# § 3 Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning

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The use of historical arguments[1] is – like all methods of legal reasoning – subject to changing trends and fashions.[2] While many common law jurisdictions have started to welcome legislative history as an interpretative aid over the course of the twentieth century, the opposite tendency can be observed in the United States:[3] the rise of textualism has put the search for legislators' past intentions on the back foot.[4] In Germany, on the other hand, the last decade has not only brought about a lively academic debate on the topic;[5] it has also witnessed a noticeable trend in the practice of our courts, particularly the German Constitutional Court, to put a stronger

1 The term is taken from the German discourse on 'historische Argumente' and refers to arguments in legal reasoning that are based on historical information. With respect to interpreting legislation their main function is to ascertain legislative intent. For further clarification see below I.1.

2 For a comparative overview see Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 Am J Comp L 401.

3 John J Magyar, 'The slow death of a dogma? The prohibition of legislative history in the 20th century' [2020] Common Law World Review 1 (focusing mainly on the United Kingdom but referring also to other Commonwealth jurisdictions and the United States).

4 On textualism's hostility towards the use of legislative history cf Antonin Scalia, 'Common-Law Courts in a Civil-Law System' in Amy Gutman (ed), A Matter of Interpretation (Princeton University Press 1997) 29–37; John F Manning, 'Textualism as a Nondelegation Doctrine' (1997) 97 Colum L Rev 673, 684–689; Tara Leigh Grove, 'Which Textualism?' (2020) 134 Harv L Rev 265, 274 and 279. See also Magyar (n 3) 25 n 132 (calling the refusal to consider legislative history a hallmark of textualism); Richard M Re, 'The New Holy Trinity' (2015) 18 Green Bag 2d 407, 411 (calling legislative history 'New Textualism's ultimate bugaboo'). On the trend against reliance on legislative history in the US Supreme Court see James J Brudney and Corey Ditslear, 'The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras' (2006) 89 Judicature 220. But see also Victoria F Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122 Yale LJ 70, 72 (noting that 'legislative history's fires still burn').

5 Three doctoral dissertations on the topic were published within the last decade: Wischmeyer, *Zwecke im Recht des Verfassungsstaates* (Mohr Siebeck 2015); Tino Frieling, *Gesetzesmaterialien und Wille des Gesetzgebers* (Mohr Siebeck 2017); Markus Sehl, *Was will der Gesetzgeber?* (Nomos 2019). See also the two essay collections Holger Fleischer (ed), *Mysterium 'Gesetzesmaterialien'* (Mohr Siebeck 2013) and Christian Baldus et al (eds), *'Gesetzgeber' und Rechtsanwendung* (Mohr Siebeck 2013).



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emphasis on historical arguments in their reasoning.[6] More often than before, judgments rely solely or at least predominantly on legislative history.

An illuminating decision in this respect was handed down by the State Constitutional Court of Thuringia in July 2020.[7] The question before the court was whether introducing mandatory gender-balancing for parliamentary election lists violated constitutional principles such as the right to free elections or the freedom and equality of political parties. Since at least some of these principles were undoubtedly affected by the gender-balancing requirement,[8] the judges had to decide whether these encroachments could be justified under art. 2 para. 2 s. 2 of the Thuringian constitution. That provision obliges the state and its administration to ensure the effective equality of women and men in all areas of public life. The majority opinion answered this question in the negative and struck down the law as unconstitutional, based on one central argument: since the constitutional committee[9] had rejected an explicit reference to the composition of Parliament when drafting the provision, the Court found itself compelled to conclude that the constitution was not meant to permit a quota for election lists.[10] Further points were not even considered. The historical argument settled the issue.

It is revealing how dissenting judges *Licht* and *Petermann* replied to this reasoning. They could have raised general concerns about the legitimacy or even the theoretical possibility of legislative intent.[11] Conversely, they

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6 BVerfGE 122, 248, 282–301 = NJW 2009, 1469 paras 95–145 (minority opinion); BVerfGE 128, 193, 209–222 = NJW 2011, 836 paras 50–78; BVerfGE 149, 126, 153–159 = NJW 2018, 2542 paras 71–87. For the Constitutional Court's earlier approach cf BVerfGE 62, 1, 45 = NJW 1983, 735, 738–739. On the development in general see Bernd Rüthers, 'Klartext zu den Grenzen des Richterrechts' [2011] NJW 1856.

7 ThürVerfGH NVwZ 2020, 1266.

8 The majority and the dissenting opinions were largely in agreement with regard to this point. For a detailed and critical analysis see Claudia Danker, 'Paritätische Aufstellung von Landeswahllisten – Beeinträchtigung der Wahlrechtsgrundsätze' [2020] NVwZ 1250, 1251; Christoph Möllers, 'Krise der demokratischen Repräsentation vor Gericht' (2021) 76 JZ 338, 340–342.

9 After the German reunification, the Thuringian Parliament assigned the task of drafting a state constitution to a newly formed committee consisting of representatives from all parliamentary parties as well as academic advisors. The committee's proposal was subsequently accepted by both the parliament and a state-wide referendum. See Thomas Flint, 'Der Prozess der Verfassungsgebung in den ostdeutschen Bundesländern' (1993) 76 KritV 442, 463–465.

10 ThürVerfGH NVwZ 2020, 1266 paras 132–136.

11 On these concerns see below II.3.



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could have tried to refute the majority's argument by showing that it had actually misread legislative intent (which in fact it had[12]). Instead, they employed an argumentative move not uncommon for German courts:[13] while leaving the majority's historical analysis basically unquestioned, the dissenters simply did not regard it as decisive. They regarded the 'subjective' will of the legislator as just one aspect of interpretation that could but need not be relevant to determine the provision's 'objective' meaning.[14] In their view, the majority's strong emphasis on legislative history expressed an unduly 'static' perception of constitutional law.[15]

In the background of this disagreement looms an old but unresolved debate about the role of different types of argument in legal interpretation.[16] According to one common formula, all relevant aspects must be considered while no definite ranking applies.[17] This formula's convenient open-endedness[18] has facilitated the kind of anything-goes-attitude towards legal methodology[19] that can be found in the dissenting opinion just discussed: to counter a historical argument you need not immerse yourself in the subtleties of legal theory or undertake a diligent enquiry into the historical record. You can simply declare it irrelevant for deciding the case at hand.

The two different approaches expressed in the Thuringian election list case illustrate what could be called the classic image of historical argumen-

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12 See below II.2.

13 cf eg BAG NZA 2011, 905 para 19; BFH DStR 2011, 1559 paras 20–23.

14 ThürVerfGH NVwZ 2020, 1266, Dissent Licht and Petermann paras 15 and 23.

15 ibid paras 14 and 23.

16 The debate is often labelled as concerning the aim of interpretation (*Ziel der Auslegung*); see Fleischer (n 2) 404–412; Axel Mennicken, *Das Ziel der Gesetzesauslegung* (Gehlen 1970); Gerhard Hassold, 'Wille des Gesetzgebers oder objektiver Sinn des Gesetzes – subjektive oder objektive Theorie der Gesetzesauslegung' (1981) 94 ZZP 192; Andreas von Arnauld, 'Möglichkeiten und Grenzen dynamischer Interpretation von Rechtsnormen' (2001) 32 Rechtstheorie 465, 466–481. Its origins lie in the diversification of legal methodology in the late nineteenth century, see Jan Schröder, *Theorie der Gesetzesinterpretation im frühen 20. Jahrhundert* (Nomos 2011) 27–28 and 35.

17 Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 345–346; Reinhold Zippelius, *Juristische Methodenlehre* (11th edn, CH Beck 2012) 50–51. For an overview see Reinhard Zimmermann, 'Juristische Methodenlehre in Deutschland' (2019) 83 RabelsZ 241, 264–267.

18 There are, of course, also more nuanced accounts, eg Claus-Wilhelm Canaris, 'Das Rangverhältnis der "klassischen" Auslegungskriterien, demonstriert an Standardproblemen aus dem Zivilrecht' in Beuthien et al (eds), *Festschrift für Dieter Medicus* (Heymann 1999) 25.

19 cf Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum 1970) 121–124.



