more likely to confuse the audience than to communicate the truth of what O'Neill wished to convey. The audience might assume that the character is vain and foolish, that she unsuccessfully strives to appear younger than she really is. They might assume that, for want of resources, the director failed to find an age-appropriate actress and is now asking that the audience simply try to overlook this, that they suspend their disbelief. Any attempt to render this text literally is bound to fail. The text does not have that kind of potential.

But another reason why no one thinks it is important to render these stage directions literally is that, while their purpose may be important, their particulars are not. In fact, clinging to their particulars will likely undermine their purpose. By giving us such text, O'Neill wanted us to understand that the character being described has been rather beaten down by life. That is what matters. That is what the audience needs to know about the character immediately upon seeing her, or after she has spoken a few lines. She carries the burden of experience. She is no longer naïve enough to believe that the world is her friend. There are many ways to convey this, and most of them will have more to do with how the actor behaves than with how she looks. One character might be prematurely aged because she has been tarnished by a dissolute existence. Another might be haunted by childhood memories that have etched lines in her brow over the course of many sleepless nights. These considerations will make a difference. Exactly how old she appears probably does not make too much of a difference. The important thing is that the audience understands that life has not been kind to her.

Similarly, the "gold standard" clause of the Constitution is not without meaning and import, but the direction it provides would be impossible to take literally in America today. For one thing, there is simply not enough gold. More importantly, retethering ourselves to the gold standard would be clinging to the particulars of the direction while undermining its purpose. This clause was the framers' way of directing Americans to avoid the evils of unchecked inflation. The important thing was to avoid inflation, which would ensure broad prosperity. Most people believe that abandoning the gold standard gave us new tools to steer the economy that have proven to be more effective at achieving these

important goals.⁶⁶ Like O'Neill, the framers came up with a particular, narrow prescription that must ultimately be rejected as impracticable, though we continue to embrace the objective being expressed.

This clause is occasionally tested by literalists, like the man who demanded that Minnesota tender his income tax refund in gold in 1974.⁶⁷ Or the man who claimed that Michigan could not constitutionally compel the payment of a traffic ticket in anything other than gold or silver coin in 1983.⁶⁸ These are failures of dramaturgy. Such people do not understand what kind of play they are in. They have mistaken the particulars for the purpose. As courts correctly remind plaintiffs in these kinds of actions, the Constitution also provides that Congress possesses the power to declare what shall be considered legal tender for the payment of all debts.⁶⁹ There are other, better places in the text where we can look for insight into how we might address the question at hand. The gold standard clause persists now mainly as a quaint relic of the authors' process of imagining a world.

C. Plausible Cruelty: Shakespeare and the Eighth Amendment

Many of the most important constitutional provisions contain few particulars. These provisions, like certain kinds of performance texts, benefit from more interpretive input than the clause that dictates the minimum age of the President. The Eighth Amendment is a fine example of this genre. The Eighth Amendment prohibits "cruel and unusual punishments."⁷⁰ On its face, the text does not tell us what it means by "cruel," nor what it means by "unusual." It does not tell us whether punishments that are merely cruel are prohibited or if cruel punishments are permissible just as long as they are not both cruel *and* unusual. On its face, the Eighth Amendment does not tell us whether waterboarding, the use of thumbscrews, or the death penalty are constitutionally permissible.

To ensure that an interpretation of the Eighth Amendment lives up to the potential of its text, we must think like the interpreter of Shakespeare. Levinson has said, and I agree, that "[t]here are as many plausible readings of the United States Constitution as there are versions of *Hamlet*."⁷¹ Reflecting on the reception of this somewhat provocative claim, he later observed that he found it curious how "most readers have read this passage as asserting the infinite malleability of the Constitution rather than, say,

66. In 1925, John Maynard Keynes was already calling gold a "barbarous relic" that had no place in modern financial systems. See SHANNON L. VENABLE, *GOLD: A CULTURAL ENCYCLOPEDIA* 187 (2011).

67. *Chermack v. Bjornson*, 223 N.W.2d 659, 660 (1974).

68. *People v. Lawrence*, 333 N.W.2d 525, 525 (1983).

69. *Id.* at 526.

