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Past Rules: Uses of History in Brazilian Legal Hermeneutics (1850s-1915)

EL PASADO Y SUS REGLAS: USOS DE LA HISTORIA EN LA HERMENÉUTICA JURÍDICA BRASILEÑA (1850-1915)

O PASSADO E SUAS REGRAS: USOS DA HISTÓRIA NA HERMENÊUTICA JURÍDICA BRASILEIRA (1850-1915)

Arthur Barrêtto de Almeida Costa[1]

Abstract
The historical element is a method of legal interpretations proposed by Savigny in the 19th century. But what does it mean when we move from theory to actual interpretation? In this article, I analyze which facts were selected by Brazilian lawyers to construct this historical element, which were the criteria used to grant normative value to historical information and which sources were employed in this process. I analyzed newspapers, annals of parliament and law books. I concluded that the historical element comprised many different meanings in the 19th century, including legislative history, social context and narratives. However, by the 20th century, it had been reduced to legislative history, focusing mostly on the analysis of amendments. In both periods, this history, written with practical intent, was deeply contextual and concrete: lawyers tried to identify the will of the legislator, *i.e.* the actual person who wrote a piece of the statute. To identify this will, they used mostly the annals of parliament, but could rely even on personal testimony or eyewitnesses.

Keywords
Historical Method; Historical Element; Legal Hermeneutics; History of Legal History; Legislative History; Brazilian Law.

Resumen
El elemento histórico es un método de interpretación del derecho propuesto por Savigny en el siglo XIX. ¿Pero qué significa cuando pasamos de la teoría a la interpretación práctica? En este artículo, analizo qué hechos fueron seleccionados por los juristas brasileños para construir este elemento histórico, qué criterios se utilizaron para dar valor normativo a la información histórica y qué fuentes se emplearon en este proceso. Analicé periódicos, actas parlamentarias y libros jurídicos. Llegué a la conclusión de que el elemento histórico tenía muchos significados diferentes en el siglo XIX, como historia legislativa, contexto social y narrativa. En el siglo XX, todavía, se redujo a la historia legislativa, y especialmente al análisis de las enmiendas. En ambos periodos, esta historia escrita con intención práctica era profundamente contextual y concreta: los juristas trataban de identificar la voluntad del legislador, es decir, la persona real que había redactado una parte de la ley. Para identificar esta voluntad, recurrían principalmente a las actas del parlamento, pero podían basarse incluso en declaraciones personales o de testigos.

Palabras clave
Método histórico; elemento histórico; hermenéutica jurídica; Historia de la Historia Jurídica; Historia Legislativa; Derecho brasileño.

Resumo
O elemento histórico é um método de interpretação do direito proposto por Savigny no século XIX. Contudo, o que ele significa quando passamos da teoria à interpretação concreta? Neste artigo, analiso quais fatos foram selecionados pelos juristas brasileiros para construir esse elemento histórico, quais foram os critérios

utilizados para conferir valor normativo às informações históricas e quais fontes foram empregadas nesse processo. Analisei jornais, anais do parlamento e livros jurídicos. Concluí que o elemento histórico tinha muitos significados diferentes no século XIX, incluindo história legislativa, contexto social e narrativas. No século XX, no entanto, ele foi reduzido à história legislativa e, principalmente, à análise de emendas. Em ambos os períodos, essa história escrita com intenção prática era profundamente contextual e concreta: os advogados tentavam identificar a vontade do legislador, ou seja, a pessoa real que havia escrito uma parte da lei. Para identificar essa vontade, eles usavam principalmente os anais do parlamento, mas podiam se basear até mesmo em depoimentos pessoais ou testemunhas.

Palavras-chave
Método histórico; elemento histórico; hermenêutica jurídica; História da História Jurídica; História Legislativa; Direito brasileiro.

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When the Past Rules the Present: Introduction

Can history have a practical utility? I am not referring to the to the classical ones usually pointed out by the theory of history: legitimation tool, political instrument, nation building, naturalization process. No. Sometimes, even abstract intellectual practices such as history can have fairly uses. It can do so by waving itself into the fabric of law.

In 1840, Friedrich Carl von Savigny proposed four modes of interpretation of statutes [*Gesetze*]: grammatical, logical, systematical and—precisely—historical (Savigny, 1840, p. 214). Since then, much ink has been dropped to clarify the meaning of these canons. Some of the original features of Savigny's proposition have changed: for instance, the "logical element" has been replaced by the teleological one—that is, interpretation in view of the particular aims of a text. Despite facing severe criticism, these methods remain relevant to legal interpretation (Krell, 2014). History, therefore, has been for a long time a central feature of the intellectual arsenal of lawyers. How come that the histories they write are frequently anachronical, fragmentary, instrumental—the frequently derided "law office history"? My aim in this paper is to historicize the very uses of history in the interpretation and application of statutes in the 19th and early 20th century to understand the conditions under which history might acquire normative value for the present.

Why late 19th and early 20th century as the object of my research? A quick glimpse into the history of the uses of history in law will clarify my choice. Jan Schröder (2003) signals that until the 17th century little attention was given to historical context in the legal, normative interpretation of a text. Law was reason, and determining the immutable *ratio* behind a text was the holy grail which jurists relentlessly craved; historical information was little more than curiosity. However, in the 18th century, the concept of law acquired more voluntaristic tones. This shift meant that the will of the legislator became much more important in determining the adequate meaning of legal provisions (Schröder, 2011). Moreover, some legal dissertations with political aims relied on the past and on documents to prove their claims, paving the way for evidence-based historiography (Barbosa, 2009). But this was not enough: to give rise to a true practice of history-writing, these new theories must be accompanied by new institutional settings and publishing practices (Schröder, 2011, p. 233-235). They mostly came about in the early 19th century with the establishment of parliaments responsible for enacting statutes and publishing their proceedings.

In England, particularly, the ban on publishing parliamentary debates was lifted in 1771 (Thomas, 1959), so to foster the formation of public opinion to be circulated in newspapers (Thomas, 1996); parliamentary reports in the form of books came to be in the first years of the 19th century (Jordan, 1931). Now, across Europe, the material and theoretical conditions for the uses of history as a source of legal interpretation were finally in place. In the second half of the century, as parliamentary democracy was adopted in most European countries, the legislative history of statutes became a routine element of legal counsel's work (Schröder, 2012, p. 359-361). In Brazil, as we shall see, similar conditions emerged around the 1850s.