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tation. That image consists of two strands, portraying an interpretative practice that is relatively objective but necessarily static.[20] The majority's reasoning in the Thuringian case exemplifies the first strand: its focus on one simple question about the past – what did the people participating in the enactment of a legal norm intend it to mean? – is a promising way to tackle the long-observed indeterminacy of legal decision-making. That question's specific attractiveness lies in its (purportedly) empirical nature. It seems much easier to reach an agreement on historical (and therefore: empirical) facts than on normative judgments.[21] That way, interpreting the law appears to be more about knowing or discovering and less about deciding on the basis of one's own preferences. The minority dissent, on the other hand, represents the second strand of the image. According to this view, the narrow concern for past facts is bound to 'freeze',[22] to 'petrify',[23] or even to 'mummify'[24] the law, to alienate it from current social practice and needs, and to bind the present forever to the past, leaving no room to ask for the currently best solution. A dynamic interpretation of the law, adapting to new situations and changed factual or legal surroundings, becomes impossible. In short: the gain in objectivity leads to a loss in dynamic potential.[25]

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20 For the first strand cf eg Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* (2nd edn, Mohr Siebeck 2016) 177–180; Franz Jürgen Säcker, 'Einleitung' in Franz Jürgen Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 1 (9th edn, CH Beck 2021) paras 126–130; Christian Hillgruber in Günter Dürig et al (eds), *Grundgesetz Kommentar* (95th supp, CH Beck 2021) art 97 paras 55–74. For the second strand cf eg Ernst A Kramer, *Juristische Methodenlehre* (6th edn, CH Beck 2019) 135–142 and 155–158; Larenz (n 17) 32–35 and 316–320; Zippelius (n 17) 17–21 and 41–42; Ronald Dworkin, *Law's Empire* (first published 1986, Hart 1998) 348–350.

21 See Thomas Honsell, *Historische Argumente im Zivilrecht* (Rolf Gremer 1982) 90 (emphasising the reality of historical events as one positive feature of arguments based on legislative history); Sehl (n 5) 247 (calling the will of the legislature an empirical anchor point); Zimmermann (n 17) 263 (regarding the will of the legislature as a distinctively more objective datum).

22 Marietta Auer, 'Eigentum, Familie, Erbrecht: Drei Lehrstücke zur Bedeutung der Rechtsphilosophie' (2016) 216 AcP 239, 249–250.

23 Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers' (1991) 116 AöR 185, 206.

24 Reinhart Maurach and Heinz Zipf, *Strafrecht Allgemeiner Teil*, vol 1 (5th edn, CF Müller 1977) 125.

25 While this can justifiably be called the classic image from a German perspective, the same cannot be said for the US: textualists do not criticise the use of legislative history for yielding static law – in fact, they might regard that as an advantage – but for its arbitrariness and manipulability; see the references in n 4 and



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After clarifying the relevant terminology (I.), I will show that this view on the relations between historical arguments, dynamic interpretation, and objectivity is questionable on both counts. The extent of objectivity that is sometimes attributed to or desired of historical arguments is unattainable; still, in an attenuated way, historical information can provide a meaningful basis for rationalising legal interpretation (II.). The problem of objectivity becomes particularly pertinent with respect to dynamic interpretation and its inherent risk of arbitrariness (III.). The main section of this article addresses this problem by linking interpretative change to historical arguments, which, contrary to the classic image, can both support and constrain dynamic interpretation (IV.).

## *I. Conceptual Clarifications*

Before examining the classic image just described it is necessary to have a closer look at its three central components: historical arguments (1.), dynamic interpretation (2.), and objectivity (3.).

### *1. Historical arguments*

While the Anglo-American world usually employs the narrower concepts of legislative history and legislative intent,[26] the notion of a 'historical' type of argument seems to be distinctively continental.[27] Particularly the

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n 58. Hence, while historical reasoning may be criticised as anti-progressive in Germany, it may evoke charges of activism in the US; cf Nourse (n 4) 73.

26 But see Jack M Balkin, *Living Originalism* (HUP 2011) 4 ('arguments from history').

27 For Austria see Gerhard Hopf, 'Gesetzesmaterialien: Theorie und Praxis in Österreich' in Fleischer (n 5) 98–99 ('historische Methode'); for Switzerland Kramer (n 20) 135–171 ('Das historische Auslegungselement'); for France see Jean-Louis Bergel, *Méthodologie juridique* (3rd edn, Presses Universitaires de France 2018) 265 ('methode […] historique'); for Belgium see Philippe Gérard, 'Le recours aux travaux préparatoires et la volonté du législateur' in Michel van de Kerchove (ed), *L'Interprétation en droit* (Facultés universitaires Saint-Louis 1978) ('interpretation historique'); for the Netherlands see Paul Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlandsch burgerlijk recht – Allgemeen Deel* (Tjeenk Willink Zwolle 1931) 55–59 ('Wetshistorische interpretatie'); for Germany see the following references.



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German methodological discourse[28] has been shaped by that terminology since the days of *Friedrich Carl von Savigny*.[29] Nevertheless, the concept still lacks a clear-cut definition and scholars have come up with various classifications and subdivisions.[30] Most often, it is understood as an umbrella term for all arguments based on some kind of historical information[31] and, hence, comprises quite heterogeneous types of reasoning, ranging from establishing a legally relevant custom[32] to backing up consequentialist arguments.[33] The following analysis, however, will be confined to the predominant function of historical arguments in statutory interpretation: providing evidence for legislative intent.[34] It is not only the subcategory to which the classic image of 'objective but static' most obviously applies, but also the most prevalent and characteristic example of how historical information is used in legal reasoning today. Whenever the interpretation of some type of legislation – including constitutional norms[35] and international treaties – is at issue, lawyers may argue, for example, that a rule

28 On legal methodology in Germany and the lack of a similarly distinct field in other jurisdictions see Zimmermann (n 17) 242–244.

29 Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol 1 (Veit und Comp 1840) 213–214. However, Savigny's understanding was considerably different from today's; see Jan Thiessen, 'Die Wertlosigkeit der Gesetzesmaterialien für die Rechtsfindung – ein methodengeschichtlicher Streifzug' in Fleischer (n 5) 57–61.

30 See eg Honsell (n 21) 1 and 214; Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick tr, Clarendon Press 1989) 236–239; Klaus F Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd edn, Carl Heymanns 2008) 619–620; Dirk Looschelders and Wolfgang Roth, *Juristische Methodik im Prozeß der Rechtsanwendung* (Duncker & Humblot 1996) 155–159.

31 One reason for this rather over-inclusive concept in Germany might be that it lies at the intersection of two discourses, one about legal methodology and one about the utility value of legal history for legal interpretation. On the latter discourse see Reinhard Zimmermann, 'Heutiges Recht, Römisches Recht und heutiges Römisches Recht' in Reinhard Zimmermann et al (eds), *Rechtsgeschichte und Privatrechtsdogmatik* (CF Müller 1999) 29–32.

32 On the prerequisites of customary law BGH NJW 2020, 1360 para 8; Martin Klose, 'Modernes Gewohnheitsrecht' (2017) 8 Rechtswissenschaft 370, 381–389.

33 See Alexy (n 30) 239 ('learning from history'); Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 ZNR 259, 268–270.

34 This subcategory of the historical argument is sometimes called the 'genetic argument'; see Ralf Poscher, 'Legal Construction between Legislation and Interpretation' in Jan von Hein et al (eds), *Relationship between the Legislature and the Judiciary* (Nomos 2017) 42; Zimmermann (n 17) 260–261.

35 On commonalities and differences between statutory and constitutional interpretation cf Kent Greenawalt, 'Constitutional and Statutory Interpretation' in Jules



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should or should not apply to a certain case, *because* those who made the rule did or did not intend it to apply.

Such statements about legislative intent can be based on different historical sources: the most common ones are specific documents from the legislative process, such as records of parliamentary debates, committee reports, or commentaries by the drafters; these documents are often collectively referred to as 'legislative history'.[36] But often enough, inferences are also drawn from the socio-economic or political context at the time of enactment[37] or from a comparison with the previous state of the law.[38]

### 2. *Dynamic interpretation*

Dynamic interpretation is often contrasted with static or original interpretation.[39] The static conception entails that the meaning of a legal norm must necessarily remain the same regardless of the point in time when it is interpreted. The dynamic conception, on the other hand, emphasises and welcomes the idea that the correct (or best) interpretation can change over time with respect to social developments.[40] In other words: if one has a static theory of interpretation, the same law cannot say one thing today and another thing tomorrow. A dynamic approach, by contrast, stresses that over time, it becomes less and less important what a norm was initially supposed to mean; instead, the norm's meaning can adapt to new social circumstances.[41]

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L Coleman et al (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 270–271.

36 Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013) 77 ('"Legislative history" is a judicial term of art that […] covers the process within the legislature for the development of bills.')

