

THE TURN TO INTERPRETATION

DAVID KENNEDY*

I.

By turning towards the study of interpretation, liberal legal scholarship has developed an important new theoretical discourse. This discourse is part of a sophisticated machinery developed in part to respond to the gaggle of leftists, structuralists, deconstructionists, and neo- or post-Marxists who have recently been attacking mainstream liberal scholarship. As developed by some scholars, this discourse combines analyses of two different things: (1) an open-ended “process of interpretation;” and (2) its resolution in a “hermeneutic moment.” The phrases “process of interpretation” and “hermeneutic moment” flow together nicely, and by connecting these two relationships in a single jurisprudence some of these theoreticians have deployed the vocabulary and insights of a distinct body of theoretical literature known as “hermeneutics” in the project of liberal scholarship. I would like to comment on David Hoy’s¹ and Ronald Garet’s² contributions to this new theoretical movement. After doing so, I will explore the perspective they advance in the context of the famous short story by O. Henry, *The Gift of the Magi*.³

A concern with interpretation responds to contemporary leftist legal criticism only if these critiques are understood in a partial and limited way. This limited, and by now standard, leftist critique understands unreflective twentieth-century American legal discourse to be power disguised as truth. In this view, the judge orders social relations while “saying the law.” When we focus attention on the saying, we are diverted from the ordering. This picture of legal hegemony suggests a form of critique. If we could “expose” what is “really going on” by

* Assistant Professor of Law, John Harvey Gregory Lecturer on World Organization, Harvard University. A.B. 1976 Brown University, M.A.L.D. 1978 Tufts University, J.D. 1980 Harvard University, Ph.D. 1984 Tufts University.

1. Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985).

2. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985).

3. O. HENRY, *The Gift of the Magi*, in THE COMPLETE WORKS OF O. HENRY 16 (1953).

attacking the ideas about truth that populate judicial discourse we could “delegitimize” judicial decision making. It is unclear what happens next, but at the least we might hope for some space in which to struggle against the reconstruction of a coherent “mechanism” for the legitimation and denial of power. To do so, of course, the critique must be comprehensive or total, relentlessly overturning *each* of the various truth pictures relied upon by the judge rather than suggesting that one be replaced by another. Hence, there can be no leftist “program.” But never mind, we’ll get to that after the delegitimation.

There are a number of problems with this story that enable those who focus upon interpretation to make response to it. First of all, this leftist critique tends to deny its program to protect its theory—repeating the relationship between truth and power that it attacks. This is not surprising since this standard critique adopts the picture of a truth and power divided which characterizes liberal discourse generally. That the new left is consequently accused of “nihilism” is not surprising. Because they themselves believe that truth and power are both distinct and yet combinable, their relentless delegitimation seems designed to release power without direction. It is to avoid this frightening dynamic that centrists construct liberalism’s apologetic structure and leftists present their criticism as a theory about the way things “really” are. The view that things “really are” or really could be completely open ended is either nihilism or lunacy. But it is a lunacy that interpretation seems able to cure.

Second, this standard critique tends to oversimplify the traditional discourse that it critiques. Liberal discourse is not just a matter of power disguised as natural or positive law. Rather, it is a complex fabric of differentiations between truth and power which generate liberalism’s hold on our imagination. The key is this differencing dynamism in liberal discourse, not a series of discernable connections between a set of asserted truths and some underlying power relations.

There is something to the notion that legal discourse, particularly early in the century, suppressed its “being about” power with its “being about” truth. However, this removal of power was only in a very vulgar form achieved by the hegemonic presence in the discourse of discussions about truth; it was more conventionally achieved through a continued repetition of the difference between truth and power, each time subtly privileging one over the other. Thus, for example, law had both a substantive and a procedural component, and of the two, “the

law respects form less than substance.”⁴ Truth over power. Similarly, the judge “said” the law in distinct operations of interpretation and application. Interpretation was always present as a supplement to the judicial truth-saying role. Power over truth. This relation made the truth saying seem active and open whether formal or equitable. Yet it seemed safer than discretion. “Application” of the law (like remedies) was the repository of power, in service of interpretation as interpretation served the law. These relations do divide truth from power and can be seen to deny power. But it is more accurate to think of the discourse as managing a shifting place for power within the liberal order. “Interpretation” in traditional liberal legal discourse endangered the serenity of truth-disguised power as it reinforced that hegemony by both domesticating and diverting acknowledgement of judicial action. The contemporary, scholarly turn to interpretation performs a similar role in the realm of theory.

The limitations of this standard leftist critique lead its proponents to underestimate liberalism’s capacity to adapt even to a “total” critique. While it is true that the concern of scholars with questions of interpretation—constantly asking what the judge *does* when he says the law—was an apologetic scholarship, domesticating judicial activity and distracting attention from judicial power, such traditional work also destabilized the patterns of traditional judicial discourse. Whether it was “because” of the war between positivism and naturalism, the reformist scholarship analyzing various doctrinal interpretations or theories of judicial review, or the critique of the legal realists, the structures of theoretical differencing and privileging within legal discourse loosened. It became possible to imagine that judicial interpretation was both more and less constrained than judicial application; that process was both prior to and in service of substance. The Canal Zone Code gives us two “Maxims of Jurisprudence” regarding interpretation:

§ 81(32) An interpretation which gives effect is preferred to one which makes void.⁵

§ 81(33) Interpretation must be reasonable.⁶

These two principles seem both different and compatible. They work together to enable and constrain the judge. Either can enable, either restrain. The difference is created by an imaginary displacement of judicial power onto the other as each is defined by connection of the judge to the truth, be truth a matter either of text or effects.

4. C.Z. CODE tit. 1, § 81.19 (1963).

5. *Id.* § 81(32).

6. *Id.* § 81(33).