In the first decades of the 20th century, conditions changed. The concept of law as a subjective will was challenged and was relinquished by many in favor of the objective will, that is, its intentions were understood as an abstract reality concretized in the text of the acts of parliament. For those adopting the new perspectives, history became much less attractive[1] (Schröder, 2020, p. 204-207). On the continent, legislative history never stopped being used, though in the second post-war it was seen as "undervalued".[2]

Today, some in Brazil talk of a "revival" of the historical interpretation of law (Santana; Cardoso, 2020). This method remains widely used in Europe (Nordquist, 2011; Vogenauer, 1997; Thaler; Wiederin, 2018; Schröder, 2003) and the United States (Brophy, 2013; Erman; Perl-Rosenthal, 2018). Yet, the past still seems to rank low in the list of priorities of lawyers: with the new trends in constitutional interpretation as the concretization of fundamental rights, legal reasoning seems to be shifting towards a focus in the future rather than the past, as judges strive to free themselves from the influence of both past and present legislators.[3] The place of historical methods in handbooks of legal interpretation is modest at best.[4]

The late 19th century can be considered the golden age of historical interpretation.[5] During this era, we can see history perfectly married to law. It is thus the better setting to study the rich variety of ways in which past texts and current interpretation can be combined.

Most previous studies of the uses of history in law have focused on legitimating narratives (Gordon, 1996, 2002; Ferreira, 2019), or on theoretical debates rather than the actual practice

1 In England, legislative history was not used between the late 18th century and 1992 (Magyar, 2018; Healey, 1999).

2 The United States, however followed an exactly opposite rout. The Supreme Court authorized the use of legislative history in 1892 (Chomsky, 2000), but courts relied little in historical information until the 1930s. Then, federal lawyers used their personal experience with the increasingly complex legislative process and influence over the legislature to gain access to hard-to-find information about the history of statutes (Parillo, 2013). At least two companies specialized in providing research on the history of statutory law for lawyers were founded in 1974 (http://www.legintent.com/) and 1983 (http://www.lrihistory.com/). In the 1980s, the Regan conservative revolution brought a new breed of lawyers to the Department of Justice and the Supreme Court that laid the ground for originalism (Baumgardner, 2019). However, after the teachings of justice Antonin Scalia, a textualist, use of legislative history declined heavily (Scalia; Gardner, 2012, p. 282-300, 303-305). Nevertheless, American lawyers still use history frequently (Sawyer III, 2019).

3 Some even argue that Brazil had no constitutional history before the current constitution (Barroso; Barcellos, 2003).

4 For example, Möllers (2020, p. 151-160).

5 To place legal sciences within the broader context of the uses of history in human and natural sciences in 19th century, see Benoît Frydman (2005, p. 350-373).

of using history in statutory interpretation (Schröder, 2012, 2020; Laboulaye; Halpérin, 2013; Vescio, 2018). I, on the contrary, intend to explore how past facts were used to interpret statues and, therefore, acquired normative value.

Historical interpretation, in this sense, has far-reaching theoretical implications for both history and law that I intend to explore. From a juridical point of view, historical interpretation brings together two dimensions of social reality whose separation is at the heart of legal theory: facts and norms. If one of the pillars of jurisprudence is the chasm between *be* and *ought*, legislative history and other forms of historical interpretation builds a much-needed bridge between these two realms by granting normative value to factual statements. From a historiographical point of view, historical interpretation gives storytelling a dimension that it is often lacking: immediate practical value.[6]

To answer those questions, I collected material from the *Hemeroteca Digital* of the Brazilian National Library. I searched for several expressions related to my theme, such as *méthodo historico* and *interpretação histórica*, but the words that returned the most results by far were *elemento histórico*, which seemed to be the technical term at the time for what we now call "historical interpretation" "*travaux preparatoires*" or "legislative history". I also searched for this term in 19th century compilations of judicial decisions[7] from the Brazilian highest court, the *Supremo Tribunal de Justiça*, but they returned almost nothing. I cannot answer, with the data I have found, how important was legislative history.[8] To supplement this, I used other sources, such as law books and the annals of parliament, to explore the impacts of the historical element on legal thought more broadly. The results ranged from brief fragments to extensive pages. For each fragment, I asked the following questions: How does the author moves from a factual statement about the past to a normative claim? Which sources are used to construct the relevant facts? What is the role of statutory law *vis-à-vis* other sources of law? What facts are deemed relevant or not? Are there formal or informal rules for interpreting the "historical element"?

The answers varied over time. History has its own history. In the first part of this article, I will discuss how the historical element was used during the Empire, when the classical rules of hermeneutics were received in Brazil and applied—even with canonical citations of Savigny. The second part will deal with hermeneutics in the first half of the First

6 For discussions on the "practical value" of historiography, or its lack thereof, see Constantin Fasolt (2004), Desautels-Stein and Moyn (2021), Anne Orford (2021) and Ian Hunter (2019).

7 Particularly, the *Arestos do Supremo Tribunal de Justiça*, organized in 1885 by Cândido and Fernando Mendes de Almeida, and the three-volume *Jurisprudência dos Tribunais*, compiled by Manuel da Silva Mafra in 1887.

8 On the risks of historical research in searchable digitized collections, cf. Underwood (2014) and Lara Putnam (2016).

Republic. The enactment of a new constitution renewed interest in uncovering the will of legislators. However, this process soon became stultified, setting the stage for new theories of interpretation to challenge the traditional outlook in the 1910s and 1920s.

I hope that this article can be useful for both historians and lawyers. If lawyers can better learn with historians how to empirically ground their working material—after all, statutes, books and court rulings are fundamentally historical texts—, historians can use the secular experience of law and the vast field of legal hermeneutics to better grasp the troubled relationship between past texts and present uses. By conflating *Historie*—the overarching narrative—and *Geschichte*—the force of facts—[9], the historical element shows how history can mediate the relationship between past and present that is fundamentally constitutive of law.

1. Legal Hermeneutics at the Political Tribune: Historical Interpretation in Imperial Brazil

The imperial Brazilian constitution of 1824 was imposed by emperor Pedro I, and the civil code remained a mirage until 1916, meaning that civil law was regulated by the 1603 *Ordenações Filipinas*, a classical example of Early Modern legal compilation. Therefore, none of them was debated in parliament. One might assume that if the very normative spines of both public and private law were promulgated without public debate, little historical information could be extracted from them. Not true. Brazilians looked way beyond the traditional sources for the "historical element": they used ordinary statutes, administrative documents and even contracts. In this section, I will first discuss what was this historical element and its relationships with 19th century legal hermeneutics. Second, I will discuss which kind of information was selected by lawyers to be turned into historical fact and vested with the power of legal command. Third, I will present the first seeds of a tendency that would gradually transform attitudes towards history: historical interpretation not merely as the understanding, but as criticism of the legislator.