37 Röhl and Röhl (n 30) 619.

38 Reinhard Zimmermann, 'Text und Kontext: Einführung in das Symposium über die Entstehung von Gesetzen in rechtvergleichender Perspektive' (2014) 78 RabelsZ 315, 325.

39 William N Eskridge, Jr, *Dynamic Statutory Interpretation* (HUP 1994) 9–11; Gert-Fredrik Malt, 'Dynamic Interpretation: Spatial and Temporal Aspects in Interpretation' in Jes Bjarup and Mogens Blegvad (eds), *Time, Law, and Society* (Franz Steiner 1995) 87–89.

40 Von Arnauld (n 16) 465.

41 ibid; Eskridge (n 39) 5–6 and 9–10.



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### 3. Objectivity

Objectivity, in the presently relevant sense, requires more than mere impartiality. Hence, legal interpretation cannot be understood as objective simply because the interpreter goes about her task with an unbiased attitude.[42] Instead, the interpretative practice and its outcomes have to be rationally comprehensible, convincing, and independent of subjective tastes or preferences, which some may share while others may not. This, of course, can be the case to a greater or lesser extent. Accordingly, objectivity is not an all-or-nothing concept, but one end of a continuous spectrum.[43]

It may be worth stressing that the present use of the objectivity concept is neither very specific nor particularly demanding. Intersubjectivity,[44] rationality, or determinacy could be taken as alternative choices of terminology and are used interchangeably in the following. It should be added as a final point that speaking about objectivity in such a way does not entail problematic metaphysical claims: assigning truth values to interpretative statements does not necessarily presuppose the existence of corresponding objects in the world.[45]

## II. Historical Arguments and Objectivity

In order to understand the relationship between historical arguments and objectivity, I will shortly summarise why there is a problem at all and how legislative history could be a possible reply to it (1.). I will then turn to some of the objections that have been raised against historical reasoning, be they practical (2.) or theoretical (3.) in nature. Many of these objections lose their bite once we lower our expectations and acknowledge that an attenuated version of objectivity is all that can realistically be attained (4.).

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42 On such a use of objectivity in ordinary language Andrei Marmor, 'Three Concepts of Objectivity' in Andrei Marmor (ed), *Law and Interpretation* (Clarendon Press 1995) 178.

43 cf Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 Stan L Rev 740, 744.

44 cf von Arnauld (n 16) 466–468.

45 Marmor (n 42) 181–191.



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## 1. The problem of objectivity

*Robert Alexy* has described as 'one of the few points of agreement in contemporary discussions of legal methodology' the observation that applying the law is more than 'a logical subsumption under abstractly formulated major premises.'[46] As reasons for the insufficiency of semantics he lists vagueness of language, conflicts between norms, lack of norms, and (legitimate) deviations from the wording.[47] In fact, hardly anyone denies the need for legal interpretation, even if they do not welcome it.[48] However, leaving the determination of the interpretative result simply to the unfettered discretion of the judge (or any other law-applying official)[49] would be unsatisfactory for two reasons. First, constitutional principles like popular sovereignty[50] and the separation of powers require, generally speaking, that political decisions are made on the legislative level while judges only apply those decisions in concrete cases; if, instead, judges were unconstrained in their interpretation, legislation would lose its significance and function.[51] Second, lack of objectivity is a problem from the individual citizen's perspective: how could one reasonably receive guidance from the law if one's fate were not to be decided by general rules but by the obscure and unforeseeable whims of a judge? Litigation would amount to no more than a coin toss.[52]

As already pointed out, the reference to historical sources is one possible candidate for overcoming the potential arbitrariness of legal interpretation. The underlying assumption is that it is easier for people to agree on empirical facts than on normative judgments.[53] However, this solution to the objectivity dilemma is subject to various lines of attack. First of all, it presupposes the objectivity of historical knowledge and, thus, imports

46 Alexy (n 30) 1.
47 ibid.
48 cf Hillgruber (n 20) para 55 (calling the need for interpretation the open flank of law's claim to objectivity).
49 On the similarities between judicial and administrative discretion Franz Bauer, 'Entscheidungsspielräume in Verwaltung und Rechtsprechung' [2014] rescriptum 98.
50 cf *Bernd Grzeszick* in Dürig et al (n 20) art 20 paras 235–247; Jörg Neuner, *Die Rechtsfindung contra legem* (2nd edn, CH Beck 2005) 86–87, 140.
51 cf Hillgruber (n 20) paras 55–74; Neuner (n 50) 85–138.
52 The litigant's perspective is taken by Dworkin (n 20) 1–3.
53 See above n 21.



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the epistemological problems of the respective debate in historiography.[54] But even if we assume that a sufficient degree of certainty about the relevant historical facts can be attained, significant practical and theoretical difficulties remain.

### 2. *The practical problem: the availability of historical evidence*

Historical argumentation can find itself confronted with many practical problems. The historical context may be opaque or indeterminate; legislative history documents may be scarce[55] or silent on the issue at hand.[56] Typically, the hard cases that predominantly attract the attention of courts and legal scholars have not been considered by legislators in advance.[57] Or, even worse, the historical record provides contradictory statements. Not rarely, both sides of a legal disagreement can cite some parts of legislative history that support their position.[58] Hence, it might seem as if by invoking historical arguments the problem of indeterminacy is only transferred to a different level.

Admittedly, these concerns are not unjustified. It is undeniable that historical arguments will not in each and every case produce a clear or even any result. This, however, is not a reason to abstain completely from historical interpretation. The fact that we lack the necessary information in *some* cases does not take away or delegitimise its rationalising effect whenever it is available.[59]

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54 Out of the vast literature on the issue cf eg Mark Bevir, 'Objectivity in History' (1994) 33 History and Theory 328; Jens Kistenfeger, *Historische Erkenntnis zwischen Objektivität und Perspektivität* (ontos 2011); Jörn Rüsen, *Historik. Theorie der Geschichtswissenschaft* (Böhlau 2013) 53–96.

55 This depends on the particular conventions concerning the creation of such documents in a specific legal system. On the legislative process in Germany and the respective documents Zimmermann (n 38) 316–320; Frieling (n 5) 25–39.

56 Christian Baldus, 'Gut meinen, gut verstehen? Historischer Umgang mit historischen Intentionen' in Baldus et al (n 5) 13–14.

57 Ralf Poscher, 'Rechtsdogmatik als hermeneutische Disziplin' in Jakob Nolte et al (eds), *Die Verfassung als Aufgabe von Wissenschaft, Praxis und Öffentlichkeit* (CF Müller 2014) 203, 208. Even stronger Scalia (n 4) 32.

58 Scalia (n 4) 35 ('In any major piece of legislation, the legislative history is extensive, and there is something for everybody'); Antonin Scalia and Bryan A Garner, *Reading Law* (Thomson/West 2012) 377; Heun (n 23) 200–201.

59 Von Arnauld (n 16) 475–477; James M Landis, 'A Note on Statutory Interpretation' (1930) 43 Harv L Rev 886, 893.



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At the same time, the amount of indeterminacy can and must be diminished by collecting all the evidence and carrying out the historical enquiry as thoroughly as possible. Often enough, interpreters swiftly pick single lines from the parliamentary record and jump to their desired conclusions, while ignoring or treating as irrelevant all statements that point towards a path they do not wish to follow. The Thuringian election list case provides an instructive example not only for a bold across-the-board rejection of historical arguments[60] but also for unsound historical reasoning on the majority's side:[61] while the committee members had in fact rejected the proposal that gender-balancing should become constitutionally *mandatory*, it simply does not follow that it was meant to be constitutionally *impermissible*. In other words: art. 2 para. 2 s. 2 of the Thuringian Constitution could very well justify gender-balanced election lists even if it does not make them a constitutional requirement.[62] The majority read something into the legislative history that simply was not there. It is hardly surprising that such an attitude towards historical argumentation casts considerable doubt on its objectivity.

This goes to show that historical interpretation can be convincing only if the whole process and context of legislation is carefully considered. Otherwise, the interpreter is at risk to read too much into one single remark or to treat it as more significant than it actually is. For example, a drafter's statement of intent might later have been rejected in Parliament;[63] or, a question might have been touched upon in the parliamentary debates, but only superficially or on the basis of insufficient factual information.[64] All

60 See above n 14 and 15.

61 ThürVerfGH NVwZ 2020, 1266 paras 132–136.

62 See Danker (n 8) 1252; Möllers (n 8) 343.

63 In 1994, the legal committee of the German Parliament approved of a proposed constitutional amendment while expressly rejecting the explanatory remarks provided in the proposal, BT-Drucks 12/8165, 29. In such circumstances, these initial remarks can no longer be treated as evidence for legislative intent.