This simultaneous double differencing provides a whole new set of doctrines and theoretical strategies. One might describe liberal legal discourse as the continual assertion that power is part of the law, just not here. But so is truth. Although you might think that such a porous self-conception would be unstable, in fact it seems quite sturdy. It might seem that the simultaneous presence within the legal fabric of alternative and inconsistent truths would be a problem given the absence of any coherent theory about choosing. It seems troublesome because it threatens to expose the power that has been hidden by the discourse of truth. But this metaphor of hidden/revealed is an oversimplification. In fact, a self-consciousness about judicial power was always present in the discourse—managed, but present.

This discursive *management* of the perceived difference between truth and power is the important thing, not the textual incoherence and incompatibility of various patterns of distinction and privilege within the frame of liberal discourse. This management occurs from a plateau above the fray of discourse. The discourser has somehow sufficiently managed to distance himself from the arguments he makes to reverse and rearrange them easily. This stance towards the social fabric has a doctrinal counterpart in the image of a passive judge waiting for the parties to meet burdens, discharge obligations, etc. Indeed, the theoretical discourse permitting the free space from which the liberal discourser constructs his adaptable reality is replicated doctrinally as well as institutionally. It is sustained by the theoretical construction of a disembodied vantage point.

Once the critique of liberal discourse is understood in this way, we can see that the turn to interpretation cannot respond adequately to it. Those who focus upon interpretation also distinguish truth and power, subtly privileging one now and then the other. It is by so doing that they criticize the more limited and standard leftist vision. Moreover, and most importantly, many of those who consider interpretation, in their movement from a process of interpretation to a hermeneutic moment, construct an extracontextual voice which is the hallmark of the liberalism attacked by this more complex critical analysis. David Hoy and Ronald Garet represent good examples of those with this tendency within the turn towards interpretation.

In their works, Garet and Hoy seem to admit all critiques in an openended “process of interpretation” which is able to acknowledge the inadequacy of all positions. Truth is not to be found in the text, the author, or the context. Nor is it to be found in the interpreter. Never-

theless, the discourse continues to be about truth finding. Every now and then, however, there is a "hermeneutic moment" in which something happens. This movement from truth to power is constructed so as to deny both the authority of any theory of truth and the exercise of any power. The hermeneutic moment is supplemental to the stable standoff of the interpretive process. As theorists, we achieve it, in part, by focusing upon what the interpreter must have been thinking given his admittedly socially constructed consciousness. On this methodological pogo stick, we get out of the stalemate of conflicting and irresolvable truth claims.

The interpretive process, so conceived, is obsessed with chasm bridging. The interpreter constantly struggles to reach out to an image that it has projected on the wall—the text, the facts, the culture, and the author. How can we get there, they ask? In this, interpretation theory retains the idea of an unknowable subject that demands understanding. This is the discursive presence of a power that must be exercised as truth but is different from truth. Moreover, this approach fractionalizes activity into a series of stages (such as knowing, interpreting, applying) whose hinge is interpretation, an intellectual process. This is the theoretical presence of a distinction between and a privileging of truth over power. These differences are maintained by constant discussion about various ways in which they could and could not be distinguished. In Hoy's and Garet's presentations, different interpretive theories or "hermeneutical perspectives" rearrange the categories of power and truth in an infinite regression mirroring the judge's own theoretical and doctrinal discourse.

The end of this regression is a very lonely place. The pluralism of interpretation, like the endless judicial monologue, needs to be rescued by a leap of action. In these pieces, for some reason, the open and humble acknowledgement of diverse interpretive possibilities is transformed into a self-conscious defense of the center. In part this seems natural because the theoretician has ended the infinite interpretive process by denying a wide range of alternatives as too "extreme." In particular, of course, alternatives not developed as programs for implementation or texts for interpretation seem beside the point. Since the interpretative process can invalidate any remaining alternative with equal ease, a politics of the center appears inevitable.

In their construction of a disembodied vantage point from which a centrist politics seems inevitable, these papers are like much of late modern or neorealist legal scholarship. Such scholarship, at least in my

own field of international law, has a peculiar style and emphasis which combines an openended humility about truth with a seemingly inevitable validation of centrist politics. The openendedness of such scholarship shows in its eclectic absorption of all possible critiques and positions. Theoretically, this work situates itself in a subservient way with respect to doctrine. It is self-assured in tone and humble in aspiration. The tone is reasonable, pragmatic, and confident. The analytic divisiveness of past work seems quaintly juvenile by contrast.

This openendedness gives way to a more determined sense of political closure. At some point, the comprehensive and universal scope of this work is exchanged for a specific and usually centrist outcome. This exchange is often signalled by a balancing test or an appeal to some factual or social inevitability which might be thought of as the "legal moment." Although each theorist has his own peculiar form of reasonable comprehensivity and his own preferred outcome, these differences seem hardly to matter, even to the scholars themselves. The very diversity of individual positions contributes to our sense of confidence in the body of work as a whole, and this idiosyncratic proliferation is symptomatic of a humility about the enterprise of theory itself.

If contemporary scholarship is surprisingly complacent about its inconsistent diversity, it is also anti-intellectual in its aspiration. Theoretical work is understood to succeed when it remains pragmatic, close to the ground and primarily descriptive—although descriptive of values as much as of behaviors. The work as a whole seems unsystematic in methodology and is often self-consciously eclectic, absorbing inconsistency and contradiction in the name of realism and effectiveness. Any logical or theoretical incoherence in presentation is simply accepted as an inevitable byproduct of the way "it" "is."

None of this should suggest simplicity or an uncritical tone. Indeed, the humility of contemporary legal theory and doctrinal work protects elaborate and sophisticated endeavors which seek to account for a wide variety of situations and often criticize outcomes, doctrines, or the theoretical positions of others. Although there is the occasional nostalgic dusting off of an updated positivism or naturalism, these theorists generally avoid discussions of the legitimacy of the law or of a theory of the state as uninterestingly divisive. Nevertheless, late-modern legal scholarship is easily supplemented by a theory that focuses on interpretation in the style advanced by Hoy and Garet. Late-modern theorists, like those focusing upon interpretation, seem more interested in the mechanics of the legal "system," describing the behavior of

norms and actors. The law is elaborated as it is and as it does; as it is treated and as it acts; as a product of atomized power and shared value. These elements, whose oppositions animated earlier scholarship, are embraced and submerged. To show how law works normatively, law is held constant and practice is examined. To tell what the law is, behavior (and its meaning or value) is held constant and the law is compiled.