70. U.S. CONST. amend. VIII.

71. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982).

the limited number of plausible versions of *Hamlet*. This probably says more about the layman's views about plausible artistic interpretation than it does about Levinson's views of the Constitution."⁷² In the latter remark, Levinson seems to be suggesting that only a philistine could imagine that the text of *Hamlet* is infinitely malleable. He has it backwards. That is not to say that every production of *Hamlet* will be equally good, or that some productions of *Hamlet* will not be quite bad. *Hamlet*, like certain provisions of the Constitution, is in fact infinitely malleable, though not because its plausible interpretations are without limit today. *Hamlet* and the Constitution are infinitely malleable because both will be with us next year, and presumably ten years from today, and perhaps even one hundred years from today. We cannot begin to conceive of the *Hamlets* we may be staging in a century's time. Nor can we claim to have any idea which readings of the Constitution will then seem "plausible."

The interpreter of Shakespeare faces a challenge that is the opposite of that faced by the interpreter of O'Neill. Shakespeare left us precious little in the way of stage directions, which has given successive generations wide latitude for their productions of his plays over the past four centuries. We can guess how an originalist like Antonin Scalia might have approached this challenge. Scalia would presumably have been partial to something like the Globe's "original practices" productions discussed above.

What is striking in reviewing the history of *Hamlets* considered superlative in their time is not only their great diversity, but that audiences of different eras found very different values and qualities to be particularly laudable or deplorable in different productions. In the eighteenth century, for example, Thomas Betterton was admired for convincingly portraying Hamlet as "a young man of great expectation, vivacity, and enterprise" even when playing the role in his seventies.⁷³ In the twentieth century, John Gielgud first played the role at seventeen.⁷⁴ His Hamlet was an excruciatingly sensitive, brooding adolescent. Gielgud retired the role at thirty-four, firmly convinced that no actor should undertake the part after reaching that age.⁷⁵

John Philip Kemble's 1812 Hamlet was all gravitas and anguish, his lines delivered "in a tone of such heart-rending pathos that every eye in the audience involuntarily dimmed with tears."⁷⁶ In contrast, George

72. Levinson & Balkin, *supra* note 46, at 1603 n.25.

73. WILLIAM ACKERMAN BUELL, *THE HAMLETS OF THE THEATRE* 13 (1968) (quoting Richard Steele, *THE TATLER*, Sept. 22, 1709).

74. *Id.* at 141.

75. *Id.* at 146.

76. *Id.* at 40 (quoting Alexander Chalmer).

Bernard Shaw praised Johnston Forbes-Robertson's 1897 *Hamlet* because, "far from being a funereally classic bore," he was "full of celestial gaiety and fascination."⁷⁷

Hamlet's behavior towards Ophelia has been a perennial critical flashpoint. David Garrick's *Hamlet* was "violent" with her in the eighteenth century.⁷⁸ In the nineteenth century, Edwin Booth's showed her "exquisite tenderness."⁷⁹ In an example of how the play's reception is often intimately bound up with contemporary social anxieties, one nineteenth-century critic feared that Kemble's *Hamlet's* vicious treatment of Ophelia must have signified that civilization itself was descending into barbarism. "Had there been one spark of chivalry left among us, the pit and boxes would have sprung on to the stage and dashed to the earth the insolent intruder who could so insult a lovely and harmless woman," the critic wrote.⁸⁰ "But alas! [T]he fashionables in their boxes who hate their wives, and the honest simpletons in the pit who are afraid of theirs, seemed to rejoice in this triumph over the daughter of Polonius as if it had avenged their own particular wrongs."⁸¹ By the twentieth century, when Richard Burton assumed the role, the pendulum had swung back towards violence, if of a more nuanced variety. "[W]hen he rails at her to get to a nunnery," one critic wrote of Burton's *Hamlet*, "his rage bespeaks his hatred for himself as well as for a base world."⁸²

At different points in history, audiences have felt that the text of *Hamlet* required radically different degrees of cruelty to be directed towards Ophelia. What seemed unbearably brutish in the nineteenth century would have seemed anemic in the eighteenth. The text never changed. What changed were the mores of the society in which the text was being interpreted. During the eighteenth century, sensationalist fare dominated stages, and Punch and Judy puppet shows were at the height of their popularity.⁸³ Domestic violence was a huge crowd-pleaser, and an actor raising his voice to an actress or grabbing her arm in a scene would have barely registered as cruelty. By the nineteenth century, things had changed. Victorians influenced by the ascendant "Cult of True Womanhood" now saw women as delicate, angelic creatures who were

77. *Id.* at 106 (quoting George Bernard Shaw (1897)).