The term "historical element" could label quite different kinds of information: it could mean the law of the past, legislative (Annaes do Parlamento Brasileiro, 1860; 1869a), judicial or administrative precedents (Correio Paulistano, 1862), a narrative, information on the legislative history, or mere tradition (Imprensa Academica, 1868; Revista Mensal do Instituto Scientifico, 1866; Nogueira, 1873). The expression and its double "*método histórico*" were at first used in Brazil to refer to political analysis in the 1830s (Montezuma, 1836).

9 See Reihart Koselleck (2006).

By the 1850s, it started to be used in literary criticism (Diário do Rio de Janeiro, 1855a); in the 1870s, it was applied to political economy (Diario de Pernambuco, 1878); and by the 1880s, it was used in grammars that describe the history of language (Annaes do Parlamento Brasileiro, 1877).

For law, 1850s are the initial point. But in the 19th century, the historical element was used not only by judges and jurists as expected, but mostly by legislators. Back then, one of the main functions of parliament was legal interpretation: the so-called authoritative or authentic interpretation (Paula Batista, 1872, p. 8-10; Pimenta Bueno, 1857, p. 69-83). This practice encouraged the highest political body—the National Assembly—to engage in debates on technical issues of statutory interpretation, discussions that often recall law conferences more than political disputes. Although Savigny (1840, p. 206-212) criticized authentic interpretation, Brazilian congressmen did not hesitate to cite the German jurist in parliament.

The historical element, therefore, was not always interpreted orthodoxically. To introduce its practice, I will discuss one case in which historical interpretation was repeatedly employed: the parliamentary debates on the act 1.083 of 22 August 1860, the so-called impediments act (*lei dos entraves*) (Brazil, 1860).

This statute was enacted in the aftermath of a cambial crisis that happened in 1857. A bank crisis in the USA led to a drop in the value of the dollar. In response, the Brazilian minister of finances authorized six banks to issue more paper money. After the crisis passed, however, the president of the *Banco do Brasil*, urged the government to restrict the credit so the banks would have to destroy paper money in order to bring the value of the *real* in line with the gold standard (Iudícibus; Ricardino Filho, 2012). The government subsequently sent a project to parliament reestablishing the gold standard, which would three years later become the impediments act.

During the debate of the bill in parliament, the Viscount of Uruguai, a conservative leader and later prominent administrative law scholar, used the historical argument to prove that the future impediments act was nothing more than an interpretation of the previous act 683 of 5 July 1853 (Brazil, 1853). Uruguai argued that "through the historical element, we know the state of law on the matter when the statute was enacted, and we verify if it follows or annihilates the traditions of the legislation" (Annaes do Parlamento Brasileiro, 1859; Jornal do Commercio, 1859). He then analyzed several statutes from the 1820s and 1830s to demonstrate that they had always gone in the direction of reducing the circulant medium to revalue the currency and keep it in line with the metal reserves. The bill under discussion went in the same direction, and therefore, brought no innovation to the Brazilian legal order. Therefore, it should be enacted by parliament as an interpretative statute. Deputy Dantas responded employing the same historical element to state that the 1853 act was not obscure and, therefore, did not need to be interpreted. He also read speeches from the author of the statute supporting his interpretation (Annaes do Parlamento Brasileiro, 1859). Deputy Fernandes da Cunha also read

several past statutes illustrated how paper money had always been presupposed as legal tender in Brazil (Correio Mercantil, e Instructivo, Politico, Universal, 1859a).[10]

A few years later, in 1861, parliament tried to interpret this interpretative statute with the budgetary act (Jornal do Commercio, 1861). In a speech at the senate, Luís Pedreira do Couto Ferraz, Viscount of Bom Retiro, stated that the house should use the historical element, that is, the will of the legislator and the parliamentary debates. By legislator, he meant the very person who actually wrote the bill that became law. In that case, who was the lawgiver? Ferraz himself. He went up to the tribune and said that "[I] *reveal* that, when [I] presented the substitutive amendment [...], [I] intended to establish the maximum of the emission of banks according to the medium term of certain trimesters". He went further, also revealing that the commission that should review the project, through one of its members, the Viscount of Sapucaí, had asked him what he meant by the phrase "the sum of banknotes in circulation". Ferraz responded that this referred to the money actually in the hands of people. Sapucaí was a senator at the time, so, by referring to this previous conversation, Ferraz provided a witness that his interpretation of the statute was not a present and voluntaristic one, but rather the view he held when the filled the bill.

This story demonstrates two points about historical interpretation in imperial Brazil. First, legislative history was the central, but not the single meaning of "historical element". Interpreters could resort to past statutes and to the state of the law at a given point in time, as Uruguai did, or to the meaning previously attributed to a word, like the Rural Bank. Second, the legal theory behind legal hermeneutics at the time was deeply concrete. Today, we tend to understand "legislator", "court", "constituent power", etc. as abstract entities. Not in the nineteenth century legal debates: then, "legislator" meant the person who actually wrote the bill or those that were in the room when it was voted; "will" meant the volition of the person who filed the bill.

Therefore, what was the relation between this "historical element" and the German historical school? A somewhat close one, on the beginning, but it faded away after a few years. The very term "historical element" [*historisches Element*] was coined by Savigny[11] – and some Brazilians were aware of it. Both the Viscount of Uruguai (Annaes do Parlamento Brasileiro, 1859) and his adversaries (Correio Mercantil, e Instructivo, Politico, Universal, 1859a; Correio Mercantil, e Instructivo, Politico, Universal, 1859b), for instance, cited the German legal historian during the debate on the act of impediments. This was not the last time that the Frankfurt jurist was cited in parliament (Annaes do Parlamento Brasileiro, 1869b). References to Savigny and the historical method abound in the few works of theory published in

10 Later, the debate spilled to the press: Correio Mercantil, e Instructivo, Politico, Universal (1859a).

11 On the reception of Savigny in 19th century Brazil, see Souza (2015).

19th century Brazil discussing legal hermeneutics (França, 1861; Mello Junior, 1861; Paula Batista, 1872). Moreover, the article from Édouard René de Laboulaye *De la méthode historique en jurisprudence*, got a Brazilian translation in the very same year when it was published in France, 1855. Brazilians were therefore somewhat up to date with recent European developments.

When these theories were subjected to pressure on the ground, however, they morphed into different – and sometimes unconventional – configurations. Savigny briefly described only the four elements – historical, systematic, grammatical and logical/philosophical (later, teleological) –, leaving theoretical voids to be filled. Which leads to my next question: what were the relations between these four different elements?