By accepting and submerging the choice of normative theory, contemporary scholarship comes to appear seamless. The dichotomies are not so much transcended as escaped. Modern theory builds space for complacency in an expansive humility. By keeping value conflicts acknowledged but submerged, theory is able to defend itself as a form of pluralism. There remains no foothold and no motivation for traditional criticism. By retaining and suppressing behavioral and interpretive conflict, theory adopts the confident tone of an anti-intellectual practicality. Everything is a process, and the only possible critique is procedural. This theoretical stance protects modern doctrinal discourse from scholarly challenge. Just as conflicts of value and interest, by remaining submerged, give theory a self-confident air, so theory's own consequent humility gives doctrine a complacent flavor. Thus, the doctrinal consequence of this theoretical structure of false humility is self-assurance.

II.

This general comparison of the theoretical turn to interpretation by David Hoy and Ronald Garet and the work of postrealist liberal legal scholars can best be demonstrated by examining their papers in greater detail. Most of David Hoy's paper⁷ describes and analyzes, at arm's length, the relationships among a number of different theoretical positions about interpretation. Slowly, Hoy builds a platform of comprehensive theoretical mastery. Once completed, he turns to what will be his last perspective, a position which he labels "deconstruction." In this final part, he writes to defend the interpretation approach from "poststructuralist" criticism. Those who focus on interpretation would have us structure legal scholarship and understand judicial discourse as Hoy's paper is structured. There is a long interpretive process, followed by a hermeneutic moment in which the chips fall. Together, these two dimensions of Hoy's paper generate a sense of both pluralistic modesty and inevitable centrism.

7. Hoy, *supra* note 1.

At the outset, Hoy creates space for his lengthy examination of various positions with humility.

The best tack for hermeneutical philosophy, then, is not to start, as epistemology does, by legislating *a priori* a method that any discipline must follow if it is to count as rigorous science. Instead, hermeneutics must take seriously the self-understanding of practitioners of various disciplines, and scrutinize those particular disciplines to see how understanding and interpretation really work. As a result, hermeneutics must be modest about what it can do for the practical disciplines themselves.⁸

By distinguishing theory and practice, this theory of theories creates a space above actual interpretive work which will be grounded by its willingness to take the interpreters' self-understanding seriously. In this theory, hermeneutics is meant for consumption by the analytic elite; those whose consciousness positions them above the judicial interpreters themselves, but who can escape responsibility for their own "understanding and interpretation" by flaunting the infinite regress of their methodology and by calling it "modesty" about "practical" effects. In this way, the center can ground its political refusal to engage.

It is striking that Hoy brings hermeneutics into theoretical parlance just as he acknowledges that doctrinal debates about interpretivism have become uninterestingly irresolvable. What is unacceptable for theorists is rehabilitated by projection out onto judicial actors. Hoy begins by examining the Gadamer-Betti debate for clues about the alternative senses in which interpretation might actually proceed. At first, as Hoy points out, it appears that Gadamer and Betti are having a simplified reenactment of the interpretivist-noninterpretivist debate in legal scholarship. Indeed, Hoy suggests in introducing the parallel that the American constitutional debate is "more detailed" than the fancy European version. It turns out, however, that just as the debate about legal interpretivism was transcended by the development of a metaprocedural vision of adjudication about the Constitution, so Gadamer, as Hoy presents him, transcends any particular position about interpretive method through reliance upon the judicial interpreter's conception of his method. The dilemma of subjective and objective interpretation is acknowledged. Each is enabled and denied by the other. This dilemma is then transcended by movement to a level of analysis superior to either but grounded in a new, transcendental subjectivity. Hoy's position is sustained by projecting and reaching for the

8. *Id.* at 136-37.

judge's "understanding and interpretation" while simultaneously acknowledging the inadequacy of the judge's own efforts to reach interpretive closure.

The privileging within the turn to interpretation of an idea about subjectivity is acknowledged as well. In the judicial context, it is grounded by a number of passing assertions about the inevitability of value-laden decisions. The hermeneuticist's privilege to interpret the interpreters is grounded in its usefulness: "the interpreter is better off knowing more about the conditioning effects than not knowing about them, so the more highly developed a hermeneutical awareness an interpreter has, the better."⁹ The first section of the piece moves from legal interpretation to hermeneutics by positioning Gadamer above the interpreter and thus creating a place for academic scrutiny.

The next section, an elaboration of Habermas' debate with Gadamer, seems, at first blush, to be a repetition of the battle over interpretation. But Hoy tells us that "the issue is now a broader one than what judges can do within the confines of current legal practices."¹⁰ Hoy is seeking a general theory which will overcome historicist interpretation and account for the possibility of change. This turns out to be a transcendent utopian picture of communication against which interpretative practices can be tested. This ultimate subject situation saves hermeneutics from the dilemma of having to ground interpretive results and permits discussion at the level of methodology.

As Hoy presents him, Habermas rescues a collapsing dialectic by transforming it into process. The result seems to replace history and practice with a projected consensus-producing process—not a consensus, but a consensus-situation beyond our grasp. The triumph of hermeneutics and of the theoretician class is achieved by the subtle privileging of Habermas as an "extension" of Gadamer—exactly as hermeneutics was created by the privileging of Gadamer over Betti—and by the transcendence of the interpretivist-noninterpretivist debate.

Throughout his presentation of these debates, Hoy maintains an analytic and dispassionate tone. His analysis of the complex relations among these positions is sophisticated and accessible. Rationality is preserved even as the antimonious results of hyperrationality are submerged by movement to methodology. The interpretive process and the hermeneutic analysis, as Hoy presents them, are of the same fiber.

9. *Id.* at 147.

10. *Id.* at 158.