64 For an example see VG Frankfurt BKR 2020, 308 para 9. Even though the relevant legal issue had been raised by experts in the committee debates, the legislature had not addressed it. The court regarded this as a conscious legislative decision. However, given the marginality of the experts' remarks and the lack of any discussion or reaction by the committee members, the historical argument is quite weak: it seems far more likely that the issue has been overlooked; see Stefan Korch, 'Delisting und Insolvenz' [2020] BKR 285, 286–287.



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this has to be taken into account before one can make a sound historical argument or, alternatively, conclude that the evidence is inconclusive.[65]

### 3. *Theoretical problems: will and form*

Even in cases where we can confidently assert our knowledge of what *some* participants in the legislative process intended, there are still considerable theoretical problems: why should *their* ideas count for the intent of the whole legislature despite the fact that they did not find their way into the legal text? Is the whole idea of legislative intent not a mere fiction prone to manipulation and, thus, a way to circumvent the legislative process?[66] These objections are not new. More than a century ago, *Philipp Heck* established a useful classification, dividing the different lines of criticism into four distinct arguments.[67] Here, we are concerned with the 'will argument' (collective entities like Parliament cannot form a common will) and the 'form argument' (legislative intent beyond the words of the law is not endowed with legislative authority and, hence, not binding).[68]

It is not the aim of this paper to develop an extensive response to the 'will argument'. It must suffice to spell out the underlying assumptions when talking about legislative intent. Intent as a psychological fact exists only with respect to specific individuals.[69] If the legislature consists of more than one person, the notion of legislative intent requires a mechanism of (normative) attribution. Recent works on this topic have shown,

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65 According to a more pragmatic counter-argument, such a comprehensive consideration of the historical record is simply too costly and practically infeasible; see Adrian Vermeule, *Judging under Uncertainty* (HUP 2006) 189–197; Scalia (n 4) 36; Scalia and Garner (n 58) 378. This disregards the role of legal scholarship as a possible intermediary: ideally, a look into one of the larger commentaries will provide an overview of the relevant legislative history and context and point to the respective historical material. More sceptical Baldus (n 56) 13. On the role of commentaries in different jurisdictions Zimmermann, 'Privatrechtliche Kommentare im internationalen Vergleich' in David Kästle-Lamparter et al (eds), *Juristische Kommentare: Ein internationaler Vergleich* (Mohr Siebeck 2020) 441.

66 cf Dworkin (n 20) 342–350; Eskridge (n 39) 14–34; Scalia (n 4) 29–37; Jeremy Waldron, 'Legislators' Intentions and Unintentional Legislation' in Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 119.

67 Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 AcP 1, 67–89.

68 Heck (n 67) 67.

69 Frieling (n 5) 131–136.



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based on theories of collective intentionality,[70] that such an attribution is rationally feasible if structured by clear and definite rules.[71] Accordingly, they have distinguished between statements that can and statements that cannot be attributed, based on the type of intention[72] or its source.[73]

As far as the 'form argument' is concerned, one point deserves particular emphasis:[74] it is a misconception to think that the use of legislative history bestows the force of law on casual remarks by drafters or parliamentarians. While the text of the law is always authoritative due to its promulgation, statements from legislative history have a lesser status. They have to be examined carefully, checked against other statements and the general context, and evaluated with respect to the weight that the legislature has given to them. Again, a valid historical argument does not just pick a random line from the record. Instead, it requires a comprehensive investigation and evaluation of both legislative history and context. Naturally, this compromises the desired objectivity of results to some degree. At the same time, the fear of manipulation during the legislative process[75] is less warranted.

I would like to add that my position has the important pragmatic advantage that it need not declare our established social practice of legal argumentation illicit – a practice carried out by judges, lawyers, and academics and presupposed by legislators. If legislative history were inadmissible, we would have to deprive our judges from what sometimes provides the easiest explanation for a cryptic legal provision.[76] As *Lord Denning* famously put it: 'Some may say – and indeed have said – that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view.'[77] There is even less reason to accede to this view if one is faced with the alternative: judges will seek for guidance in commentaries and law journals. But surely, if academic writers can help to elucidate the law, why not the very people who enacted it?

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70 Wischmeyer (n 5) 225–250; Michael von Landenberg-Roberg and Markus Sehl, 'Genetische Argumentation als rationale Praxis' (2015) 6 Rechtswissenschaft 135, 150–161; Sehl (n 5) 99–127.

71 Wischmeyer (n 5) 377–398; Thomas Wischmeyer, 'Der "Wille des Gesetzgebers"' (2015) 70 JZ 957, 960–964. See also Nourse (n 4) 88–90.

72 Frieling (n 5) 202–208.

73 Wischmeyer (n 71) 964–966.

74 On additional counter-arguments see Frieling (n 5) 174–181.

75 Particularly pronounced Scalia and Garner (n 35) 376–377.

76 Greenawalt (n 35) 83.

77 *Davis v Johnson* [1979] AC 264, 276.



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### 4. Objectivity attenuated

Legal interpretation is never a simple discovery of empirical facts. Historical arguments are no exception. Lack of availability and evidence, ambiguities and contradictions, and the problem of attribution water down their potential for tackling the indeterminacy of legal decision-making. Still, wherever these problems can be overcome – be it through more diligent and comprehensive examination of the *whole* historical context, be it through convincing rules of attribution – historical arguments can have a significant rationalising effect on legal interpretation by providing a (more or less) solid empirical foundation and by focusing an otherwise completely open-ended debate on the question of legislative intent. Historical argumentation is not a panacea for all difficult interpretative issues. But it is a method that, if operationalised properly and diligently, brings us closer to the more desirable end of the continuous spectrum from arbitrariness to objectivity.[78]

## III. Dynamic Interpretation and Objectivity

The problem of objectivity becomes particularly pertinent with respect to dynamic interpretation. Its proponents have employed flowery metaphors for the law's continuing interpretative development over time.[79] According to *T. Alexander Aleinikoff*, legislating is like building a ship and charting its initial course while leaving its further journey and its ultimate destination to subsequent navigators.[80] *Ronald Dworkin* has compared legislating to writing only the first chapter of a chain novel that is to be completed by others.[81] One is supposed to 'bring statutes up to date',[82] to interpret 'not just the statute's text but its life',[83] or to find 'the will of

78 cf Archibald Cox, 'Judge Learned Hand and the Interpretation of Statutes' (1947) 60 Harv L Rev 370, 372 (maintaining that the metaphor of legislative intent 'sets a goal to which the judge aspires even while he knows it is beyond attainment').

79 cf Fleischer (n 2) 426–427.

80 T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87 Mich L Rev 20, 21.

81 Ronald Dworkin, 'Law as Interpretation' (1982) 60 Tex L Rev 527. See also Dworkin (n 20) 350 ('Hercules interprets history in motion, because the story he must make as good as it can be is the whole story through his decision and beyond').

82 Dworkin (n 20) 348.

83 ibid.



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the law', which can be wiser than the will of the legislator.[84] This use of metaphorical language raises the suspicion that it is meant to conceal the real difficulty: providing some objective standard of where to steer the ship and how to proceed with the novel. Many have pointed out this inherent risk of arbitrariness in all dynamic interpretation:[85] if judges (or other law applying officials) can freely adjust the law to new circumstances, what will guide them if not their personal moral and political opinions? What will constrain them from turning the rule of law back into a rule of men?

References to 'public opinion'[86] will hardly ever provide a useful standard to structure or guide the interpreter's decision. Firstly, public opinion is elusive and it is always tempting to take one's own view for the 'public' one.[87] But more importantly, the idea of one predominant opinion, discernable enough to base legal decisions on it, presupposes a society much more homogeneous than most of today's societies are. Public opinion on moral and political matters is diverse, fragmented, and hopelessly antagonistic. In the democratically constituted state, it is not legal interpretation but the legislative process that provides the place for fighting and deciding the battle between those different views.[88]

The plain observation that times have changed can never be enough to justify dynamic interpretation. Instead, one must take its inherent risk of arbitrariness seriously and look for a standard that can rationally constrain interpretative change. I argue in this article that historical argumentation, as far as it is available and produces reliable results, can provide such a standard for separating justified from inadmissible forms of dynamic interpretation. To substantiate that argument, I will now turn to the nuts and bolts of how historical arguments and dynamic interpretation can go hand in hand.