Paula Batista (1872, p. 14-15) slightly diverges from Savigny. While he starts with the German scholar's system, he merges the systematic and historical elements into a single, "scientific" one. He explicit adopts the maxim *interpretation cessat in claribus*, contrary to Savigny. This shift suggests that the Brazilian jurist had placed the historical element into a secondary position. For instance, Paula Batista highlights the importance of legislative history for, but primarily mention this method for resolving obscurities in the law (Paula Batista, 1872, p. 36-37). In his discussion of the motives and ends of the law, he does not mention that legislative history could be used (Paula Batista, 1872, p. 36-37).

Paula Batista – though very influential – was not entirely aligned with the mainstream of Brazilian legal practice. More than once, congressmen interpreting previous statutes in parliament asserted that the only elements of interpretation were the grammatical and the historical ones (Annaes do Parlamento Brasileiro, 1868; Jornal do Commercio, 1868). They argued that if interpretation was meant as the unveiling of a will embedded in the text,[12] then only two fields needed investigation: the text itself and its creation process. Some conflated the teleological element with the legislator's intentions, which they believed should be explored through history.[13] In some cases, it was even suggested that if there was a conflict between text and legislative intent embodied in history, the latter should prevail (A Provincia do Espirito Santo, 1886).

To understand the unrelenting presence of history in interpretation, we must explore the tensions between the systematic and historical elements – an iteration of the ancient clash between dogmatics and history. In 19th century Brazil, time could beget structure, as we can see in a discussion that took place in Parliament in 1871 (Annaes do Parlamento Brasileiro,

12 Slightly different from Savigny (1840, p. 213), which conceived interpretation as the reconstruction of the thought, and not the will of the legislator.

13 Examples in Manuel Azevedo (1876) and Manoel Mafra (1877).

1871). Emperor Pedro II was about to leave the empire, and the National Assembly was voting on the authorization. Deputy Coelho Rodrigues discussed whether the houses should also elect the regent and determine the limits of the regency using the historical element – that is, "the complex of circumstances that preceded, followed and determined the legislative disposition" (Annaes do Parlamento Brasileiro, 1871). But what were those circumstances for a constitution granted without legislative approval? Coelho Rodrigues pointed to two elements. First, he argued that the unenacted 1823 project of constitution explicitly stated in article 44, § 2nd, that the assembly was responsible for electing and determining the limits of the regency. When emperor Pedro I unilaterally dissolved the assembly, he stated that the new constitution would be "twice as liberal as the project"; therefore, the 1824 charter could not grant the legislative branch less power than the 1823 project. Second, the Portuguese constitution of 1826 was considered as a historical clarifier of the Brazilian 1824 one, as they were almost identical and granted by the same emperor/king. In 1852, the Portuguese legislature enacted an interpretative additional act concluding the constitution should be read as imposing that parliament should elect the regency. According to Coelho Rodrigues, the Brazilian constitution must forcefully follow the same logic. This was not the only instance in wich Portuguese interpretative acts were argued to apply to Brazil (Diario do Rio de Janeiro, 1872). Both arguments from Coelho de Souza collect historical evidence, but they use those data to systematically interpret the constitutional text.

But this was not always the case. In the 1850s, an opinion article argued that the Brazilian commercial code was based on the French and Spanish codes and, therefore, they should be used to interpret the Brazilian document. However, the author classifies this procedure into the "systematic element" (Diario do Rio de Janeiro, 1855b). We could also recall the 1860s debates on the nature of the moderating power between Brás Florentino Henriques de Souza, Zacarias Goes de Vasconcellos and the Viscount of Uruguai.[14] Much of their discussions concerned the true meaning of Benjamin Constant's work and his concept of *pouvoir neutre*, which was considered the "origin" of the Brazilian moderating power. Those debating did not bother to clarify whether they were doing history or system.

1.1. The Anatomy of History: Which Facts Became History in Imperial Legal Hermeneutics?

What kind of factual information assembled in law books was granted normative force by interpreters? I found six classes of historical information to which normative value was attributed.

14 On this debate, cf. Walter Guandalini (2016). On the moderating power in the Brazilian constitution, cf. Lynch (2005).

First, as previously discussed, legislative history as a key component. The process of a bill coming into law was scrutinized by jurists and lawmakers in search for the intention of the legislature, or, more frequently, of the legislator himself. Debates were often cited, sometimes with precise references to the pages of the annals where they could be found. Other frequently used resources were rejected amendments (Revista do Instituto dos Advogados Brasileiros, 1868; Jornal do Commercio, 1881), especially when the motives for reasons were debated.[15] Lawmakers sometimes compared the text of statues before and after an amendment to find out whether the final command should be interpreted restrictively or broadly (Jornal do Commercio, 1884; O Tempo, 1880). When a bill was filed by the government, interpreters could cite ministerial reports (Jornal do Commercio, 1886a), opinions from the Council of State (Correio Paulistano, 1862) or exposition of motives (Jornal do Commercio, 1889a) to understand the executive branch perspective, as well as reports from parliamentary commissions (Correio Paulistano, 1877) and reports of the lawmaker who filed the bill (Diario do Rio de Janeiro, 1871). Generic mentions of the discussions abound (Jornal do Commercio, 1868). Finally, Legislative history was not univocal, as deputies frequently diverged in their interpretation of the annals of parliament.[16] This divergence implied that references to legislative history were considered strong arguments, requiring rebuttals.

Second, we have past law. In these cases, the interpreter analyzed the state of the legal system at the time a given statute was enacted to determine whether the new text had changed the tradition of Brazilian law or simply followed the rules already in place. This analysis could involve reviewing past projects, for instance (Annaes do Parlamento Brasileiro, 1869c; Jornal do Commercio, 1886b); or studying the history of applicable roman law (Nogueira, 1877); or precedents (Jornal do Commercio, 1888a).

Third, genetic origin. That is, if a statute reproduced the wording of preceding legislation, this legislation should be used to clarify the meaning of the new statute. This approach was used when the Criminal Code was interpreted in light of the 1603 Portuguese ordinations,[17] and when the ordinations themselves were interpreted according to Roman law (Tribunal da Relação do Rio de Janeiro, 1870).

Fourth, narrative. Sometimes, jurists departed from the traditional approach of analyzing individual facts and instead arranged them into a narrative claiming normative significance. For instance, Silveira Martins analyzed the legislation on slavery and argued that each

15 Example from the Tribunal da Relação do Ceará (1877).

16 Example of a deputy arguing that the speech of a previous legislator in the debates of an electoral statute referred to the second, and not to the first election, as the first lawmaker had implied: Jornal do Commercio (1877).