78. *Id.* at 18.

79. *Id.* at 76 (quoting J. Palgrave Simpson, *THE THEATRE* (Dec. 1, 1880)).

80. *Id.* at 51 (quoting *THE EXAMINER*).

81. *Id.*

82. *Id.* at 160 (quoting Howard Taubman, *N.Y. TIMES* (1964)).

83. See generally Trevor Hill, *The Punch and Judy Show: Its History and Cultural Significance*, 20 *ACTA NEOPHILOLOGICA* 169 (2018).

utterly dependent upon men and perpetually in need of their protection.⁸⁴ In this context, audiences might have been more uncomfortable watching Ophelia get slapped around; merely treating Ophelia with cold indifference might have seemed exceptionally cruel of Hamlet. By the twentieth century, Freud had somewhat complicated American theatergoers' understanding of human motivation.⁸⁵ Burton's Hamlet could be cruel to Ophelia not out of scorn for her, or for Womankind, but out of displaced self-loathing, changing the meaning, purpose, and resonance of the cruelty altogether.⁸⁶

Scalia believed, and presumably his protégée Amy Coney Barrett agrees, that the Eighth Amendment embodies an abstract principle.⁸⁷ "What it abstracts, however," he says, "is not a moral principle of 'cruelty' that philosophers can play with in the future, but rather the existing society's assessment of what is cruel."⁸⁸ Whatever the framers of the Eighth Amendment believed to be cruel in 1791 should be our standard until such a time when a two-thirds majority of both houses of Congress decide that the Eighth Amendment no longer meets our needs and that it must be repealed and replaced with a Twenty-Eighth Amendment. This Twenty-Eighth Amendment will prohibit "cruel and unusual punishments." It will be identical to the old Eighth Amendment. Critically, however, because interpreters will know that the Twenty-Eighth Amendment was ratified not in 1791 but in 2022, those interpreters will understand that these words now forbid executing people with intellectual disabilities, whereas under the old Eighth Amendment there was room for dissenting views on the subject.⁸⁹

In his production of *Hamlet*, Scalia would attempt to replicate the cruelty with which Richard Burbage, probably the first actor to play Hamlet, treated Ophelia. To do it right, the director would have to become a historian, or engage the services of one. There would still be a great deal of guesswork involved, as we have only a few scraps of written descriptions of Burbage in the role, none of which are detailed enough to be particularly instructive.⁹⁰ We have, obviously, no photographs or video.

84. See generally Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 154 (1996).

85. See SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* 125 (2018).

86. In Laurence Olivier's post-Freudian film interpretation, he reserved the most loving tenderness and most vicious cruelty for Hamlet's mother Gertrude. See generally, *HAMLET* (Universal-International 1948).

87. Antonin Scalia, *Response in ANTONIN SCALIA: A MATTER OF INTERPRETATION* 129, 145 (1997).

88. *Id.*

89. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002).

90. See OSCAR G. BROCKETT & FRANKLIN J. HILDY, *HISTORY OF THE THEATRE* 164 (2007).

Perhaps Scalia could come up with a kind of composite, an averaging of what we knew about acting conventions of the time, about attitudes towards women at the time, about representations of madness, representations of grief. Once he had come up with a historically informed estimate of where Burbage would have stood, how loudly he would have bellowed, and what he would have done with his hands, it would be up to our unfortunate actor to memorize and meticulously replicate this physical and emotional choreography. He would be under strict orders to immediately snuff out any original authentic impulses that might come welling up in him.

This would be a very strange production of *Hamlet*. It is difficult to imagine that the performances would not feel wooden. We would not recognize such performances as examples of “good” acting. We would not understand the behavior. We would find the cadence of speech and thought bewildering. The performers would lack any connection to one another. They would lack any connection to their own interior lives. Scalia would be, I think, pleased to know that he had gotten as close as possible to recreating the production that was staged under the watchful eye of Shakespeare himself. He would, however, have created something that could only be a pale imitation—when Burbage played the role, his original, authentic impulses and ability to respond spontaneously to his surroundings would have been an important part of what made the performance successful. Like his stunted interpretation of the Eighth Amendment, Scalia’s stunted production of *Hamlet* would not live up to the potential of the text. There would be nothing “Shakespearean” about his production.