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84 Gustav Radbruch, *Rechtsphilosophie* (Erik Wolf and Hans-Peter Schneider eds, 8th edn, FK Koehler 1973) 207.

85 Eg Hillgruber (n 20) paras 58–62; Röhl and Röhl (n 30) 628–632; Scalia (n 4) 45 (stating that 'the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful').

86 Dworkin (n 20) 348–350.

87 cf Greenawalt (n 35) 101–102.

88 Lord Sumption, 'The Limits of Law' in NW Barber et al (eds), *Lord Sumption and the Limits of the Law* (Bloomsbury 2016) 15, 23–26. See also Rüthers (n 20) 20–23.



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## IV. Historical Arguments and Dynamic Interpretation

The classic image that views historical arguments as necessarily static is mistaken. To start with, these arguments have normative force only by reference to legislative intent (1.). The perception that such a reference must lead to static interpretation disregards the important distinction between intent as meaning and intent as purpose (2.), as well as the complex interplay between these different elements of intent (3.). Since legislative purposes may under changing circumstances require different means, purposive reasoning allows for a dynamic interpretation that is structured and constrained through its link to historical information (4.).

### 1. The impermissibility of 'direct' historical argumentation

Historical arguments can – in a very crude and trivial way – yield static interpretation where they simply invoke the continuity of the law and thereby endow legal history with direct normative force. At least with respect to interpreting legislation such arguments are unsound. The mere fact that something used to be the law is, generally speaking, no reason that it should continue to be the law.[89] Legislators can change the historically grown state of the law at will and decide that a legal question that has been answered one way for centuries is now to be solved in a different way. In other words: whether any argument can be drawn from an older state of the law depends on whether the legislature has decided to let that state continue or not. This is a question of legislative intent. Thus, the normative force of historical arguments can never be immediate, but must draw its legitimacy from the legislative decision.

### 2. Meaning and purpose: two types of legislative intent

But even when historical arguments refer to legislative intent they are, according to the classic image, bound to result in static interpretation. If statements made at the time of enactment have to be treated as authoritative, one cannot deviate from them in order to take account of later developments. This view disregards an important distinction that has been

89 Grigoleit (n 33) 260–262.



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drawn between two types of legislative intent: meaning and purpose.[90] Statements of meaning refer to legislators' concrete ideas about which actions, objects, case scenarios etc. are to be covered by a specific expression. Statements of purpose spell out the goals which a legal norm is supposed to serve.[91] While intent as purpose tells us something about legislative ends, intent as meaning concerns the means that should or should not be employed to reach such ends.[92] Both concepts can be found in the Thuringian election list case: the majority based its decision on an alleged statement of meaning according to which art. 2 para. 2 s. 2 of the Thuringian Constitution was not meant to justify gender-balanced election lists, while the dissenting opinions stressed the provision's purpose to promote gender equality as a reason for such justification.[93]

Since the terms 'intent', 'purpose', and 'meaning' are used in various and often confusingly different ways, two clarificatory notes should be added. First, legislative intent is viewed here as an umbrella term with meaning and purpose as subcategories.[94] Second, the word meaning is sometimes supposed to signify the end-result of interpretation: only *after* we have interpreted the norm's language do we know its true meaning.[95] Here, instead, 'meaning' is used as a short form for 'intent as meaning' and, hence, is just one element of interpretation.[96]

Even though the distinction between meaning and purpose may be subject to uncertainties, these two types of legislative intent represent two

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90 From an Anglo-American perspective Landis (n 59) 888; Cox (n 78) 370–371; Gerald C Mac Callum, Jr, 'Legislative Intent' (1966) 75 Yale LJ 754, 757–761; Greenawalt (n 35) 96–102. From a German perspective Larenz (n 17) 328–333; Frieling (n 5) 105–110.

91 Sometimes, such purposes are explicitly established by the law itself. Although traditionally uncommon in Germany, there has been a more recent trend in this direction; see Röhl and Röhl (n 30) 246. Laws of the early modern period frequently stated their goals explicitly; see Thiessen (n 29) 53–54. Nowadays, the same is true for the recitals of European legislation; see Sebastian AE Martens, *Methodenlehre des Unionsrechts* (Mohr Siebeck 2013) 178–179. Critical of this practice Marie Theres Fögen, *Das Lied vom Gesetz* (CF v Siemens Stiftung 2007) 9–23.

92 Greenawalt (n 35) 96–102.

93 ThürVerfG NVwZ 2020, 1266 para 135; Dissent Heßelmann para 17; Dissent Licht and Petermann para 27.

94 Landis (n 59) 888; Cox (n 78) 370–371; Manning (n 4) 677–678 note 11. But see also Eskridge (n 39) 14–34 (contrasting intentionalism with purposivism).

95 cf Fiss (n 43) 740 (calling interpretation 'a dynamic interaction between reader and text, and meaning the product of that interaction').

96 See also Balkin (n 26) 12–13 (listing five different ways in which the word 'meaning' can be used).



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general normative techniques that can play out both at the level of norm design and the level of norm interpretation.

(i) At the level of norm design, *Niklas Luhmann* introduced the distinction between conditional and purposive programs, which was then adopted by German administrative law scholarship.[97] Conditional programs are characterised by an if-then-structure: 'if specific conditions are fulfilled (…), then a certain decision has to be made.'[98] Purposive programs, on the other hand, prescribe certain goals that are to be achieved and, usually, some procedural framework as to how such norms are to be concretised. To use a famous example,[99] one could either set up a rule prohibiting the driving of vehicles in the park, in order to reduce noise or to increase the safety of pedestrians, or one could explicitly spell out such goals and leave it to the park authorities to find the appropriate measures to accomplish them as far as possible. The German Building Code (BauGB) uses the latter technique when authorising local authorities to draw up a local zoning plan in accordance with a list of interests – ranging from the public need for accommodation to the demands of national defence or flood prevention – that have to be taken into account and balanced against each other.[100] Another example is, again, art. 2 para. 2 s. 2 of the Thuringian Constitution, which prescribes gender equality as a relevant objective while remaining silent on how exactly it is to be reached.[101] This type of norm design may commend itself when legislators agree on the purposes they wish to implement, but do not know or agree on the precise means that are best suited for that implementation.

(ii) At the level of interpretation, the distinction between meaning and purpose mirrors the normative structure of the two programs just described. While intent as meaning retains the binary structure of 'If A, then B' by providing definitions or examples for A and B, intent as purpose requires a similar enquiry of the interpreter as the purposive program: a (consequentialist) evaluation of which interpretation will be most useful

97 Niklas Luhmann, *A sociological theory of law* (Elizabeth King and Martin Albrow tr, Routledge & Kegan Paul 1985) 174–179. On the further development Wischmeyer (n 5) 280–297.

98 Luhmann (n 97) 174.

99 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593, 607–608; Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harv L Rev 630, 662–663.

100 Section 1 paras 5–7 and section 2 para 3 of the German Building Code (BauGB).

101 On state objectives (*Staatszielbestimmungen*) generally Wischmeyer (n 5) 193–195.



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for attaining the goals prescribed.[102] For example, if we want to know what counts as a vehicle in respect of the vehicle ban in the park, historical information about the rule making process may tell us two different things: that the lawmakers did not consider bicycles to be vehicles (meaning) or that they were primarily concerned with the reduction of noise (purpose). In the first case, we have an immediately plausible argument not to apply the rule to bicycles. In the second case, the interpreter, in order to determine whether bicycles fall under the rule, has to figure out how they affect the degree of noise exposure in the park.

Critics have argued that the dichotomy between conditional and purposive is merely terminological: while all purposive programs can be reformulated as conditional ones (and vice versa), conditional norms may permit or even require purposive interpretation.[103] This criticism ties in well with the preceding two-level-analysis: purposive and non-purposive reasoning do not exclude each other but can and will be combined at different stages of the interpretative process. Norms of both designs rely on words that are open to interpretation. Such interpretation can, in either case, refer to both kinds of legislative intent. In short, purposive and non-purposive reasoning – the latter may also be called, with different connotations, textualist, formalist, or conceptualist[104] – are ideal types of legal reasoning, which, on their own, hardly ever provide a full account of what is going on.[105] The important point here is that these two models do not only pertain to norm design but can also help to structure legislative intent. In that context, the two models differ – as we shall see – with respect to the degree of flexibility they offer for dynamic interpretation.

### *3. The interplay between different legislative intentions*

While legislators must choose between a conditional or a purposive program on the level of norm design, the legislative process leaves room

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102 cf Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer et al (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 241, 265–267.