17 That was the case in a ruling from the *Supremo Tribunal de Justiça* (1877) and on Jornal do Recife (1887).

statute enacted over time intended to broaden freedom from the restrictions imposed by previous legislation (Jornal do Commercio, 1886c). Therefore, in case of doubt, new statutes on slavery should be interpreted in favor of freedom. Other examples could follow (A Regeneração, 1873; Diario do Rio de Janeiro, 1873; Perdigão, 1879).

Fifth, factual context. This could simply entail banal clarifications, such as the meaning of a word in the past (Constitucional, 1864), or more complex remarks, such as that if the conditions under which the statute had been enacted changed, its interpretation must also be modified (Jornal do Commercio, 1887, 1888b, 1889a, 1889b, 1889c).

Sixth and last, interpretative tradition. Jurists were much deferential to reiterated unopposed practices, especially when these practices reflected the government's understanding of the law. Sometimes, the "historical element" was found on ministerial reports interpreting a statute, and, therefore, providing the government's view (Correio Mercantil, e Instructivo, Politico, Universal, 1866). For instance, in 1876, the *Tribunal da Relação do Rio Grande do Sul* (1876) interpreted that the provision stating that slaves who left the country became free did not apply to those merely transiting abroad using both parliamentary records and extradition treaties signed with Uruguai. The judges considered that, if the government thought extradition of slaves was possible, the executive considered that, in some cases, Brazilian slaves abroad were still slaves. Whenever possible, judges tried to follow the executive interpretation of statutes, instead of using law to check and control the administration.

Jurists looked sought out some classes of facts that could have normative consequences. And, if they were looking, there was certainly people offering such information to them. Several legal books provided the "historical element" of the themes they addressed for counselors, judges and others use in their court practice.

For instance, Bandeira Filho's (1876) book on the act on non-Catholic marriages has a whole section dedicated to the "historical element", featuring opinions from the Council of State and commentaries on parliamentary debates. Other books extensively discussed parliamentary debates,[18] or were preceded by historical introductions intended to assist with interpretation.[19] Joaquim Pires Machado Portella's (1876) book had a whole section called "sources of the Brazilian constitution" in which he transcribed the articles from foreign constitutions (mainly the Portuguese, French and Spanish ones) and the botched 1823 project of constitution. According to a review, this work allowed the "study of the history of our constitutional law", helping "the reader to determine his interpretation on many controversial

18 See the Viscount of Uruguai's book on administrative law and Belizário de Souza's book on electoral law (Diario do Rio de Janeiro, 1872).

19 Cândido Mendes de Almeida's *Ordenações Philipinas* (Godoy, 2021) and *Direito Civil Eclesiástico Brazileiro* (Martins, 2021, p. 41-42).

issues" (O Globo, 1876). Finally, Cândido Mendes de Almeida provided historical information through his editions of other authors' works. A review of his edition of the *Princípios de Direito Mercantil* highlights that he added several abrogated statutes from before the enactment of the Brazilian Commercial Code, which would be useful for the "interpretation of our code by the historical element" (Diario do Rio de Janeiro, 1872).

An important resource that facilitated the integration of history into legal interpretation was the book *A consituinte perante a história* (*The Constituent Assembly [of 1823] before History*), from Joaquim Ignácio Homem de Mello, published in 1863. In this book, Homem de Mello presented the botched project of 1823 and the 1824 constitution side by side, showing the deep relationships between the two texts. Since there were no surviving procedures from the Council of State that drafted the Brazilian constitution, the author argued that this comparative approach was the only method to apply "the history of the law" to "the interpretation of our constitution" (Actualidade, 1863). By comparing the two texts, interpreters could see which doctrines the drafters of the constitution had accepted, rejected, widened or restricted. By doing so, "the interpreter can, at least approximately, follow the affiliation of ideas inside the spirit of the lawgiver and almost restore his thought" (Actualidade, 1863).

Bandeira Filho, the Viscount of Uruguai and Cândido Mendes: all of their books suggest that the interpretative practices I have been describing herein were not exceptions, but rather common enough to affect how law books were written.

Scholars, judges and lawmakers meticulously scrutinized every move of previous legislators in a frantic and deferential search for their will. However, after such close study, they began to realize that lawgivers might not warrant that much respect; Brazilians started to make such delusive findings in the 1880s. For instance, an opinion article from 1887 discussing the Rio de Janeiro state act 2,848 on tax law laid bare how sloppy the legislative procedure could be, showing how drafters failed to update cross-references in the text after the bill had been amended (O Fluminense, 1887). The writer argued that the original intention of the legislator should be followed rather than the poorly drafted text.

Poor wording might demonstrate that lawmakers were not the very incarnation of reason. Unveiling the political and sometimes unscrupulous intentions of legislators could erode the legitimacy of the previously sacred will of the Lawgiver. And there was hardly anything more politically charged in 19th century Brazil than slavery. The dubious intentions of legislators were laid bare on the debates concerning the sexagenarians act, an 1885 statute that freed over 60 captives and setting a 13-year timeline for the abolition of slavery. A year after this statute was approved, some deputies clashed over whether the mandatory decrease of the price of slaves should start from the day the statute was promulgated or from when the slave was registered. Senator and Prime Minister Baron of Cotegipe argued in parliament that, when the bill was being debated, deputy Ulysses Vianna intended to present an amendment declaring that the devaluing of slaves should start when the statute was enacted (Jornal do Commercio, 1886d). However, politics got in the way: if both liberals

and conservatives were backing the bill, the latter would drop their support if the amendment was approved. Vianna therefore retreated from his proposition. This, according to Cotegipe, proved that deputies intended that the devaluing would start only after slaves had been registered. Senator Saraiva, however, counter-argued that Araújo Gois had presented an amendment stating that the devaluing of slaves should start after the register, however, it was rejected (Jornal do Commercio, 1886e), and Cotegipe's understanding had also been repudiated. Later, Vieira himself published a letter clarifying that he had retracted his amendment because he believed that, after the other one had been rejected, the will of parliament had been clarified (Jornal do Commercio, 1886f).

In the annals of parliament, jurists could not find the abstract *Legislator*, but rather a fractious and conflictive mass of lawmakers divided in groups struggling for power. As Joaquim Nabuco wrote commenting on the law of slavery, if one delves into the parliamentary records "down to the detail, one arrives to this true and shameful wound of our county, that statutes or regulations on slaves are made by those directly interested in slavery" (O Paiz, 1886). The historical element here not only supported the application of the law, but also served to delegitimize statutes.