We can imagine the originalist *Hamlet* failing in more catastrophic ways, too. If Scalia was directing the production in his “faint-hearted” mode, he might not force the actors to wear the toxic face paint made from lead and mercury.⁹¹ In his “stouthearted” mode though, he would likely insist on it.⁹² Sensitive contemporary spectators would probably have a

91. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 UNIV. CIN. L. REV. 849, 864 (1989). Scalia said that he was not so committed to originalism as to be capable of authoring an opinion upholding against an Eighth Amendment challenge a law that prescribed eighteenth-century punishments for contemporary crimes. *Id.* “I hasten to confess,” he said, “that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.” *Id.*

92. After a few decades on the bench, Scalia seemed to have reclaimed the courage of his convictions. See Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013) <https://nymag.com/news/features/antonin-scalia-2013-10/> [<https://perma.cc/A2KT-V6WP>].

SENIOR: You’ve described yourself as a fainthearted originalist. But really, how fainthearted?

SCALIA: I described myself as that a long time ago. I repudiate that.

SENIOR: So you’re a stouthearted one.

difficult time following the plot; they would be distracted by the knowledge that the actors' faces were being devoured by poison before their eyes. Actors' Equity Association, the labor union that now represents stage actors, would try to shut the production down. Scalia would refuse to recognize the union's authority, arguing that actors in Shakespeare's time were not represented by formal collective bargaining units. People would picket outside the theater, holding signs featuring grotesque, enlarged images of human skin mutilated by repeated exposure to ceruse. Perhaps on the opening night red carpet, balaclava-wearing activists would shower the well-heeled attendees with buckets of broken thermometers, disappearing into the darkness as ambulances arrived to rush those exposed to mercury to the emergency room. The scandal would be the talk of the town, but no one would be talking about *Hamlet*. Anything substantive that *Hamlet* might have had to offer our contemporary moment would be lost to us, displaced by the antediluvian violence of the whole sad spectacle. The text would be the only thing "Shakespearean" about this production.

This is just one of many "originalist" details that, faithfully reproduced, would doom a contemporary production of *Hamlet*. Thoughtful critics have always understood that each new production of a play must be assessed on its own terms. There is the text, and the text's past, but the contemporary interpreter answers to the present. This is why the critic William Hazlitt, reviewing Edmund Kean in the role of Hamlet, could write, "Mr. Kean has introduced in this part a *new reading*, as it is called, which we think perfectly correct."⁹³ Kean's manner, Hazlitt wrote, of "coming back after he has gone to the extremity of the stage, from a pang of parting tenderness to press his lips to Ophelia's hand" was "the finest commentary, that was ever made on Shakespeare."⁹⁴ Hazlitt understood that Kean was *adding* something to the text, contributing something of his own, something new, but he was able to recognize this contribution as beneficial, even necessary. Kean kept the text alive for subsequent generations by showing how it could be made to speak to his present. *Hamlet* lives on because of new readings, new commentaries. Without such new interpretations, *Hamlet*, like the Eighth Amendment, would cease to speak to us at all.

SCALIA: I try to be. I try to be an honest originalist! I will take the bitter with the sweet!
What I used 'fainthearted' in reference to was—

SENIOR: Flogging, right?

SCALIA: Flogging. And what I would say now is, yes, if a state enacted a law permitting flogging, it is immensely stupid, but it is not unconstitutional.

Id.

93. BUELL, *supra* note 73, at 45 (quoting William Hazlitt).

94. *Id.* at 48.

D. Full Abstraction: Gertrude Stein and the Ninth Amendment

As much room for interpretation as *Hamlet* leaves us, it is far from being a fully abstract text. It has delineated characters. It is clear who says what when. The play has enough stage directions that we generally know who is in a given scene. We can generally figure out who is and who is not yet dead. It has a discernible plot. None of these things can be taken for granted in a text by a writer who traffics in true abstraction like, for example, Gertrude Stein.