This is important because the key to hermeneutics, as presented here, is its move away from the sharpened social and intellectual dialectic of reason. Rather than pursue a critique of reason, hermeneutic philosophy moves towards the intuitive, appealing to absent authority as reason runs out. It is the hermeneutic moment which permits shoulder-shrugging acknowledgement of the undecidability of questions of interpretation. Consequently, Hoy's analysis of these positions must be understood relative to his subsequent discourse when he reenters the text as hermeneuticist.

Hoy reenters criticizing those who would "undermine even legal interpretation's minimal claim to rationality."¹¹ As Hoy constructed his theory, he was present in the text only as analyst, reviewing and rejecting various extreme positions. Everything is rejected in one way (in its "extreme" or "generality" or "particular form") and reaffirmed in another (in its "principle" or "in some cases"). Thereafter, Hoy enters the text more actively as a critic of criticism. In this section, the "new nihilists" are chastised for excess. Hoy acknowledges that there is something to ambiguity, but "it" is not "all random." There is something to the idea that all interpretivism is noninterpretivist, but there is something to the reverse as well. Deconstruction may show why something doesn't work, but why, Hoy wonders, would we want to apply it to "working" languages?¹² Hoy emerges as a hermeneuticist quite late in the piece: "[o]n my hermeneutical view, deconstruction exaggerates. . . . [It] infers from the collapse of the ideal of absolute justification that no justification is possible."¹³ Hoy is now in the text, but "deconstruction" remains a position to be analyzed at arm's length. "Deconstruction" acts, infers, and exaggerates.

In fact, only critics who reduplicate the liberal vision of theory bridging the gap between truth and power divided would understand the end of critique to be a position about what was "really going on" in the text. Hoy's description of the "new nihilist" criticism to which his hermeneutics responds, mirrors the partial but standard leftist critique described earlier. But these positions are not part of an endeavor opposed to liberalism. Writing as if deconstruction "were," in his own words, "a fundamental principle of understanding and interpretation"¹⁴ is, in other words, bad hermeneutics. The deconstructionists

11. *Id.* at 165.

12. *Id.* at 168-69.

13. *Id.* at 169.

14. *Id.*

could not be thinking of their methodology in such a way and sustain their criticism. But this conception of deconstruction permits its dismissal as “philosophical overkill” without endangering the hermeneuticist’s pluralism.

This position is also political, as Hoy goes on to suggest. Once any attempt at a totalizing moment has been reduced to a privileging of textual oppositions, the “only alternative” seems to be a “hermeneutic moment,” without which “we cannot really contemplate an infinity of meanings and still claim to be understanding the text.”¹⁵ Hoy’s political moment is similar to the legal moment in much contemporary legal scholarship. He writes: “I prefer to think of understanding as a matter of balancing two factors that are rarely in equipoise, namely, complexity and sense. A reading is precisely an attempt to gain a reflective equilibrium in which the two appear as balanced as possible.”¹⁶ Social action is disguised as “reading,” a *process* with “no privileged starting point” and “no ideal final resting place.”¹⁷ This is a politics of endless management, whose governor is the “reflective equilibrium” of the decisionmaking elite. There is now a name for the place from which “ultrarationalism” can be admitted and denied:

If we think of interpretation . . . as the *hermeneutical process* of balancing the principles implied in the legal language with the exigencies of particular cases, [or, I would imagine, the principles implied in particular cases with the exigencies of legal language] then we need not think of the laws as either miraculously rational or merely ad hoc.¹⁸

From this place, political differences become a “radical . . . conflict of interpretations,”¹⁹ and alternatives which are neither “conflicting interpretations” nor “conflicting philosophies of interpretation” cannot be understood without being translated into an articulation of “what is really going on in the text, or what is the best explanation of how the text applies to a given situation.”²⁰

Ronald Garet’s paper²¹ executes a similar project. He begins by establishing distance from the objects of his study—various “normative hermeneutic projects.” At this early stage, these projects seem to be

15. *Id.* 169.

16. *Id.* at 170.

17. *Id.*

18. *Id.* at 172.

19. *Id.* at 175.

20. *Id.*

21. Garet, *supra* note 2.

philosophical inquiries of a specific and limited nature. It is easy to see the assumptions, as Gareth describes them, that constitute projects of this sort. Gareth draws our attention to the importance of a grounded "theory of interpretation" in the constitution of a "normative hermeneutic object" and hence of the legitimation provided by such theories for institutions engaged in various interpretive projects. This analysis, like much new leftist criticism, focuses upon the hidden power arrangements enabled by various knowledge systems. From this vantage point, we can dismantle each of the various legitimating links between theory and practice. Gareth's analysis is elaborate, creative, and convincing.

Gareth compares three hermeneutic projects: scriptural, literary, and constitutional interpretation. His comparison forces the reader to acknowledge the weakness of each discipline's legitimation claims. Strangely, however, the overall effect is to validate each of these practices. This critique and revalidation provides the basis for the last section of Gareth's paper wherein he proposes a comprehensive "narrative" approach to hermeneutic projects. In this analysis, Gareth's piece is structured like Hoy's: a lengthy analysis followed by a decisive political moment. The interesting thing about his piece is the paradox of critique and reacceptance which animates his analytic discussions and prepares the way for his "narrative" approach. This paradox is particularly acute for constitutional law, which seems the least coherent in his comparative analysis and yet receives the most attention in the narrative reconstruction.

The three disciplines chosen for comparison restate the classic liberal alternatives to the state: the sacred and the social. In liberal mythology, each sphere has its own dynamic. The sacred is general; the social, particular. The sacred is associated with formal textuality, closure, and a rigid, naturally justified hierarchy. The social is associated with loose, open ended interpretation. Such hierarchy as exists seems open textured or unimportant. The social discipline seems *relatively* apolitical. Where the sacred tends towards the principle of *solo scriptura*, the social develops a shifting canon. Gareth elaborates and criticizes each of these alternatives, slowly transforming them into alternatives whose vices and virtues are not fully present in constitutional hermeneutic practice. His critique considerably elaborates upon these oversimplified, if total, images of religiousity and culture. He points out, for example, that textual literalism could be the vice or the virtue of either discipline.