103 Wischmeyer (n 5) 191 note 45 and 290–294. See also Esser (n 19) 142–145.

104 On the (at least tentative) identification of *Luhmann's* conditional program with conceptualist or 'mechanical' jurisprudence Wischmeyer (n 5) 284. See also Esser (n 19) 142.

105 But see Wischmeyer (n 5) 293 (doubting even any heuristic value of the dichotomy).



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for various statements of intent. This is particularly clear for legislative purposes:[106] one only has to look at the page-filling recitals of European legislation to see how many different objectives can have a bearing on the interpretation of a norm. Two observations are important for understanding the interplay between such different legislative intentions. First, where multiple and even conflicting purposes are relevant, close attention to language and its intended meaning is crucial to determine how and to what extent legislators wanted to pursue those purposes (a.). Second, purposes with different degrees of abstraction can engage with and reinforce each other (b.). Both observations raise questions of priority that can be addressed through rebuttable presumptions.

### *a. Multiple purposes and the presumption in favour of meaning*

Legal norms sometimes aim at accomplishing more than one purpose. If one prohibits vehicles in the park this may serve to reduce pollution, noise, risk of accidents, and deterioration of pathways at the same time. These purposes could be aligned next to each other on a horizontal line: they coexist on the same level of abstraction and have an equal claim to be considered and, as far as possible, attained by the interpreter – in a similar way as all the objectives of purposive programs must be considered in the process of application.[107] Difficulties arise if some of these purposes conflict in a specific situation and, consequently, a choice is necessary as to which one takes priority.

Moreover, legal norms are often a manifestation of compromise between two opposing purposes or interests.[108] Sometimes, legislators spell out the conflict between different purposes explicitly before striking a balance between them. For instance, section 573 of the German Civil Code permits the termination of a residential lease by the lessor only if she has a legitimate interest. This is meant to protect the lessee from arbitrarily losing the centre of his life, but only as long as the lessor cannot show a good reason for the termination; in that case, her property interest prevails.[109] In other cases, the conflicting purpose is less visible. If the vehicle ban is supposed to reduce noise, there seems to be no countervailing objective at first

106 Eskridge (n 39) 27; Greenawalt (n 35) 99; Grigoleit (n 102) 265.
107 See above IV.2.
108 Grigoleit (n 102) 266–267.
109 BGHZ 213, 136, 146–147 = NJW 2017, 547 para 26 (including many references to the relevant legislative history materials).



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sight. But if that were the only purpose at stake, it would be puzzling why the park can be accessed by chattering pedestrians. Instead, two regulatory goals are in conflict here: to reduce noise and to offer recreational space for the public.

Pointing out that multiple and conflicting purposes can be relevant in interpreting one legal norm is important because it underscores the role of language and its intended meaning: it tells us how exactly the respective conflict of purposes was meant to be resolved.[110] This insight has significant consequences for situations where meaning and purpose collide, i.e. where there is 'a lack of fit between how the legislator expected the words of the statute to be understood, and what he hoped to achieve by means of the statute'.[111] Since it is primarily for the legislature to choose the means by and the extent to which its purposes are to be attained, this choice must be honoured by those who apply the law. Hence, there should be a presumption that in case of conflict intent as meaning takes precedence over intent as purpose.[112]

Other authors, instead, have advocated a priority rule in favour of purpose. They argue that, first, a norm's language is often just an inadequate way of communicating legislative purpose and, second, legislators are usually much more aware of a proposed norm's objectives than of the drafters' detailed elaborations of meaning.[113] While certainly one or both of these statements *can* be true in a specific case, their generalisation is problematic. As pointed out, the intended meaning may precisely manifest the relevant compromise, and that compromise may well be what legislators cared about most.[114] At least as a starting point, we should assume that they meant what they said. It is, however, only a starting point. *If* we have suf-

110 Frieling (n 5) 180–181. See also Eskridge (n 39) 27 and 32–33.

111 Mac Callum (n 90) 759.

112 Similar ideas are expressed by Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 249–251 and Frieling (n 5) 177–181, though both do not think in terms of a presumption. Ekins makes a stronger claim by arguing that purpose can trump meaning only in 'exceptional cases'. Frieling underscores the relevance of both meaning and purpose while demanding respect for the legislature's choice of means, but does not explicitly advocate a priority rule. See also Greenawalt (n 35) 100–101.

113 Claus-Wilhelm Canaris, 'Die Problematik der Anwendung von § 546b BGB auf die Kündigung gegenüber dem Erben eines Wohnungsmieters gemäß § 569 BGB – ein Kapitel praktizierter Methodenlehre' in Bernhard Großfeld et al (eds), *Festschrift für Wolfgang Fikentscher* (Mohr Siebeck 1998) 30–32; Canaris (n 18) 51–52. See also Larenz (n 17) 328–329.

114 Greenawalt (n 35) 99–100.



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ficient indication that legislators were primarily concerned with reaching certain goals and less so about how to do that exactly, the presumption can be rebutted.[115]

The dissenters in the Thuringian election list case disregarded this presumption when they turned too swiftly to the purpose of art. 2 para. 2 s. 2 of the Thuringian constitution, i.e. the promotion of gender equality.[116] Again, we simply do not know to what extent that goal is to be pursued in light of possible constraints on other constitutional principles. Instead, the majority's methodological starting point was correct when they searched for a concrete expression of meaning as to what the provision should require (or permit!) with respect to state elections.

### *b. Interconnected purposes and the presumption in favour of the lower level*

However, the interrelation between purposes is often more complex than being simply one of coexistence or conflict. A legal norm may also serve a line of purposes with different degrees of abstraction that are interlinked and reinforce each other.[117] Instead of a horizontal line one could speak of a vertical line with low-level goals specifying how exactly high-level goals should be pursued. Let us assume that prohibiting vehicles in the park is meant to reduce pollution, noise, and risk of accidents for pedestrians. These low-level purposes may themselves serve a more overarching goal: enhancing the park's recreational potential. This purpose, again, may aim at improving the quality of living for citizens or the city's attractiveness for tourists.

This relation between high-level and low-level purposes is essentially the same as between low-level purposes and meaning. In the end, we can imagine a vertical line of legislative intentions with concrete ideas

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115 Canaris (n 113) 15–25 refers to a case where an express statement of meaning (here: a list of statutory rights to terminate a lease) does not correlate with an express statement of purpose. As far as it seems plausible that one example found its way into the list by accident or by virtue of a misapprehension, the presumption in favour of meaning may be seen as rebutted in such a case. A counter-example is the decision BVerfGE 149, 126 = NJW 2018, 2542 paras 81–85 where there was a clear and deliberate legislative decision for a specific account of meaning. Hence, the presumption could not be rebutted. On that case cf Frieling (n 5) 180–181.

116 ThürVerfGH NVwZ 2020, 1266, Dissent Heßelmann para 17; Dissent Licht and Petermann para 27.

117 cf Greenawalt (n 35) 96–97; Grigoleit (n 102) 242.



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of meaning at the foot, low-level purposes in the middle, and high-level purposes at the top. Consequently, we can put the presumption in favour of meaning in more general terms: if we have a conflict between two or more elements of that line, there is a presumption in favour of the lower level. The reason is, once more, that the lower level shows us how exactly and to what extent the legislature wanted to accomplish the purposes on a higher level. And again, this presumption can be rebutted because legislators are free to place more weight on the higher regions of the line. Only if there is sufficient indication that the legislature was more concerned about reaching a certain goal than about how to achieve it, is it permissible to favour purpose over meaning or high-level purpose over low-level purpose.

An instructive example for this vertical line is the 'minced meat' case decided by the German Federal Court of Justice (*Bundesgerichtshof*) in 1962.[118] An executive regulation permitted the sale of minced meat in butcheries while prohibiting it in ordinary meat shops. As the term 'butchery' ('Fleischerei') was not sufficiently clear the court turned to the intentions of the lawmaker (here: the Ministry of the Interior). On the low end of the line, they found intent as meaning: 'butchery' was supposed to mean a place where large pieces of meat were professionally disjointed.[119] The immediate rationale (low-level purpose) behind that understanding was to keep transportation distances for minced meat as short as possible. The high-level purpose was to prevent bacterial contamination of fresh meat and, consequently, to protect consumer health. In interpreting the term 'butchery', the court underscored the importance of the lower level and refused to focus solely on the 'final' goal, i.e. the high-level purpose.[120]

### *4. The dynamic potential of historical arguments*

While the horizontal line of purposes helps to understand why we need a presumption in favour of meaning, it is particularly the vertical line that enables dynamic interpretation. As long as all elements of intent on the vertical line are well-matched the interpretative setting is stable. If these elements are in conflict already at the time of enactment – usually because

118 BGHSt 17, 267 = NJW 1962, 1524. On the historical argumentation in that case Eric Simon, *Gesetzesauslegung im Strafrecht* (Duncker & Humblot 2005) 298–299.