While he devoted a chapter of his seminal 1931 book *Axel's Castle* to her, the distinguished literary critic Edmund Wilson confessed that he had not read Stein's thousand-page novel *The Making of Americans* all the way through.⁹⁵ "I do not know whether it is possible to do so," he said, by way of excuse.⁹⁶ Having come to believe "that words had other values than those inherent in their actual meanings," Wilson diagnosed, "most of what Miss Stein publishes nowadays must apparently remain absolutely unintelligible even to a sympathetic reader We see the ripples expanding in her consciousness, but we are no longer supplied with any clew as to what kind of object has sunk there."⁹⁷

Stein is sometimes seen as having set out to write as her friend Pablo Picasso painted.⁹⁸ Like the cubists, she concerned herself with the surfaces of things, with the limits of perspective and the sensuous qualities of her materials—words—themselves. General hostility to this endeavor persisted for many years. "She was, she thought, dislocating the narrative and psychological architecture of the novel as painters had dismantled representationalism," wrote one critic in 1998.⁹⁹ "The aim is an illusory one," the critic concluded, "for ultimately words without denotation are anarchic nonsense."¹⁰⁰ Because Stein's texts do not mean in conventional ways, they have often been dismissed as not meaning at all.

Critical neglect did not prevent Stein from being outspokenly assured of her own genius and quite prolific.¹⁰¹ She also wrote performance texts. Some of them to a greater or lesser extent observe existing conventions of dramatic writing. Only two were produced during her lifetime. The first was the opera *Four Saints in Three Acts*, a collaboration with composer

95. EDMUND WILSON, *AXEL'S CASTLE: A STUDY IN THE IMAGINATIVE LITERATURE OF 1870–1930*, at 243 (1931).

96. *Id.* at 239.

97. *Id.* at 243–44.

98. *See id.* at 242–43.

99. Donald Lyons, *The Sense of Gertrude Stein*, 16 *NEW CRITERION* 11 (1998).

100. *Id.*

101. *See* GERTRUDE STEIN, *THE AUTOBIOGRAPHY OF ALICE B. TOKLAS* 5 (1933).

Virgil Thomson, for which Stein wrote the libretto.¹⁰² It ran on Broadway, to Stein's great delight.¹⁰³ The only nonmusical play of hers to be staged, just months before she died, was a piece called *Yes Is for a Very Young Man*, which did have characters, stage directions, and the like. It received its world premiere in 1946 at the Pasadena Playhouse in California.¹⁰⁴ Stein was intimately involved with its production, exchanging copious correspondence with the director and occasionally rewriting to meet the needs of the evolving production.¹⁰⁵

Ignoring how obviously invested Stein was in her plays being produced, respected scholars continue to insist that most of Stein's plays are "closet dramas," plays that were written to be read and never intended to be performed.¹⁰⁶ As modern closet dramas, her texts might not be *impossible* to stage, the argument runs, but they are texts that "actively resist being staged."¹⁰⁷ It is true that some of Stein's plays are only readily distinguishable from her prose pieces because she helpfully subtitled them "A Play."¹⁰⁸ Some lack even this designation. But an interpreter who argues that these texts could not possibly have been intended for performance is only confessing his own impoverished dramaturgical imagination. In Stein's texts, language laps up against the edge of the unknown. She requires her interpreter to intervene, to get involved. Stein requires her interpreters to insert themselves, their experience, and their needs into the text in order to give it shape and form.

Take, for example, a typical passage from Stein's play *Pink Melon Joy*:

It pleases me very much.

Little swimming on the water.

I meant to mention pugilism. Pugilism leaning. Leaning and thinking. Thinking.

I meant to mention pugilism. Pugilism and leaning.

102. See STEVEN WATSON, PREPARE FOR SAINTS: GERTRUDE STEIN, VIRGIL THOMSON, AND THE MAINSTREAMING OF AMERICAN MODERNISM 3–8 (1998) (introducing the *Four Saints in Three Acts* collaboration).

103. *Id.* at 96.

104. *Gertrude Stein's 'Yes Is for Very Young Man' Gets Mixed Reaction in Pasadena Playhouse*, N.Y. TIMES, Mar. 14, 1946, at L20.

105. GERTRUDE STEIN & CARL VAN VECHTEN, THE LETTERS OF GERTRUDE STEIN AND CARL VAN VECHTEN 1913–1946, at 707 n.2 (Edward Burns ed., 2013).

106. MARTIN PUCHNER, STAGE FRIGHT: MODERNISM, ANTI-THEATRICALITY, AND DRAMA 110 (2002).

107. *Id.* at 101.