To Garet, the state is characterised by a relatively undifferentiated hermeneutic practice. The lack of self-consciousness about various stages in the constitutional process motivates his comparative technique. Once we have seen textualism or contextualism legitimated in the spheres of the sacred and social, we, as analysts, deepen our understanding of what is "really going on" in constitutional law. This comparison enables a comprehensive critique of the liberal state, collapsing it back into either the sacred or the profane. This comparison also provides Garet with a basis for reestablishing the constitutional project.

Reestablishment occurs in several phases. Initially, it seems unimaginable to have a state practice that is either sacred or profane. The extremes, once critiqued, seem unattractive and impractical for modern statecraft. This idea about practicality is like Hoy's reference to *living* languages which are somehow outside critique or rejection. Constitutional discourse *in fact* experiences neither the instability of the sacred nor the triviality of the social. Thus Garet differentiates constitutional texts in part by distinguishing the interpreter's stance towards them. We are presumed to want to interpret the Constitution.²²

It seems impossible to imagine that "we" would not want to find the "savory juices" of the Constitution. The legitimation question is answered by the inevitability of the practice for our class. This seems to be another way of saying that it *is* legitimate, or, as Hoy puts it, that the language works for us. Finally, Garet proclaims that constitutional practice *is*, by its nature, ungrounded and hence ungroundable. The vice exposed by comparison has become a virtue. If religious and literary interpretation are sustained and ultimately betrayed by their purport to be about uncovering experiences beneath their texts, the characteristic feature of constitutionalism seems its freedom from any such purport. In this view, since nothing lies beneath the Constitution, its vacuity cannot betray its pretense.²³

The dimensions of constitutional theory that have imitated the sacred or social have been superfluous to the basic existence of the constitutional enterprise. Thus, we can dispense with constitutional

22. *See id.*

23. *See id.*

interpretivism that merely “offers to shore up hermeneutical authority by giving it sound historical support.”²⁴ Hermeneutics has been promoted from a description of a set of disciplines to an authority. Indeed, none of the other sources of constitutional authority work. “Originalism,” “conceptualism,” and “functionalism” commit the vices of the sacred and the social. Nevertheless, constitutionalism endures despite the fact that “none of the constitutional views persuasively executes the mission of Constitution.”²⁵

We are now prepared for Garet’s hermeneutic moment. The analytic process has banished all available alternatives from the text. The bridge paragraph to Garet’s advocacy of a “narrative” hermeneutics is worth quoting in its entirety:

It is certainly not my purpose to urge that the bridge in constitutional law be built to any particular design: only, by comparative analysis, to indicate its indispensibility, and to provide some of the lumber out of which it might someday be built. In that spirit, the final Section of this Article will compare the uses to which one view of textual authority, the narrative view, is put in our three fields. The point is not to replace existing constitutional notions such as originalism or conceptualism with a new “narrative theory,” but to exhibit some of the normative operations of narrative, especially in relation to the kind of constitutional political theory which sets up Constitution *qua* normative hermeneutic object as a “consent tradition.” That much of what will be said about the constitutional stories will seem terribly obvious does not count, I think, against the use of narrative as a bridge-building material. Narrative is as obvious a part of constitutional authority as it is a part of theological authority. The problem, to employ Frei’s useful metaphor, is that narrative in both fields has been “eclipsed” by a variety of practical and philosophical interests.²⁶

This is extremely modest. In Garet’s view, “practical and philosophical interests” have overshadowed the storytelling function of constitutional law, somehow diverting us to imponderables. Our task is to rehabilitate this conceptual image of constitutional discourse to contribute to an “indispensible” philosophical project. Garet’s image, as I read it, is of a proceduralization of social life in which an exchange between consensus representation and creation is fluidly enabled by the “narration” of social conflict. This is a vision similar to, if more comprehensive than, Hoy’s notion of a “hermeneutical process.”

24. *Id.* at 88.

25. *Id.* at 116.

26. *Id.* at 119.

Both of these papers build a centrist political perspective of theoretical agnosticism by focusing upon interpretation and importing hermeneutical insight into legal theory. In the process, they demonstrate the power of hermeneutics—its insight into the inevitability of methodological groundlessness in any living interpretive practice. There is no reason this insight must be extended to an acceptance of the inevitability of a particular discourse and social practice unless the hermeneuticist believes, exactly as does the standard leftist critique, in the necessity of a grounded critique. Yet as we abandon ground as theorists, why create social alternatives in a self-image that we reject? I suppose this occurs in part for the same reason that hermeneutic theory imputes the consciousness it abandons to the good faith of the judiciary—it is a comfortable, if alienated, plateau up here with the agnostic reconstructionists. But there are alternatives. We could exchange our tragic acceptance of the liberal vices for an anti-interpretivist lifestyle detached from authority fetishism.

Both Hoy and Garet construct elaborate images of a possible relationship between truth and power in which power seems tamed despite the unavailability of a workable picture of truth. By combining a modesty about truth with a sense of the simultaneous inevitability and benignness of power, Hoy and Garet have constructed a legal theory that meets the needs of modern centrist legal scholarship. If the attack upon liberalism is based upon the indeterminacy of legitimating truth pictures, the approaches suggested by Hoy and Garet respond brilliantly. But this is not the critique being advanced by the “new nihilists.” Rather, as I read their work, they seem to be struggling for an image of law that avoids this oscillation between truth and power, and that could develop a social vision outside the notion of a “program” in the style of both liberalism and more standard leftist criticism.