In the Brazilian empire, even though the constitution had been granted without debate in parliament and many statutes came from early modern kings or even Roman antiquity, jurists found creative ways not only to discuss the history of statutes, but also to use the information they found to meaningfully interpret and apply positive law. How would this practice fare after legal reforms in the early Republic?

2. The Shadow of the Constitution: Historical Interpretation – And Constitutional History – In the First Republic

When a country changes its political regime, the balance of times shifts: the past yields to the future. Yet, after dust settles, compromises must be found. After the monarchy was overthrown in 1889 and the new constitution was enacted in 1891, Brazil had to reconcile the new foundations of order with a legal system and political class that still bore many continuities with the immediate imperial past. This contradictory, tense environment was also reflected in the evolution of the historical element in Brazilian hermeneutics. Two parallel movements influenced how Brazilians used the past to interpret law: first, the historical element gained importance; second, the very meaning of this historical element became more restricted, as most historical analysis focused on the constitution, and the pool of sources from which Brazilians drew shrunk, mostly comprising legislative history. These two movements are the main topic of this section.

Three phenomena demonstrate that the historical element features more prominently in First Brazilian Republic law: it affected the very meaning of parliamentary debates; legal literature aimed at providing the historical element emerges; and the first consistent pushbacks against the historical element take place.

Parliamentary debates. Several examples reveal that deputies and senators believed that their discussions at the house floor served also (or even mostly) to clarify the true meaning of the law for future interpreters. Coherently, deputies lamented when bills were rushed into approval without debates, as this would mean that the legislative will would remain obscure (Minas Geraes, 1894). Lawmakers praised the speeches of colleagues for explaining the bill so that a historical element would be registered in the annals of parliament (Minas Geraes, 1899; O Estado do Espirito Santo, 1891), and bemoaned those who remained silence precisely because future interpreters would be left unaided (Correio Paulistano,1913; Annaes da Camara dos Deputados – ACD, 1893). They explicitly declared that they made speeches (ACD, 1902, 1907a, 1914a), raised questions (ACD, 1913a) or presented votes in writing (ACD, 1914b) to clarify the meaning of the bill for future interpreters.

If the annals of parliament were the golden book casting light over statutes, their contents would be fiercely disputed and sometimes misused. It was a common practice for judges and lawyers to argue that, if an amendment had been voted down by parliament, the doctrine it espoused had been rejected. Some deputies declared in speeches that their votes should not be interpreted in this way (ACD, 1903a, 1907b). In a debate in 1907, deputy Rivadávia Corrêa cracked under the weight of the responsibility: when he presented some amendments, he said his justifications should not be used as a historical element in future interpretation, as he was just exploring possible arguments (ACD, 1907c). Lawmakers were aware that whatever they said inside a parliament building would be used for interpretation. Antônio Carlos reached a level of paroxysm when, on the floor of parliament, he reproached his colleagues for taking too long to discuss the wording of a statute. He argued that the meaning of the document had been so thoroughly debated that the annals sufficed to clarify the legal commandment, regardless of the exact wording to be chosen (ACD, 1912a). Why bother so much with the text when history was illuminating enough?

A second proof of how important the historical element had become was that the legal literature increasingly catered to its audience with the past in mind. For instance, an electoral law book by Oscar de Macedo Soares was praised for relying mostly on legislative history to comment the law (O Paiz, 1909a). However, history found its true home in constitutional law, with its most ardent promoter being Felisbelo Freire.[20] He wrote a three-volume collection on Brazilian constitutional history. The first volume discussed republicanism, while the second one described the provisional government from 1889-1891. Volume III, more interestingly for our purposes, described the Constituent Assembly. The work commented on each article of the original project along with its amendments and debates, supplemented by notes

20 On early Brazilian constitutional history, cf. Godoy and Amaral Júnior (2016) and Galvão (2017).

taken by Freire himself, who had been a member of the assembly (Freire, 1895, p. XII). These notes were meant to provide the "historical element, indispensable to determine the true meaning of the constitution" (Freire, 1894, p. XII). The book was designed to be a sort of hermeneutic toolbox for jurists. The proof? Freire himself, after being reelected to parliament, repeatedly cited his book in speeches to use the "historical element" to interpret constitutional provisions (ACD 1910a, 1915a, 1915b, 1915c, 1915d; O Paiz, 1909b). He was an enthusiast of the historical element, and was not restricted to his own work. When an article of the State Constitution of Bahia was being debated in the federal parliament, he took a printed version of the annals of the Bahian Constituent Assembly, raised it and declared: "here it is a precious book", and stated that he tried to obtain the annals of every state "to get this historical element" (ACD, 1905a).

Freire was not alone; other deputies and senators cited his book (ACD, 1901), and even traditional commentaries of the constitution (Jornal do Commercio, 1901, 1904; O Jornal, 1926), to find historical information. In reviews, Freire's and Barbalho's books were praised for filling the gap left by the absence of comprehensive commentaries on the 1891 constitution (Diario de Pernambuco, 1903; Jornal do Recife, 1908), as the annals of parliament were seen as providing the true "development to the doctrines of the constitution" (O Jornal, 1926). Therefore, constitutional history was born in Brazil out of the historical element. It may not be a coincidence that it was also in the 1890s that legal history gained a place in law schools' curricula, with the first book on the discipline being published by Isidoro Martins Jr.[21]

So much attention to the historical element invited backlash, though criticism usually did not entirely dismiss the usefulness of historical investigation (O Paiz, 1910). Judge José Viveiros de Castro, for instance, argued that history bore no value against the clear text of the statute (Jornal do Commercio, 1898). He pointed out that parliamentary debates were often chaotic, and more significantly, that relying on the historical element could petrify the law and hinder the "most useful cooperation from case law". But even though he defiantly declared that he does "not need to shake the dust in archives fighting the bookworms for fragments of rejected amendments", in another text from the next year, he admitted that the historical element could bear some value even against the crystalline constitutional text (A Federação, 1899). Others went further and implied that "reconstruct the thought of the legislator" was nothing more than a trick to distort the law (O Paiz, 1911a), a "fog" covering the truth (Jornal do Commercio, 1899). One statement, however, stand out. Deputy Paranhos Montenegro, a former judge, pointed out that the historical element had little impact on the application of statutes because "we do not legislate only for capital cities and illustrated

21 For those developments in Germany, cf. Gerhard Dilcher (1998).

judges": in the backlands, where less-educated magistrates worked, it was hard to access the annals (ACD, 1894). Thus, the historical element was criticized by judges as a straitjacket for courts and as something found in inaccessible repositories.