108. See, e.g., *Bonne Annee, A Play*, in GERTRUDE STEIN, GEOGRAPHY AND PLAYS 302–03 (1993).

Leaning and thinking. I think.

I meant to mention that it was a resemblance that was not by way of exceeding the kind thought.

Pugilism. Pugilism and leaning.

I saw a door not that exactly, I saw a lamp shade. Certainly that. I will not stir. Pugilism and leaning.

Leaning.

Pugilism and leaning.

The reason I mention what is happening is not by way of concealing that I have babies. I don't mean to leave so and I shall speak in silence. What is a baby.

Now I know what I say.¹⁰⁹

The “me” in the passage might strike one interpreter as a particularly important “character” worthy of illustration. The revelation of the babies might become an important “plot” point for another interpreter. For some, the repetitive rumination on the contours and connotations of the word “pugilism” might become the dramatic action of the passage, might become a kind of detective story or simmering conflict or epiphanic experience. Looking to the circumstances of *Pink Melon Joy*'s composition can provide some indication of what the text might have meant to Stein. The play was written as World War I was breaking out in 1914. Stranded in England, sheltering with friends until it was deemed safe to travel home to Paris, “Stein worked to absorb into the continuity of her writing the discontinuities of the world of war,” as one scholar puts it.¹¹⁰ With this in mind, it is easy to read “pugilism” as the threat of war and “leaning” as the fraught question of whether to take up arms. The rest of the play could then be organized against this background.

Other parts of the text, however, remain simply unknowable. They cannot be deciphered, only theatrically interpreted. The play's wartime context provides information about the text that will be useful, perhaps even necessary, for a sound interpretation. But this information will not be sufficient for a successful production; there will be much that the interpreter still needs to invent to bring the text to life. What is clear is that there is no One True Way to translate this text into time and space. Some critics confront texts like this and—seeing no *obvious* or *definitive* way to

109. GERTRUDE STEIN, *Pink Melon Joy*, in GERTRUDE STEIN, *GEOGRAPHIES AND PLAYS* 357 (1993).

110. GERTRUDE STEIN, *A STEIN READER* 280 (Ulla E. Dydo ed., 1993).

interpret them—conclude that they are “anarchic nonsense.”¹¹¹ This is a mean and miserly way to approach the act of interpretation which, as Stein teaches us, can be expansive and generous. One sound interpretation need not demolish another in order to prove its mettle. Just because there is little precedent for it does not mean that it must be cast aside as meaningless.

Since her death, some of Stein’s performance texts that were previously considered unstageable have been staged to great acclaim. Elizabeth LeCompte and Robert Wilson, two major figures of the American avant-garde, have each directed productions of Stein’s *Doctor Faustus Lights the Lights*, a very free adaptation of the Faust legend that evinces skepticism regarding technological progress. LeCompte’s cacophonous production juxtaposed the text with the 1964 B-movie *Olga’s House of Shame* and portrayed Faust as both oppressor and victim of insatiable greed.¹¹² Her *mise en scène* was cluttered with microphones and video monitors that mediated the audience’s experience of the performers’ voices and bodies. In contrast, Wilson’s production was a sleek, spare, minimalist affair.¹¹³ He triple-cast the leading roles, creating a “flock of protagonists” who were, in one critic’s words, able to “enact the syntactic undecidability of the Stein text.”¹¹⁴ The fact that the two productions were so different attests to the great potential of the text, not to its incoherence. Even the seemingly hermetic *Pink Melon Joy* has been staged a number of times.¹¹⁵ The interpreter of such a text must not be daunted by the text’s apparently limitless possibilities. The interpreter must not be dissuaded by the text’s having been neglected, forgotten, or dismissed as too abstract.

To the dramaturg with vision, Stein’s texts approach the state of pure potential energy that the Ninth Amendment reaches. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹¹⁶ No one knows exactly what this means. No one can ever know all that the Ninth Amendment might one day come to mean. The Ninth Amendment is a rule that asks to be interpreted in the context of the needs and values of the moment of

111. Lyons, *supra* note 99.

112. Cynthia Gendrich & Woodrow Hood, *Review of House/Lights*, 50 THEATRE J. 380, 380 (1998).

113. See generally David Savran, *Whistling in the Dark*, 15 PERFORMING ARTS J. 25 (1993).

114. *Id.* at 26.