This is an image of social life that is difficult to communicate to a scholar who relies upon the language and social image of hermeneutics as presented by Hoy and Garet. The hermeneuticist seems tempted to reimagine any aspiration for an alternative as a combination of the sacred and the profane, as a utopian program for implementation relying upon a deeper notion of truth or a hidden structure of power. Reimagined in this way, the attack can be critiqued, as Hoy and Garet have ably shown, leaving the hermeneuticist free to pursue a politics of centrist management. The new nihilists have tried a variety of strategies to prevent this intellectual capture of their criticism. They have tried shock, the sudden juxtaposition of surprising oppositions, the

equation of terms which usually exist only in textual hierarchy, the relentless and simultaneous critique of the constituting rationality and intuitionism of hermeneutics, or the experience of unalienated life. But hermeneuticists of the center have been able to absorb and submerge it all in an interpretive process that leaves them free for a later moment of political decision. In order to demonstrate some of these techniques and to illustrate the position from which the critique I have in mind might proceed, immune from capture by hermeneutic pluralism of the sort advocated by Hoy and Garet, I have sought to analyze the text of O. Henry's *The Gift of the Magi* both as a standard leftist critic or hermeneuticist might, and as one might if tendencies towards centrist apology are to be avoided.

III.

O. Henry's famous short story, *The Gift of the Magi*,²⁷ provides us with a tissue of a plot, unembellished by interpretation or morality. The story resembles the facts present in the typical appellate opinion or record presented to a judge. In analyzing this story, I do what a judge might do: discover the reversible and dialectical structures which lie beneath the plot. But, in another sense, the author's construction is not unlike the judge's opinion or the elaboration of the commentator. The entire text may be regarded as content to be interpreted rather than analyzed. This is the customary approach of legal theorists or opinion writers. The adage that it is "all in the facts" refers, after all, not just to a first-order analysis of events, but to the way opinions and norms are to be treated in second-level interpretation. Both are projections.

The story is this. A husband and a wife each have a prized possession: the man, his gold watch; the wife, her golden hair. As Christmas approaches, they each secretly consider the gift they should give the other. On Christmas morning, the husband reveals that he has sold his watch to purchase some combs for his wife. She, however, has sold her hair to purchase a chain for his watch. The story consists of three parts: an initial situation, an act, and a result. Both traditional and alternative methods of analysis proceed in two steps: the meaning of each part is analyzed, and a coherent interpretation of the entire story is developed. We can see already the similarity between the story (which proceeds from situation, through action, to result) and both methods' approaches to it (which proceed from the story, through symbolic analysis, to interpretation). The traditional analysis finds a meaning in each

27. O. HENRY, *supra* note 3.

stage; the alternative finds reversible or indeterminate meanings. Where the traditional method would produce coherent, meaningful interpretations that themselves could be used as stories in future interpretations, the alternative would find a self-contained dialectic of difference in resolution.

As traditional scholars analyzing the story, we might see any number of symbolic connections and we might tell the story in a number of ways. Here are some examples:

Telling 1: The initial situation (marriage) was one of love. Love means loss of self in communion. The act was the sacrifice of love; each gave his identity to fulfill the other. To be in communion is to be fused with the other. The result is such a fusion; each has lost his identity and his roots in the material world and has been freed to find the other: love.

Or:

Telling 2: The initial position is one of hate or alienation. Each sold that which the other loved to capture the other in dependence. The result is also separation, for each is alienated from the other: hate.

It was the statements of principle in Telling 1 that enabled me to move from the description of the essence of the initial position to that of the act and result in a coherent way. Though absent in Telling 2, they were understood. Hate is selfish and aggressive. Hate revealed is separation. These principles might be altered and recombined to produce other tellings.

Telling 3: They begin in love. Love is mutual respect and distance. The act was the giving up of self, confirming the integrity of each, separate from his attributes. The result was reconfirmed respect without possession: love.

Telling 4: They begin in hate, dependent and defined only by the relationship. Each took what the other loved to free himself. Dependence, when revealed in separation, leads to a deeper alienation. The freedom of each was revealed to be rooted in dependence upon the other. The result is a deeper and more suffocating solidarity: hate.

Each of these four tellings returns the actors to their initial position. While Tellings 1 and 3 or 2 and 4 seem similar externally, they rely on opposed visions of love and hate. Thus, we might understand these initial tellings as follows:

<u>Analysis</u>		<u>Vision Relied Upon</u>
	Telling 1:	
Initial love fulfilled.		Love as solidarity or communion.
	Telling 2:	
Initial hate fulfilled.		Hate as separation or alienation.
	Telling 3:	
Initial love fulfilled.		Love as distance and respect.
	Telling 4:	
Initial hate fulfilled.		Hate as suffocating solidarity.

These could be rearranged to produce additional tellings which set the initial and final positions in opposition.

<u>Analysis</u>		<u>Vision Relied Upon</u>
	Telling 5:	
Initial position: love.		Love as solidarity.
Result position: hate.		Hate as alienation.
	Telling 6:	
Initial position: love.		Love as solidarity.
Result position: hate.		Hate as smothering.
	Telling 7:	
Initial position: hate.		Hate as smothering.
Result position: love.		Love as solidarity.
	Telling 8:	
Initial position: hate.		Hate as smothering.
Result position: love.		Love as distanced respect.
	Telling 9:	
Initial position: love.		Love as distanced respect.
Result position: hate.		Hate as smothering.
	Telling 10:	
Initial position: love.		Love as distanced respect.
Result position: hate.		Hate as alienation.
	Telling 11:	
Initial position: hate.		Hate as alienation.
Result position: love.		Love as solidarity.
	Telling 12:	
Initial position: hate.		Hate as alienation.
Result position: love.		Love as distanced respect.

These might be expressed narratively as follows:

Telling 5:

Their love was perfect, for they gave themselves fully to one another. But in expressing their love, they destroyed that which held them together.

Telling 6:

Their selfless love led them to destroy each other, dominating that which they had cherished.

Telling 7:

They had viewed each other as objects to be possessed. By acting on aggressive feelings, they stripped each other of their identities: they were led to depend upon and love each other as people for they had nothing else.

Telling 8:

They had viewed each other as objects to be possessed. Stripped of their masks, they were forced to respect each other as individuals.

These various tellings or analyses are possible because we can see the facts as either separation or fusion, which can each symbolize either love or hate. Marriage may be either a state of separation or fusion, of love or of hate. Similarly, the final position may seem one of separation or community, of love or of hate. Love may mean the independence of separation or the security of dependent community. Hatred may be the isolation of separation, the disrespect for distance, or the suffocation of closeness. Separation may be dependent or independent, hateful or loving. Likewise for community.