Now we proceed to the second phenomenon affecting the uses of history in legal hermeneutics: restriction. In the two decades following the promulgation of the new constitution, lawmakers frequently turned to the annals of 1891 to understand what had been intended – frequently by themselves, as many members of the constituent assembly remained in parliament. During this period, constitutional interpretation dominated the agenda of the historical element, with other objects of historical inquiry returning only in the early 1910s. Moreover, the historical element came to mean almost always "legislative history". There were still some forms of narrative construction (ACD, 1905b) or "genetical interpretations" of the constitution (Diario de Pernambuco, 1905), especially confronting it with its American inspiration (Jornal do Commercio, 1896a; ACD, 1896, 1897; O Paiz, 1893), or the still-valid Philippine ordinations (Gazeta de Noticias, 1892; Jornal do Recife, 1894), but those were exceptions.

Legislative history also narrowed. The lawgiver's intent was now demonstrated almost exclusively through amendments presented during debates on the bills. Jurists pointed out to which parts of the text had been changed positively to demonstrate the intent of the Parliament (Jornal do Commercio, 1891a, 1897, 1904; ACD, 1892a; Gazeta da Tarde, 1901; O Paiz, 1907). They explored evolution of the text throughout the legislative procedure to show the general thrust of parliamentary intent (ACD, 1891a, 1912b, 1915d). Most controversially, they relied on rejected amendments to demonstrate that the lawmakers had demised certain rules or theories (ACD, 1891b, 1901, 1910b, 1911a, 1912c, 1913b, 1915b, [*s.d.*]; A Imprensa, 1911; A Rua, 1915; Jornal do Brasil, 1911; Jornal do Ceará, 1904; Jornal do Commercio, 1891b, 1896b; O Imparcial, 1913; O Paiz, 1911b; O Pharol, 1901). These amendments were sometimes interpreted with the aid of speeches from their sponsor (ACD, 1892b, 1895, 1913c; A Republica, 1906; Gazeta de Noticias, 1896; Jornal do Commercio, 1891c; O Dia, 1905), written declarations of vote (ACD, 1891c) and written motivations of amendments (ACD, 1893) but such documents were rarely available. Therefore, interpreters frequently found themselves having to face only the bare amendments. This could lead to dissent, as different people with varying objectives could see diverging meaning in such thin evidence as the fate of an amendment. This was what happened in four of the five major debates of the early years of the Brazilian Republic that revolved around the historical element. These debates included the limits or professional liberty, the criminal responsibility of priests celebrating religious marriages before civilian ones (ACD, 1900a; Correio Paulistano, 1893; Gazeta de Noticias; 1893; Jornal do Commercio, 1901; Republica, 1891), the fate of goods from religious orders (ACD, 1893, 1911b; Jornal Pequeno, 1911; Jornal do Commercio, 1891a) and municipal autonomy (A Republica, 1906; A Rua, 1915). All of them concerned parts of article 72 of the 1891 constitution—its Bill of Rights—and amendments proposed during the drafting of political charter.

Let us explore the most important of these debates: the one concerning professional freedom, unfolding from the onset of the new constitutional regime all the way to the 1910s. Art. 72, § 24, of the constitution guaranteed freedom to pursue any profession, but at the same time, the 1890 Penal Code criminalized the "illegal exercise of medicine" (art. 156, sole paragraph), and many states required that those willing to be admitted to the bar hold a law school diploma. This raised the question: Were those restrictions constitutional? Many figures, such as judge Francisco José Viveiros de Castro, argued that if the plain text of the constitution did not restrict professional freedom, other statutes could not establish conditions (Jornal do Commercio, 1898). Their adversaries, however, mentioned that two amendments had been filed before the constituent assembly stating that the law should not require diplomas from those willing to enter a profession; however, these amendments were later rejected. Jurists disagreed on the legal meaning of this rejection. Advocates of restricted professional freedom defended that rejection of an amendment meant rejection of its motives (ACD, 1913b; Jornal do Brasil, 1896). Moreover, the amendment had been presented by positivist congressmen, and was present in the project of constitution drafted by the Positivist Apostolate; since positivism was defeated within the 1891 assembly, its ideas should be discarded as well (Jornal do Brasil, 1895). Advocates of wide professional freedom relied on the bare text of the constitution (Jornal do Commercio, 1899; O Paiz, 1911a), and alleged that the amendments were rejected only because the text was already clear enough (A Federação, 1899).

This debate covered one of the major contending points of the hermeneutics of parliamentary history: how to interpret the rejection of an amendment? Many jurists highlighted that *a contrario sensu* interpretations were valid only when supported by additional evidence, such as speeches and written declarations. A deputy, for instance, recalled that during the constitutional assembly, Francisco Badaró filed an amendment declaring the constitution was the supreme law of the Republic and could not be revoked by any statute. Though this amendment was rejected. The congressmen stated that it would be absurd to infer that the constitution could be revoked by ordinary statutes (ACD, 1902). Reading into amendments was risky.

Interpreters nonetheless craved certainty. In their pursuit of safe ground, jurists – and legislators – clenched to what is perhaps the most concrete evidence of legislative will: testimony from past lawmakers.[22] On at least three occasions, when the true meaning of a past statute was being debated in parliament, deputies or senators who had either helped draft the bill (ACD, 1905c) or witnessed the debates back in the day (Minas Geraes, 1893) took to the tribune to offer their "personal testimony" (ACD, 1915c) on the will of the original legislator

22 In imperial Germany, some lawmakers and people involved with the legislative process were even called to court to testify on the meaning of parts of the recently enacted Bürgerliches Gesetzbuch (BGB) (Thiessen, 2013, p. 65-69).

or the intention behind the rejection of a certain amendment (ACD, 1898). However, these lawmakers strived to show that they were simple witnesses of past events, and were not trying to impose their current, solipsistic interpretations. For instance, when parliament discussed the meaning of art. 34, § 10, of the constitution, Felisbelo Freire, who had proposed the amendment that became that provision but was no longer a lawmaker, sent a letter to the Chamber of Deputies clarifying his intentions: "Only I can clarify which were my intentions, my thought when I filed this amendment" (ACD, 1903b). Valuable was not his opinion, but his state of mind when filing the proposal. This is why some legislators named witnesses who could recall their past intentions, or even read their own speeches from the discussion of a bill (Diario de Pernambuco, 1906).