115. See, e.g., Douglas J. Keating, *Stein’s ‘Pink Melon Joy’ Leads Audience Around Art Alliance*, PHILA. INQUIRER, Aug. 28, 1992, at 14; Matthew Perlman, *I Saw the Stein: Gertrude Stein Play Brings the Weird to Williamsburg*, BROOKLYN PAPER (June 24, 2014), <https://www.brooklynpaper.com/i-saw-the-stein-gertrude-stein-play-brings-the-weird-to-williamsburg/> [<https://perma.cc/Z6TJ-6Z37>].

116. U.S. CONST. amend. IX; cf. WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 5. (“There are more things in heaven and earth, Horatio, / Than are dreamt of in your philosophy.”).

interpretation.¹¹⁷ Like one of Stein’s so-called “closet dramas,” it lay largely forgotten and inert until the perfect meeting of interpreter and circumstance transpired.

Before *Griswold v. Connecticut*, the case in which Justice Douglas articulated a constitutional right to privacy, the Supreme Court had scarcely had occasion to construe the Ninth Amendment.¹¹⁸ Its potential had gone unrealized for over a century. In *Griswold*, Justices Douglas and Goldberg brought it to life.¹¹⁹ In his majority opinion, Douglas invoked the amendment and its “penumbras” in striking down a state law against the use of contraceptives by married couples.¹²⁰ In his concurrence, Goldberg construed it to mean that “there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”¹²¹ No one disputes that the framers never expressly contemplated the amendment being pressed into service to defend purveyors of birth control from reactionary state legislatures, but Douglas and Goldberg saw the potential of a text that no one else had seen and gave it the production it deserved at the time.

There will be other productions of the Ninth Amendment—its textual potential has not yet come close to being exhausted. In 1971, Douglas wrote in his *Palmer v. Thompson* dissent that the Ninth Amendment required a city to reopen segregated swimming pools that had been closed and to begin operating them on a desegregated basis.¹²² In 1972, dissenting from the Court’s refusal to hear *Freeman v. Flake*, Douglas wrote that the question of whether a public school may refuse to permit a student to attend because school authorities disapproved of his hair style had important Ninth Amendment implications.¹²³ These interpretations did not seem sufficiently “plausible” during Douglas’s lifetime, but interpreters who are not yet born may one day see even more potential in the Ninth Amendment. They will see its abstraction not as resistance, as a problem, but as an opportunity.

117. Luis Kutner, *The Neglected Ninth Amendment: The “Other Rights” Retained by the People*, 51 MARQ. L. REV. 121, 142 (1968).

118. *Id.* at 126.

119. *See generally* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

120. *Id.* at 484.

121. *Id.* at 488 (Goldberg, J., concurring).

122. *Palmer v. Thompson*, 403 U.S. 217, 239 (1971) (Douglas, J., dissenting).

123. *Freeman v. Flake*, 405 U.S. 1032, 1032 (1972) (Douglas, J., dissenting); *see also* *Olf v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1044 (1972).

CONCLUSION

A dramaturgical approach to constitutional interpretation has advantages over previously proposed literary criticism-inflected approaches to constitutional interpretation because dramaturgy answers to the present where these other approaches mainly look backward. Dworkin, for example, proposes that we treat the process of adjudication like the process of contributing to a chain novel, emphasizing the need for consistency and continuity.¹²⁴ Stanley Fish has introduced the rubric of “interpretive communities” to emphasize the constraints novelists, literary critics, and judges are always already under when they begin to write or interpret.¹²⁵ Balkin and Levinson acknowledge that the law is a live art form, but reserve their highest praise for interpretations that seem to be “the living embodiment of tradition, of the past.”¹²⁶ A dramaturgical approach makes much-needed space for the present and the future, for the particular actors involved in an action—be they litigants or judges—to be themselves, alive to the authentic needs of the moment. A dramaturgical approach to constitutional interpretation puts the past in its proper place and opens up the possibility that we might—one day—realize the full potential of our Constitution.

124. See Ronald A. Dworkin, “*Natural*” Law Revisited, 34 U. FLA. L. REV. 165, 166–68 (1982).

125. See generally STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, 9 CRITICAL INQUIRY 201 (1982).

126. Levinson & Balkin, *supra* note 46.