Not only are the various analyses or "narrative tellings" which result varied and incompatible, but the reversibility of the ad hoc connection of meanings and facts yields incompatible interpretations of the story. We might view the story as a tragedy or a comedy. In one view, however, tragedy is an initial position frustrated; in another, it is an initial position fulfilled. The possibilities multiply. Just as the internal mechanics of the story produce reversible, but not unrelated, results in a way which has nothing to do with the internal O. Henry reversal of combs/chain, hair/watch, woman/man, the use of these readings in interpretation produces, in traditional analysis, reversible connections of *story* (e.g., love-love, love-hate) and interpretation (tragedy-comedy). For example, imagine that the story is about positions of fusion and separation, and that we seek a moral about the meaning of love. Examples of the interpretations which present themselves are:

Interpretation I:

They acted from fusion. The result is fusion. The human condition is not tragic. Love is self-sacrifice for another. When two so destroy themselves, they find love.

Interpretation II:

They acted from separation. The result is fusion. The human condition is not tragic. Self-sacrifice will destroy the other with debt and smother his will. Yet, mutual recognition of this might redeem love. The flaw in separation is that it is mutual. When this is revealed, one finds the solidarity of love.

Interpretation III:

They acted from fusion. The result is fusion. The human condition is tragic. Love is independence and respect. Searching for it, they destroy the element each most loved and revealed their possessive lack of respect. The exposure yielded mutual dependence.

Interpretation IV:

They acted from separation. The result is fusion. The human condition is tragic. Love is self-sacrifice. They sought domination, but in recognition of the mutuality of their lust, they were denied its satisfaction and ended dependent.

All of these interpretations result in fusion. They differ in their understanding of "tragedy," which can occur in either the fulfillment or the frustration of an initial position. Four parallel interpretations could easily be constructed for tellings resulting in separation. For example, if true love is absolute, their search for it may have been frustrated by their human limitations; man's condition is tragic in its imperfection. Likewise, if love is the separation of mutual respect, their love may have been flawed by the need to augment their partner by self-sacrifice. The result was the separation of dependence and loss of respect: the story is a tragic one.

Both the symbolic analysis and the interpretation of the traditionalist, then, are indeterminate, at least in the absence of determinative outside referents; other stories, as a *practical* matter (though never theoretically or logically), have precluded these tellings. That is, so long as the story remains subject to interpretation, the interpretation seems indeterminate because of the shifting and interlocking meanings of the events and the content of the meanings ascribed. This reversibility is made possible by the manipulation of the relationships between symbolic oppositions: love/hate, fusion/separation, tragedy/comedy.

Traditionally, in analysis, we seek to avoid this mire of indeterminate content: were they in love, did they act generously, was the story tragic? Faced with the multiplicity of possible factual interpretations, we find retreat in many forms of content-based analysis which are critiqued by hermeneutics. The "true meaning" of the facts may be revealed by their juxtaposition, or by the author's intention—as revealed by the narration. Yet, their relation within the text does not give them

content. We have seen the indeterminate forms a telling may take from a single starting point. Reliance on the author is also misplaced.

O. Henry suggests the indeterminacy of such considerations in his closing paragraph:

And here I have lamely related to you the uneventful chronicle of two foolish children in a flat who most unwisely sacrificed for each other the greatest treasures of their house. But in a last word to the wise of these days let it be said that of all who give gifts these two were the wisest.²⁸

His intent, then, is on its face unclear. The narrative voice describes their actions as both “wise” and “unwise.” Throughout the tale, this voice is both sincere and ironic, even as it gives hints in both directions. Which voice is the true narration? How strong must the voice speak to overcome the “natural meaning” of the facts? Which speaks more loudly, the adjectives that encircle the story or the explicit narration? Which is ironic and which is sincere?

In asking these questions, we are driven ever further from the surface statements of the narrator, just as we were driven from the facts themselves. The facts turned out to be capable of symbolizing inverse propositions. At the first level, the narrator’s description of the meaning of these facts in one way or another may symbolize either what it says or its opposite—it may be ironic or sincere. Just as a contextual examination of the facts could not produce a single authoritative telling, so a consideration of the full narration/text relationship will not reveal the true attitude of the narrator.

Even if we *could* produce a coherent picture of the narrator’s attitude, the meaning of the story would remain unclear. For which is the true story, the narration, or the text? To determine this, we must look beyond the story, to the intention of the author or to the consensus of the readership. We might imagine an authoritative meaning to have motivated this particular juxtaposition of narration and text. Evidence of its content comes from a variety of sources. We might seek to find some clues in the story as to the author’s intention about the roles of narration and text. Yet, if the analysis that drove us to this inquiry was complete, these clues will give us conflicting signals. We may have some view about the historically specific relationship between authors and texts, or this author and his texts, which informs our choice. These must grow, however, from analyses of texts precisely as indeterminate.

28. *Id.* at 111.

The author may have commented about the story; yet, which should convince us of his true intention, the story or his commentary?

Finally, we must set the author and his story against each other as we did the narrator and his text. To choose, we must inform our interpretation of the story with our own view about what a reasonable O. Henry would have meant, about the authority of texts, or about the enterprise of assessing authority by connection to the author's intention. Our view as readers, whether or not informed by principles of textual criticism current in the literature, is related to O. Henry's intention exactly as his intention is related to the story and, in turn, the narration is related to the text within the story.

This rather simplistic elaboration of the problem of subject and object in criticism is intended merely to convey the sense in which a very wide variety of interpretive styles tie themselves to a search for the meaning of the story, and to give a flavor for the way in which these efforts might be united. Hermeneutics systematizes these insights about interpretive frailty but resolves them in a mystical moment, importing an unacknowledged authority. This resolution enables a discursive management of the problem of love and hate, which postpones indefinitely their social confrontation. The key to developing an alternative analysis of both the story and the interpretive efforts is to focus on the discussion itself, not on the content of the story. To begin, let us return to the story and reexamine the reversibility of meaning and the dialectical development of the plot.