119 Admittedly, the Court's historical reasoning is questionable as it relies on a ministerial document that was circulated only about one year after the executive regulation had been issued; cf BGHSt 17, 267, 269.

120 ibid 272. See also below IV.4.a.



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of some legislative mistake – interpretation may be more challenging, but is equally stable. If, however, a change of circumstance subsequently alters the interrelation between the elements of the vertical line, a preference for purpose can yield a change in the interpretative result. Surely, such a preference would have to overcome the presumption in favour of meaning. If it does, we face a type of dynamic interpretation that is not arbitrary but linked to and rationalised by historical information. In fact, arguments from changed circumstances are historical in two ways: (i) they are based on a legislative purpose that has to be derived from historical sources (legislative history, context etc.) and (ii) they need to show a change of circumstance as a matter of historical fact.

Before having a closer look at how this type of dynamic interpretation works it is useful to introduce another distinction. So far, we have analysed the vertical line of purposes specifically attached to a rule, i.e. the kind of objectives one would receive as a reply were one to ask: what is that rule good for? I will first have a look at such specific purposes (a.). In addition to these, legislators may also pursue some more general, supplementary objectives such as preserving systematic coherence, which can potentially justify dynamic interpretation (b.). To complete the picture, I will add a few remarks about the possibility of dynamic interpretation beyond historical arguments (c.).

### *a. Specific purposes*

Empirical or normative developments can lead to a situation where some purpose can no longer be achieved by the originally envisaged means or where some low-level purpose has started to run contrary to the high-level purpose it was supposed to serve. Standard examples are technological progress and changed social practices. Let us assume that the regulators that banned all vehicles in the park had three distinct intentions when they established that rule: first, they thought cars should be covered (meaning); second, their aim was to reduce noise in the park (low-level purpose); and third, noise reduction was meant to enhance the park's recreational value (high-level purpose). If a car with zero noise emissions were to be constructed, that car would still be covered by the intended meaning, but



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no longer by the two purposes.[121] Hence, there is a historical argument, based on these purposes, for an exemption of these new cars from the scope of the rule. This argument would have to overcome the presumption in favour of meaning. If, however, we know (i) that noise reduction was the only relevant (low-level) aim and (ii) that banning the new cars would have absolutely no effect on noise reduction, there is a strong case for not applying the rule to these new cars.[122] Under these new circumstances, purpose would trump meaning and trigger a kind of dynamic interpretation that is backed up and justified by a strong historical argument.

The same can happen with respect to low-level and high-level purposes. If, for example, it evolved as a common social practice that people used noise-cancelling earphones in public, the promotion of recreation would no longer require the reduction of car traffic noise. Again, one would have to rebut the presumption in favour of the lower level. Still, if it were clear that recreation was the only relevant purpose and that noise reduction had no bearing on it anymore, there would be a sound argument from changed circumstances that cars should no longer be banned. High-level purpose would trump both meaning and low-level purpose.

A useful real-life example for this kind of dynamic interpretation is, again, the 'minced meat' case.[123] The defendant sold minced meat in a branch store where no large pieces of meat were processed; hence, that store could not be considered a 'butchery' in light of the intended meaning. The low-level purpose – keeping transportation distances as short as possible – also supported the prohibition since fresh meat had to be brought from the main store every day. However, due to advanced refrigeration technologies that had not yet existed at the time of the Ministry's decision, the defendant's business model did not pose any public

121 The example presupposes that the regulators were concerned about improving the recreational value *only by means of* noise reduction but not with regard to other factors like health or safety.

122 It is a different question as to how that interpretative result can be reached technically. One could either say that the new cars should not be treated as vehicles under the rule or, if one regards this as impossible, one could assume an implied exception from the rule. This technical question touches on the German debate about 'Auslegung' and 'Rechtsfortbildung' as two types of legal interpretation in a broad sense; cf Zimmermann (n 17) 256–258 and 267–268; Poscher (n 34) 41–42 (speaking of 'interpretation' on the one hand, and 'construction' on the other). Since we are only concerned with the result of such an interpretative act and not its technical classification we need not get any deeper into this distinction.

123 See above n 118.



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health threat. Consequently, the appeal court had reasoned that in light of the high-level purpose both meaning and low-level purpose could be disregarded: it considered the branch store a butchery and endorsed the defendant's acquittal. The Federal Court of Justice disagreed. Its reasoning is, in my view, best understood as saying that the presumption in favour of meaning could not be rebutted under the specific circumstances of the case. But importantly, the Court did not in principle rule out the appeal court's envisaged dynamic interpretation in face of technological progress.[124]

It should be added that the relevant change need not concern the empirical or normative reality as such, but can merely pertain to our knowledge about that reality. Legislators may have thought that some means were useful to reach certain goals when it later turns out that they are not and never had been.[125] So again, historical arguments can support dynamic interpretation in such a case. A similar type of reasoning was alluded to in the Thuringian election list case. Both dissents emphasised that after more than twenty years, the objective of art. 2 para. 2 s. 2 of the Thuringian Constitution had still not been achieved: not even a third of the state parliamentarians were female.[126] This could be read as an argument from changed circumstances or, more precisely, a changed understanding of the relevant means-ends-relation. Even if the (constitutional) legislators had thought that gender equality in Parliament could be accomplished through other ways than gender-balanced election lists, we may know better now and, hence, may re-interpret the provision in light of this new knowledge.[127] This argument was hardly fleshed out at all in the dissents, but it could be a valid one. Much depends on whether legislators in fact believed that – even without gender-balanced election lists – they would soon achieve gender equality in parliament, or whether they merely did not care as much.

124 BGHSt 17, 267, 274.

125 cf Eskridge (n 39) 30–31.

126 ThürVerfGH NVwZ 2020, 1266, Dissent Heßelmann para 26; Dissent Licht and Petermann paras 8–9.

127 See also Möllers (n 8) 338–339 (stressing the relevance of political context, particularly the recent development of the gender ratio in German parliaments).



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### b. Supplementary purposes

These specific purposes may be supplemented by a more general type of objective that is not directed at achieving a precise social aim like public health but at linking the application of a norm to changing circumstances. As such, these supplementary purposes provide some kind of reservation or qualification: they require the interpreter to take into consideration not only the norm's specific purposes but also (and maybe even predominantly) external and time-sensitive social factors like public morality, language conventions, or the legal system as a whole.

Such supplementary purposes are sometimes made explicit by the legislature, e.g. when the legal text itself refers to the technological state of the art[128] or when the documents of legislative history expressly state that some legal question should remain unresolved for further consideration by courts and scholars.[129] But more often, such objectives have to be implied and, hence, need to rely on presumptions and probabilities. Consequently, they may easily appear as mere fictions and raise doubts as to their objectivity.

Hence, intentions of that kind have to be treated with great caution and restraint. The less explicit such supplementary purposes are, the more careful one has to be. This can be exemplified with regard to two important groups of supplementary purposes that I will sketch out in the following. While one may more easily assume a legislative invitation to dynamic interpretation where the language of the law refers to particularly open-ended and time-sensitive concepts (i), it is more difficult to ascribe a general intention to secure systematic coherence to the legislature (ii). In both cases, however, interpreters can turn to dynamic interpretation if there is sufficient reason to believe that the legislature allowed for or even welcomed it. Legislating is not by its nature like building a ship while leaving its further journey in the hand of the navigators.[130] But it is certainly not impermissible to do that.

(i) Legislators can invite dynamic interpretation by choosing language that is open-ended enough to embrace social change.[131] This is particularly

128 Von Arnauld (n 16) 484–485.

129 See eg BT-Drucks 14/6040, 93 or BT-Drucks 14/7752, 14. On the phenomenon in general Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd edn, Duncker & Humblot 1983) 134–135.

130 cf Aleinikoff (n 80) 21.