An apocryphal quote attributed to Otto von Bismarck states that those wishing to consume both laws and sausages should never be allowed to watch them being made. The close scrutiny of the legislative process in the early decades of the Brazilian Republic most certainly affected attitudes towards the law: statutes might be regarded with awe if they are seen as mighty grants from a mysterious Legislator, but once this Legislator acquires a name, a face, a party, spurious economic interests, or perhaps questionable moral behaviors, worship might stop. For instance, legislators interpreting past laws sometimes remarked that a certain statute had been written "in a rush" (Minas Geraes, 1897), with mistakes (ACD, 1905a; A Imprensa, 1911), was plainly "arbitrary" (ACD, 1910c), or that the constitution itself had been drafted in a turbulent context (O Paiz, 1899). And these mistakes might change interpretation significantly. The most glaring example, and the fifth major discussion that used the historical element in the First Republic, concerned the election of the president. In 1891, Deodoro da Fonseca resigned from the presidency; art. 42 of the constitution stated that "if in the case of vacancy, for any reason, of the Presidency or Vice Presidency, less than two years have elapsed, it should be proceeded with a new election" (Brazil, 1891). Some jurists, however, analyzing the annals of the constituent assembly, argued that the intended wording was "presidency *and* vice-presidency", and nor "*or*": only if both positions were vacant, a new election would be in order (ACD, 1892c; Jornal do Brasil, 1892; Jornal do Commercio, 1892). Other jurists contended that the report with which José Hygino presented the amendment that became into art. 42 clearly stated that the vice-president should replace the president only for short periods, and not definitively (ACD, 1892b). Both sides, therefore, had claims based on the historical element. Ultimately, the interpretation that prevailed was that the Constitution's wording was wrong: no election was held, and history trumped text.

Though the legislator was no longer seen as sacred, and the legal text was no longer regarded as impenetrable monument, legal theory struggled to account for the imperfections of legal and political actors. Alfredo Pujol, for instance, argued that no hermeneutical consequences could be taken from drafting errors; judges could not correct legislators, because only the authority responsible to create a legal document, such as a statute, had the

power to alter it (O Paiz, 1899). Deputy Fausto Cardoso stated that "there can be no absurd law, or a wrong or a bad one, for, though they are made by ignorant and passionate men, when they leave the terrain of passion and ignorance, they enter the general plane of legislation", where they will be harmonized with "universal reason" through the "principles of hermeneutics" (ACD, 1900b).

In early 20th century, Brazilian hermeneutics was at a crossroad. The 19th-century-hermeneutics, which emphasized statutes, remained the mainstream. However, American-style judicial review and political upheavals from urbanization complexified the relation between the political production of law and technical interpretation. By 1915, theories accessible to Brazilians were perilously ageing: Paula Batista's book, still widely cited, was more than fifty years old (ACD, 1900b; Correio Paulistano, 1912; Jornal do Commercio, 1904; O Paiz, 1899, 1911a). Savigny, was criticized,[23] but not superseded. Change would arrive within the next decade, when a new Civil Code (1916) and Constitutional Reform (1926) provided new material for historical interpretation. Additionally, new theoretical foundations were provided by Carlos Maximiliano (1925), whose work continues to be cited to this day.

3. The Normative Value of History: Final Remarks

Amaro Cavalcanti, a lawyer, worked for many years in parliament, both in the constituent assembly afterwards. This might have given him immense authority. And he used it. When art. 42 of the constitution, regulating early presidential elections, was being debated, he took to the tribune to weight in. He was not bare-handed: he held an old, worn-out notebook. He went to the front of the house and said: "I have the habit of, when I take part in any important task, to take private notes of facts and incidents". Raising the notebook, he continued: "I have here the project of constitution of 22 June, issued by the provisional government, which I used during the constituent assembly". Then, he padded the notebook, adding: "This contains the most important things that happened in the commission of the 21, and at the margin of each article I marked the names of the authors of amendments, summarizing its motives or sense" (ACD, 1892b). The "book of life", the "book of history", being held by the lawgiver-prophet, is a recurring scene. Felisbelo Freire also padded the annals of the constituent assembly inside parliament; several deputies and senators we encountered in previous pages read and cited previous speeches from books before their colleagues, as priests revealing the true word of God from the pulpit. Not by chance, Ferraz, the legislator

23 For example, José Mendes (1909) and Pedro Lessa (1903).

behind the *entraves* act, stated that he would *reveal* his intentions: Rio de Janeiro had become a new Mount Sinai where the Word flowed from the mouth of a legal prophet.

I could draw two main conclusions about how the "book of history" could guide the frequently hesitant hand of the law.

First, the meaning of the "historical element" evolved alongside changes in the sources of law and the separation of powers. In the 19th century, law was the paramount source, while the judiciary and the executive branches are meant only to apply rules. Therefore, interpreters concentrated on the will of the legislator, and troves of interpretations were performed by legislators themselves. With the advent of the Republic, however, Brazil adopted judicial review, shifting much interpretative power to the judiciary. Case-law acquired relevance. Legislators, in response, interpreted their statutes, especially the constitution, as a mere embodiment of their will. But interpreters increasingly questioned what "will" actually meant, and this method of interpretation started to be challenged. Frequently, by judges.

Second, the historical element connects facts and norms, be and ought. But in different, changing ways. During the empire, a wide array of facts could be vested with normative power: state of the law of the past (which was the original definition of "historical element" by Savigny), the general thrust of legislation, economic conditions, etc. However, this caused uncertainty: the more facts with normative power, the greater the potential for conflict. In the 1890s, uncertainty was fought by shrinking the pool of available facts: from then on, almost only legislative history could count, and, within legislative history, interpretation was mostly confined to the fate of amendments. But this was not enough: frequently, the annals of parliament themselves required interpretation. Later, these challenges, coupled with the delegitimizing effects of historical enquiry, led to a crisis in the historical element.

The history of the historical element reveals that, until the early 20th century, law and politics were entangled in unsuspected ways: a fundamental role of parliament was to interpret the law. Deputies often cited Savigny or invoked hermeneutical rules in ways that even judges frequently could not. This was possible because law was the common language of public life, and because, before mass democracy, skillful oral and intellectual performance was crucial to electoral success.

The uses of the historical element demonstrate that hermeneutics was deeply contextual a hundred years ago. The textual history of statutes and the lives of their drafters were of great importance. Facts and norms were deeply entangled, building together the architecture of law. In 19th and early 20th century legal thought, history was not a distant advisor, but a present guide, and this testifies to the enduring power of the past. While classical thought proclaimed *historia magistra vitae*, modern lawyers countered with *historia regina vitae*: in legal hermeneutics, Clio does not merely teach Themis; she commands her.

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