Although it was not possible to connect facts in each stage of the story to love, to hate, to separation, or to community, these seemed at least potentially relevant objects of the story's indeterminate symbolism. To understand the story's structure and the structure of discussions about it, we need make no claim about the truth of the symbolic associations—neither as to the choice between, for example, love and hate nor as to the implication of this particular pair in the content of the story. It is enough that the story may be and has been so interpreted—for we seek the structure of interpretation, not interpretation itself. This we learn from hermeneutics.

To disentangle the story's implication of love/hate and separation/fusion, we might begin by elaborating upon the contradictory associations of each dichotomy in each stage of the story, without imagining that these are any more truly central to the "meaning" of the story than any other potential symbolism such as man/woman, body/object, etc. One possible structural connection would be that the

story relates the dichotomy of love and hate to that of separation and community in a series of stages. The drive shaft is the relationship between that which is known and that which is hidden, a differentiation that gives meaning to the textual juxtapositions and permits movement to resolution by its flexibility and our preference for the revealed.

In the first stage of the story, the characters are known to each other and their actions are hidden. The turning point of the story reveals the actions and conceals the characters. In the initial position, the hair and watch are known attributes of the characters. Their feelings for each other are hidden; they are to be revealed in the act of gift giving. When the gifts are exchanged, the feelings revealed, each parts with the character that was known. Naturally one could reverse these associations and argue that the subjective character is known and is concealed by the action. The important point is to understand the *movement* as a reversal of what was known and what was hidden.

The love/hate and separation/community polarities are related in the same way as are the initial and end positions in the story. When one is hidden, the other is revealed. It is easiest to see that love/hate seem to be subjective descriptions of feelings while separation/community describe objective conditions of association. To the internal observer, love/hate will be visible while the objective nature of the association will be hidden. The reverse will be true for the analyst. Moreover, we have seen that the various tellings are united by the manipulation of the association with either independence or community, hate with alienation or suffocation, etc. These variable associations result from the separation of subjective and objective experience. We, like the author, the narrator, and the characters, are unable to move determinedly from conditions of separation or fusion to feelings of love and hate and back again. If, for example, we begin a telling with a description of the subjective feelings (they were in love), we understand the rest of the story (the meaning or motivation of the act and the final position) by reference to the objective conditions that we associate with love (e.g., motivations of separation, conditions of community). Each telling is manipulated in two dimensions. First, it relates love/hate to separation/fusion in a given way. Second, it explains the dynamics of the story by associating these two polarities with either subjective or objective experience.

The structure of the plot—movement from hidden to revealed—is like the structure of the relationships—movement from subjective to objective. An interpretation is possible because the first tension is re-

solved through the second. Within the story, for example, we understand the end position as love because the condition of separation becomes community through revelation. We understand the story in each telling as the resolution of a tension through movement from hidden to revealed. For example, the initial position of feelings may be either love or hate—unknown to both the participants and to us as analysts. When the characters act, they produce known conditions—for example, separation. This reveals their feelings, both to each other and to us, because of the way separation seems related to love. The dynamic movement of the story, back and forth from hidden and revealed, manages the tension between objective and subjective, continually promising their resolution or mutual presence. But, as static analysis of each position demonstrates, the play of hidden and revealed is never finally resolved, for we cannot know what is “really” hidden or revealed.

Understanding the story in this way is independent of a commitment to any single telling. Whatever we feel about the associations appropriate among these dichotomies or their symbolic manifestations in the story, the structure here described animates the telling. This, in my view, is the key point. By freeing ourselves from a search for the “correct” telling, we may elucidate the conditions of possible tellings, and thereby glimpse the substantive power of symbolic analysis. Moreover, we may elucidate our relationship to the story in this way. In the traditionalist mode, we may confront the dilemma of interpretation whenever we seek to inform our analysis of the story itself with reflection about the author’s or reader’s roles. Analysis of this tale is like the tale itself—the contradiction between views about the connections of meanings to facts is resolved when the concealed becomes manifest and the associations between these contradictions are shifted.

The key to this method lies in analysis of the dynamic relationship between relations of difference. The thesis is that some large class of stories are structured around the resolution of oppositions by shifting attention among them. When a question of meaning arises, it does so because of a conflict either within the meaning of a concept (love as separation or fusion) or its application in a given instance (is this love or not love, irony or sincerity, etc.). In this view, it is the tension between concepts and their opposites or antitheses that creates interesting questions of interpretation. Consideration of such dilemmas involves the apparent resolution of the tension by relying upon a shift among

equivalent oppositions until one is found in which the relationship of "supplementarity" (here, the preference for the revealed) is sustainable.

This picture of social life is neither about the truth of the story nor about the social relations that it relies upon to create various truth images. It is about the life problem of being caught between the indeterminacy of truth and the ungroundedness of power. It does not concern itself with interpretation or with political advocacy. It is concerned with releasing us from the story's dynamic balance of tragedy and comedy.

If one were to stop the critical analysis having shown the indeterminacy of various interpretive strategies, the narrative or hermeneutical approaches of Garet and Hoy would have been responsive. They could admit this indeterminacy in an interpretive process, constructing an analytical position from which the "inevitable" dialectic of love and hate could be managed by balance or narration. The alternative which I have sought to illustrate continues the critique, addressing the apparent inevitability of an interpretive or narrative moment with its subtle shift from truth to power, as relentlessly as it addressed the inadequate interpretive strategies provided by various individual theories of love and hate. The goal is to refuse, rather than to embrace, complicity in the management of love and hate, treating the apparent inevitability of their division and reconnection as a contingent social event. The turn to interpretation in legal theory, by accepting the inevitability of elite management, reconfirms the structured distinction between truth and power which in turn sustains the position of the manager. By doing so, this work helps cut us off from the possibility of reimagining and transforming doctrinal categories like "love" and "hate" which, in more refined and apparently necessary forms, constitute our current social world. As a result, what began as a modest acknowledgement of the fluidity of social theory and human relations, ends by redeeming the structure of social choice presented by a centrist political vision.