131 Von Arnauld (n 16) 483–488.



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clear where the law refers to concepts like public morality[132] or customs of trade.[133] The reference to a social concept that is subject to permanent transformation strongly suggests that the legislature intended to allow for a changing interpretation in accordance with such transformations. To a lesser extent, the same can be said about all abstract or open-ended language.[134] Its use at least indicates that legislators wanted to avail themselves of the gradual shifts of meaning that all abstract concepts undergo over time and authorise corresponding interpretative adjustments.[135] An example is section 823 of the German Civil Code, which provides inter alia for the liability of someone who injures another person's health. Hardly anyone would understand the term 'health' to refer merely to illnesses known at the end of the nineteenth century. Instead, it is to be interpreted in light of current medical knowledge.[136]

It must be emphasised, however, that the interpreter has to look carefully at all available historical information before assuming an invitation to interpret dynamically. Legislators *can* permit dynamic interpretation but they need not do so. Accordingly, it has been a contentious question in German constitutional law, whether the protection of 'marriage' in art. 6 of the German Constitution can be understood dynamically (and, hence, could possibly include same sex marriages) or whether it exclusively refers to the notion of marriage prevalent in the 1940s.[137]

(ii) A less explicit supplementary purpose is the intention to secure systematic coherence. At least in some areas of the law, a large number of norms are deeply interlinked, refer to each other, and pursue the same (specific) purposes.[138] Altering one norm in such a system produces various ramifications. Consequently, legislators may want to ensure that individual norms are interpreted in light of the whole system and, hence,

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132 eg sections 138, 242, 826 of the German Civil Code (BGB).

133 eg sections 151 s 1 and 157 of the German Civil Code (BGB).

134 cf von Arnauld (n 16) 483–488 (distinguishing between legal principles, indeterminate elements in legal rules, and generic terms); Balkin (n 26) 6–7 (contrasting determinate rules with standards and principles).

135 Auer (n 18) 248–250.

136 Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts*, vol II/2 (13th edn, CH Beck 1994) 377–378.

137 cf Carsten Bäcker, 'Begrenzter Wandel' (2018) 143 AöR 339; Jan Philipp Schaefer, 'Die "Ehe für alle" und die Grenzen der Verfassungsfortbildung' (2018) 143 AöR 393. See also Auer (n 20) 250 and 266–268.

138 Such a set of norms can also include higher ranking (eg constitutional) law; cf Zimmermann (n 17) 260. On the limits of a constitutionally informed interpretation of statutory law Neuner (n 50) 128–131; Scalia (n 4) 20 note 22.



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that changes within that system can trigger a different interpretation of an unchanged norm. For example, a norm's (specific) purpose may have seemed rather commonplace at the time of enactment; subsequently, however, it may turn into an outlier or misfit as new provisions concerning similar fact situations no longer adhere to the same purpose. Does that objective become irrelevant or at least lose weight even though the norm at issue has not changed?

Certainly, one cannot simply assume a tacit reservation in favour of systematic coherence. It is not impermissible (reproachable as it may be) to legislate for the exclusive benefit of some interest or voter group. Whether some rule is to be viewed as a systematically incoherent slip or a conscious decision to grant an exceptional privilege is the legislator's and not the interpreter's choice.[139] Hence, there is a presumption that specific purposes are to take precedence over systematic coherence. However, this presumption is rebuttable where legislators in fact placed more weight on systematic concerns. If they did not say so explicitly, one has to look for other signs that point towards legislative priorities. If, for example, the respective field of law has a strong systematic character or if the rules concerned are not distinctly regulatory in nature, this can be treated as a mild indication in favour of systematic coherence.

### *c. Dynamic interpretation beyond historical arguments*

Even strong supporters of legislative intent have to admit that historical arguments will not always do the trick.[140] As already mentioned, legislative history and context may be silent on the issue at hand[141] and, consequently, the interpreter must resort to other considerations (like systematic coherence or general expediency) in order to decide whether or not to interpret dynamically. But even where we have been able to find and attribute legislative intent, there may be, under exceptional circumstances, reasons to conclude that the initially envisaged purposes are no longer relevant.

This is not the place for a comprehensive theory of the exceptional circumstances that might justify assuming a change of purpose. Instead, I will only point towards two examples. The first concerns the emergence

139 Neuner (n 50) 122–123; Hillgruber (n 20) para 57.
140 cf Neuner (n 50) 139–177; von Arnauld (n 16) 493.
141 See above II.2.



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of additional purposes. At the end of the nineteenth century, the drafters of the German Civil Code had given certain privileges to civil servants[142] and spouses[143] with respect to their liability. In the absence of any limiting considerations, these privileges applied to all areas of life. Later on, the social significance of road traffic increased tremendously and the legislature began to establish clear and rigorous standards of care in the law of traffic. Hence, a new legislative purpose emerged that could not have been foreseen, considered, and balanced against other goals at the time when the privileges were enacted. The Federal Court of Justice concluded that this new purpose had to be taken into account and excluded road traffic from the privileges' scope of application.[144] The second example concerns the substitution of purposes.[145] Sometimes, the initial goal of a rule becomes impermissible due to new constitutional requirements; if, however, a permissible goal can be substituted for the original one, it would be odd to demand that the legislature, in order to effect a change of purpose, must first abolish the rule before enacting the exact same rule again.

It seems, therefore, possible that major purposive shifts in the legal system can also have an effect on the purposes that were initially meant to be pursued by a rule. However, such deviations from the initial legislative intentions presuppose compelling arguments that have to overcome a strong presumption against such changes. In any case, these rare exceptions should not obscure the central point of this article: as a general rule, it turns on legislative intent, based on historical arguments, whether dynamic interpretation is permissible or not.

## *V. Conclusion*

I have argued in this article that the classic image of historical arguments as being objective but static is over-simplistic and misleading on both counts.

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142 Section 839 para 1 s 2 German Civil Code (BGB).

143 Section 1359 German Civil Code (BGB).

144 BGHZ 53, 352 = NJW 1970, 1272; BGHZ 68, 217 = NJW 1977, 1238. See also Honsell (n 21) 163.

145 cf Neuner (n 50) 149–151. For an example from German family law see Marie Herberger, *Von der 'Schlüsselgewalt' zur reziproken Solidarhaftung* (Mohr Siebeck 2019) 127–130.



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(1) Historical arguments cannot provide the kind of definite objectivity that is sometimes attributed to them. While lack of evidence, ambiguities, and the need for normative attribution necessarily water down that claim, historical arguments can still have an important rationalising effect on our interpretative practice due to their empirical foundation. This effect depends very much on how properly the historical enquiry is carried out.

(2) Nor are historical arguments by their very nature static. A closer look at legislative intentions reveals that they can operate in different ways. Distinctions can be drawn between intent as meaning and intent as purpose as well as between different subcategories of purposes such as low-level and high-level ones or specific and supplementary ones. While there is a presumption that legislators generally try to solve a problem in the most concrete and definite way, there are also cases where they prefer to choose the ends and leave it to the interpreters to find the required means. Hence, changed circumstances can lead to a dynamic re-evaluation without deviating from legislative intent. Instead, the appeal to historical purpose allows for an interpretation that aligns the legislature's initial plan with modern day conditions and provides the necessary standard to structure and rationalise interpretative change.

The Thuringian election list case not only presents the classic image of historical interpretation that I have taken as a starting point for my argument. It also exemplifies two classic mistakes: an all too easy across-the-board rejection on the one hand and an unjustified jumping to conclusions on the other. The majority rightly searched the legislative history for statements on how the constitutional provision was supposed to be understood.[146] This is what the presumption in favour of meaning requires. But they were unable to demonstrate that the constitutional legislators had in fact considered gender balanced election lists impermissible. That could have opened up the debate for a historical argument based on purpose: possibly, the constitutional legislators had erred and time had shown that their objective could not be reached without the new measure.[147] But these questions remained unresolved because both sides decided to have it the easy way.

Ultimately, what really matters is the quality of historical argumentation. In recent years, a slight turn in the debate has been noticeable: away from theoretical all-or-nothing controversies to more sophisticated

146 See above IV.3.a.
147 See above IV.4.a.



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accounts of how to operationalise arguments from legislative intent.[148] I have tried to show why we should welcome and further pursue this new trend. Attempts to disavow historical arguments for yielding static law are unwarranted and keep us away from doing the actual work: sorting out the historical context as best we can.

148 Sehl (n 5) 20. See Nourse (n 4) 76 (arguing that 'we must move beyond the great debates about abstract questions of legislative intent'); Wischmeyer (n 71) 964–966 (providing criteria for the practical operationalisation of legislative history); Frieling (n 5) 209 and 215 (trying to provide a method for distinguishing relevant from irrelevant statements of intent).



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